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Doctrine of Precedents and Public Service Commissions, The

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THE DOCTRINE OF PRECEDENTS AND PUBLIC SERVICE COMMISSIONS

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1. INTRODUCTION

In the last half century there has come to be what may fairly be called a system of administrative adjudication.[1] It has developed without definite design or benefit of legal theory, and largely as incidental to primary attempts to solve specific problems of modern government.[2] Regulation of various aspects of our social and economic relations has been committed to administrative agencies which, in the interest of effective regulation, frequently possess and exercise undifferentiated functions which embrace the three historic aspects of government.[3] Adjudication by these agencies is either conveniently, appropriately or inseparably an integral part of the larger administrative process of regulation.[4] But it is none the less adjudication, and of competing claims and interests which at an earlier time and in a separate, distinct proceeding would have occupied the ordinary courts. Nor is the nature of the process obscured by the fact that it takes place less in an "atmosphere of indifferent neutrality"[5] in which the common law developed, and more under circumstances in which considerations of policy and discretion affect the determination of rights.[6]

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1. Part of the vast literature on the subject is conveniently assembled, together with incidental references to other materials, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW—ADMINISTRATIVE LAW (1938).

2. "Governmental regulation of banking, insurance, public utilities, industry, finance, immigration, the professions, health and morals, in short, the inevitable response of government to the needs of modern society, is building up a body of enactments not written by legislatures and of adjudications not made by courts, and only to a limited degree subject to their revision." FRANKFURTER AND DAVISON, CASES ON ADMINISTRATIVE LAW (1st ed. 1932) p. vii. See also BLACHLY AND OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934) c.1; LANDIS, THE ADMINISTRATIVE PROCESS (1938) pt. I

3. LANDIS, *op. cit. supra* note 2, *Introduction.*

4. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) 15-31; Cooper, *The Proposed United States Administrative Court* (1937) 35 MICH. L. REV. 565; Dodd, *Administrative Agencies as Legislators and Judges* (1939) 25 A. B. A. J. 923.

5. FREUND, STANDARDS OF AMERICAN LEGISLATION (1917) c. 2, p. 48.

6. See DICKINSON, *op. cit. supra* note 4, at 29-31; LANDIS, *op. cit. supra* note 2, at 37-46.

Traditionally, adjudication is a judicial process, the nature of which is not wholly alien to the lawyer. Indeed, a modest mastery of its intricacies[7] constitutes his special and professional knowledge and competence. Time and the requirements of a legal order have institutionalized the function and have given to it a unique quality and significance. When a judge in a court of law decides a controversy, more is involved than merely bringing to its solution an unformulated and momentary sense of justice. A decision dictated solely by personal impulse as to what is fair and reasonable in the circumstances lacks the guaranty of uniformity in official action and the generality, equality and certainty in the administration of justice indispensable to a proper securing of the interests upon which the economic and social order depends. These and other advantages of "justice administered according to law"[8] are achieved in large measure even without antecedent legislative rules of guidance[9] by a technique of decision, *self-imposed* to minimize and regularize the exercise of an otherwise uninhibited judicial discretion. Not without reason has the common law been defined as "essentially—a mode of treating legal problems,"[10] its most characteristic doctrine, "the doctrine of *stare decisis*."[11]

Stare decisis or the doctrine of precedents, like any other traditional art or technique, does not readily lend itself to verbal or written formulation.[12] Its precise play and balance in common law adjudication is perhaps

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7. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 641, 802, 940.

8. Pound, *Justice According to Law* (1913) 13 COL. L. REV. 696.

9. CARDOZO, *op. cit. supra* note 7, at 142, where traditional Anglo-American adjudication is said to proceed by supplying the rule for "transactions closed before the decision was announced."

10. POUND, THE SPIRIT OF THE COMMON LAW (1921) 1.

11. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW (1931) 50. "But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance. It is absolutely necessary to the formation and permanence of any system of jurisprudence. Without it we may fairly be said to have no law . . ." Black, C. J. in McDowell v. Oyer, 21 Pa. St. 417, 423 (1853).

12. "A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where 'the very point' is again in controversy; but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or acual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitarary or inflexible." CHAMBERLAIN, STARE DECISIS (1885) 19.

This is probably a good statement of the American version of the doctrine. The English doctrine of precedents is far stricter; if a case qualifies squarely as a precedent its authority is said to be *absolute*. SALMOND, JURISPRUDENCE (7th ed.

more a matter of professional sensitivity. Under the "intellectual" compulsion of the doctrine a tribunal having before it the decision of a cause is "bound"[13] to follow its own decisions and the decisions of other like tribunals. This phase of the doctrine subordinates official discretion to the requirements of a body of authoritative legal materials and a traditional technique of applying them in the decision of a case. At the same time the tribunal has the responsibility of so deciding that its decision or the grounds on which it proceeds will enter harmoniously into the body of law as a precedent for future cases.[14] This double insistence of the common law doctrine of precedents gives to judicial adjudication a special significance. It provides at once a binding rule and therefore a *body of law*[15] and a technique for deciding the immediate case *according* to law.[16]

1924) 187. Mr. Goodhart makes a convincing case for the proposition that the American tendency is strongly away from the strict English doctrine. GOODHART, *op. cit. supra* note 11, c. 3.

It should be observed that the doctrine deals with an individual case and the force of its decision as binding authority. This is not to be confused with the Continental theory of precedents which recognizes only the persuasive effect of a settled course of decision. There are superficial similarities, but in technique and in theory the two doctrines are fundamentally different. See GOODHART, PRECEDENTS IN ENGLISH AND CONTINENTAL LAW (1934).

13. Consider, however: "The Judge is 'bound' by authority only according to his own lights, *i. e.* according as he himself considers the precedent cited to him to be analogous to the circumstances in issue." ALLEN, LAW IN THE MAKING (2d ed. 1930) 204.

However the doctrine is stated it describes a complex technique of decision which in its functioning depends upon the varying faculties of individual judges. It is usually said that a judge is bound by his past decisions and by decisions of equal or higher courts; but it is in the nature of the doctrine that he decide for himself whether he is or is not bound. His task is two-fold, (1) to discover the true reasons, the *ratio decidendi*, which led the court in the previous case to its conclusions (See WAMBAUGH, THE STUDY OF CASES (2nd ed. 1894) and GOODHART, *op. cit. supra* note 11, c. 1), and (2) to determine whether the circumstances of the two cases are so substantially identical as to make the theory of decision applicable. Depending upon his conclusions, he will either follow the past decision as binding authority or distinguish it, as not controlling; or he may, but very rarely and only for grave reasons, overrule it. Finally where no precise authority is available, he must apply the principle of previous cases by way of analogy.

For recent discussions of *stare decisis*, see Evans, *Jurisdiction to Divorce—a Study in Stare Decisis* (1943) 8 MO. L. REV. 177; Sprecher, *The Development of the Doctrine of Stare Decisis and The Extent to Which it Should be Applied* (1945) 31 A.B.A.J. 501; Green, (*same title*) (1946) 40 ILL. L. REV. 303.

14. "He(the judge) must so decide that his decision or the grounds thereof will serve, first, as a measure or pattern of decision of like cases for the future, and second, as a basis of analogical reasoning in the future for cases for which no exact precedents are at hand." Pound, *supra* note 7, at 940.

15. "This (body of general law in England) was achieved through practice of courts following their past decisions in like cases, in looking to their past decisions for the principles to be applied as new situations called for decision, and

Administrative treatment of a controversy is taken to be "a disposition of it as a unique occurrence, an individualization whereby effect is given to its special rather than to its general features."[17] It seeks to reach a just result in the particular case in a practical and efficient manner, with little regard for the "universal" aspect of the situation and with no purpose to promulgate a rule for subsequent cases. This way of dealing with legal problems inevitably calls for a wide discretion in the magistrate and a flexibility of judgment unhampered by predetermined legal categories.[18] Insisting that each case is to be treated without reference to any other there is presumably no conscious adherence to the course of past decisions, no place for the common law notion of the binding force of precedents—either in its law-creating aspect or as a theory of decision.

This conception of the nature of administrative adjudication is neither easily nor kindly received where a "supremacy of law"[19] tradition prevails. Individualization and dispatch in the disposition of controversies are not alone in the public interest. "The social interest in the general security" is also to be considered, and that interest, it is said, "calls for jealous scrutiny of free action by the magistrate."[20] Accordingly controls are devised to set limits to discretionary authority. Freedom of administrative action

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in using their past decisions by way of analogy in developing the law. . . . In England the courts, called upon to administer a non-existent common law of England, made such a law through regarding their past decisions as not merely decisions of the particular causes before the court but as solemn ascertainments of the law as well." POUND, AN INTRODUCTION TO AMERICAN LAW, Dunster House Papers No 3 (1919) 13. See MARKBY, ELEMENTS OF LAW (6th ed. 1905) §§ 92 and 100.

16. "In this perpetual flux the problem which confronts the judge is in reality a two-fold one: he must first exact from the precedents the underlying principle, the *ratio decidendi;* he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die." CARDOZO, *op. cit. supra* note 7, at 38.

17. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 109. See also FREUND, ADMINISTRATIVE POWER OVER PERSONS AND PROPERTY (1938) § 52.

18. ROBSON, JUSTICE AND ADMINISTRATIVE LAW (1928) 227-228.

19. "There is a common element in the two fundamental doctrines of the common law, the doctrine of precedents and the doctrine of the supremacy of law. The same spirit is behind each. The doctrine of precedents means that causes are to be judged by principles reached inductively from the judicial experience of the past, not by deduction from rules established arbitrarily by the sovereign will. In other words, reason, not arbitrary will is to be the ultimate ground of decision. The doctrine of supremacy of law is reducible to the same idea. It is a doctrine that the sovereign and all its agencies are bound to act upon principles, not according to arbitrary will; are obliged to follow reason instead of being free to follow caprice." POUND, THE SPIRIT OF THE COMMON LAW (1921) 182.

20. Pound, *The Administrative Application of Legal Standards* (1919) 44 A.B.A. Rep. 445, 459.

is at the outset circumscribed by statutory "policies" and "standards."[21] But these legislative formulations are uniformly vague and undefined and leave a virtually uncontrolled discretion in the disposition of specific cases. Judicial control is indicated. There is no dissent from the proposition that some measure of control over administrative action is properly committed to the judiciary. However, the appropriate and effective limits of judicial supervision is a matter of doubt, discussion and controversy.[22]

Recently the possibility of effectual restraints on the exercise of discretion *from within* is receiving a fresh appraisal.[23] The point of emphasis has in a manner shifted from external control to procedural regularity and orderly and dependable methods in the administrative process itself. This derives in part from a clearer recognition of the need for technical competence in administration and the propriety of an independent discretion in the administrative application of legal standards. On the other hand there is a traditionally sound insistence upon the exercise of this discretion in a restrained and disciplined manner—in conformity with appropriate procedural processes and in accordance with an adequate technique of application developed in and verified by experience.[24] This is highly essential to the protection of individual interests affected by administrative determin-

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21. LANDIS, THE ADMINISTRATIVE PROCESS (1938) c. 2.

22. "The need for a formula to define adequately the areas of administrative immunity and judicial supervision is one of the most pressing problems facing government today." Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 Yale L. J. 577, 588. See Black, *The "Juristictional Fact" Theory and Administrative Finality* (1937) 22 Corn. L. Q. 349, 515, where much of the material on this subject is cited.

23. See Brown, *Public Service Commission Procedure—A Problem and a Suggestion* (1938) 87 U. of Pa. L. Rev. 139; *Symposium on Procedural Administrative Law* (1940) 25 IOWA L. REV. 421, especially *Introduction* by Professor Gellhorn; MacFarland, *Administrative Law and the Future* (1943) 18 TENN. L. REV. 157; also LANDIS, THE ADMINISTRATIVE PROCESS (1938) 98-100.

The present emphasis upon the adequacy and fairness of the administrative process itself—the procedures within the tribunal—also is manifest from current discussions growing out of the Attorney General's REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) Sen. Doc. 8, 77th Cong., 1st Session. See *Administrative Law Symposium* (1941) 27 A.B.A.J. 133-153, 660-678; *Administrative Procedure Bill* (1945) 31 A.B.A.J. 615 *et seq.*

24. ". . . But safeguards must also be institutionalized through machinery and processes. These safeguards largely depend on a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure (always remembering that 'in the development of our liberty insistence upon procedural regularity has been a large factor'), easy access to public scrutiny and a constant play of criticism by an informed and spirited bar." Frankfurter, *The Task of Administrative Law* (1927) 75 U. of PA. L. REV. 614, 618.

ations and to the promotion of confidence in official action. It is equally indispensable to the efficient performance of the task of regulation.

Anglo-American judicial administration[25] presents this sort of procedural discipline and professional restraint in its severest form. Its characteristic doctrine of precedents became the rule of decision presumably because it best served to achieve the legitimate objects of administration. Magisterial discretion was subjected to restraint by an adjudicative technique responsive to the requirements of regularity and generality in administrative action[26] and to the psychological demand that reasonable expectations be satisfied.[27] Moreover, the flexibility of the doctrine afforded at least some relief from universality where individualized treatment was called for and a limited facility to accommodate new conditions in a none too dynamic society. It is not to be supposed that its observance by the conventional tribunals made for perfection in judicial administration. The unfortunate consequences of a too faithful and mechanical adherence to precedent have not gone unnoticed.[28] However, they are due in large measure to the unwarranted assumption that because *stare decisis* works well enough in certain areas of the law, *e.g.*, in the field of property and commercial law,[29] it is an adjudicative device of utility in all fields of the legal order. Where the precept to be applied and by which conduct is appraised is a standard of relatively vague contours the traditional rule of decision is of doubtful service.[30]

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25. "'Judicial administration is merely a specialized form of the general administration which has acquired an air of detachment'." Stamp, *The Contrast Between the Administration of Business and Public Affairs* (1923) 1 J. of Public Administration 158, 159.

See also RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY (1936) 76-77: "The Common Law is at bottom 'administrative law.' . . . The second generalization which must be added to that which makes substantive law a by-product of procedure is that procedure itself, as far as the Common Law is concerned, is a by-product of the task of administration."

26. "To quote that mine of legal wisdom, Stephen's *Commentaries*, 'the great doctrine of judicial precedent checks caprice in the administration of the law and has enormously strengthened the solidity and certainty of legal principles'." MULLINS, IN QUEST OF JUSTICE (1931) 69.

27. See Helvering v. Hallock, 309 U.S. 106, 119, 60 Sup. Ct. 444, 451, 84 L. ed. 382, 388 (1939) (Frankfurter).

28. See SALMOND, INTRODUCTION IN SCIENCE OF LEGAL METHOD (The Modern Legal Philosophy Series, 1921) p. lxxvii; WIGMORE, PROBLEMS OF LAW (1920) 79; Pound, *Law in Books and Law in Action* (1910) 44 Am. L. Rev. 12, 20; also GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW (1931) 58-65 (quotations).

29. WAMBAUGH, THE STUDY OF CASES (1894) 104; POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 139-140.

30. See Pound, *The Administrative Application of Legal Standards* (1919)

Adjudication by administrative bodies belongs in the main to this latter field of law. Specifically, the cases decided by our state public service commissions involve the application of undefined standards for which there are no definite or objective tests.[31] Whether by proceeding from case to case in the application of those standards—a process to which the theory of the binding force of precedents is highly congenial, if not essential—public service commissions are taking over the common law technique of decision, is, therefore, a proper subject of inquiry. Do they, for example, ascribe to their determinations the kind of binding authority that judges and the law profession ascribe to the decisions of an appellate court? Is there evidence of a disposition on the part of such commissions to be controlled or bound by their prior decisions—to regard precedents as speaking with the authority of law?

What a public service commission says in its reported decisions by way of direct response to this sort of question at least is indicative of a conscious and considered appraisal of its deciding technique. Allusions of a less reflective character, made more or less unwittingly and only as incidental to an absorbing consideration of the substantive issues of a case are not without significance. It is even more important, perhaps, to take into account how the commission actually proceeds in coming to a decision and what it says are deciding factors. In the analysis of judicial decisions lawyers have come to associate certain formalized practices and a special form of thought and type of language with observance of the doctrine of precedents—for example, the practice of citing cases, talk of *following* or *adhering to the principle of* prior cases or regarding them as *conclusive, decisive, controlling* or *binding,* the technique of distinguishing cases and sparingly overruling them. To what extent are these unique practices, expressions and techniques, so much a part of the common law theory of decision, taken over by public service commissions? The matters here suggested, and in the same order, are considered in the following pages.[32]

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44 A. B. A. Rep. 445, 456 *et seq.;* Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 940, 950 *et seq.*

31. Hyneman, *Administrative Adjudication: An Analysis* (1936) 51 Pol. Sci. Q. 383; Hyneman, *The Case Law of the New York Public Service Commission* (1934) 34 COL. L. REV. 67.

32. This approach or method of inquiry closely follows that used in a similar study of the decisions of the Interstate Commerce Commission. See Pittman, *The Doctrine of Precedents and the Interstate Commerce Commission* (1937) 5 GEO. WASH. L. REV. 543, reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW—ADMINISTRATIVE LAW (1938).

2. Reference to Stare Decisis or to Precedents

a. Direct Consideration and Appraisal of the Doctrine

Our conventional courts without exception avowedly accept *stare decisis* or the doctrine of precedents as a rule of decision. It is "the everyday working rule" of our traditional system of adjudication.[33] There are sporadic instances when a previous case is not followed, when in fact it is expressly overruled. That, however, does not signify a repudiation of the common law technique of decision. On the contrary, a deliberate departure from precedent is usually an occasion for affirmance of the doctrine and a deferential explanation that its flexibility permits this course of action under the peculiar circumstances.

Reception of the doctrine by state public service commissions is not so clear. When, with respect to the adjudicative aspect of their processes, it is proposed that identity of function calls for similarity of technique, the suggestion is met with a denial that the principle of *stare decisis* is applicable to proceedings before regulatory bodies.[34] It is said that public service commissions are "not bound by any rule of *stare decisis*"[35] This is not alone the view of the commissions; there is some judicial authority for that position.[36]

One reason assigned for the inapplicability of the doctrine of precedents.

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33. Cardozo, The Nature of the Judicial Process (1921) 20.

34. "The defense mentioned is in the nature of what might be denominated in a court proceeding res adjudicata or *stare decisis*. Those principles are not applicable to a rate proceeding or, for that matter, any other proceeding before a regulatory body, for the reason that a rate or classification or rule established by a regulatory body today may at this time next year be shown to be entirely unreasonable, unjust, or discriminating in its effect." Chamber of Commerce of Greeley v. Union P. R. Co., (Colo. Pub. Util. Comm. 1923) (rate case), quoted in Note, P.U.R. 1924 A, 379 at 381. In *Re* Everett (Colo. Pub. Util. Comm. 1936) 16 P.U.R. (N.S.) 511, 512 (certificate transfer case) the same generalization is made.

35. *In re* Long Island R. Co., (N.Y. Pub. Serv. Comm., 1st Dist. 1917) 3 P.U.R. Dig. 2609 (location of station case) (statement from Interstate Commerce Commission case to that effect said to be applicable to public service commissions).

36. "Incidentally involved in the contentions heretofore discussed is the contention that the decision of the Commission in a prior proceeding . . . was in the nature of *stare decisis* and, therefore, should have controlled and concluded the decision of the Commission in the instant case. . . . Orders of the Commission being conclusive between the same parties only for the purpose for which they are made and not being binding upon the same parties in subsequent proceedings, certainly, such orders cannot be said to be binding upon different parties, and the orders of the Commission, not attaining the status of *res adjudicata*, obviously cannot be held to rise to the dignity of *stare decisis*." Motor Transit Co. v. Railroad Comm., 189 Cal. 573, 586, 209 Pac. 586, 591 (1922).

is that circumstances and conditions of fact and policy determining the decision in a particular proceeding are of a complicated and constantly varyin character, and for that reason, the *special facts of each controversy* must constitute the dominant factor in its disposition.[37] Each proceeding is regarded as unique, each situation distinctive, requiring individual treatment without regard to previous decisions. There is a conscious unwillingness to accept a rule of decision congenial to the courts simply *because* of its facility for turning "questions and matters which were previously of fact into questions and matter of law."[38] Another reason suggests that the doctrine of precedents is regarded as strictly a *court* technique, and commissions are not courts. If they function *as courts,* adjudicating issues as do courts, they are nevertheless not courts in the strict sense, and the doctrine of precedents as courts know it does not bear transplanting.[39] The latter reason probably

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37. Chamber of Commerce of Greeley v. Union P. R. Co., (Colo. Pub. Util. Comm. 1923) Note, P.U.R. 1924 A, 379 at 381, cited *supra* note 34.

"I do not think that the contention of counsel for petitioners that this Commission must always and forever be bound by the acquiescence or the permission, or by the decision of a predecessor Commission, no matter how long ago it was made, or on what inadequate investigation it may have been based, or whether right or wrong, is either logical or sound. Conditions change; new information becomes available; improved and progressive public policies are formulated; new laws are enacted and added means of regulation are made available. As a result a better understanding of the fundmental questions involved and their effect upon the public interest is acquired. To assert that the present Commission must be bound by and cannot change or modify particular permissions and decisions of predecessor Commissions, made many years ago, regardless of changed public policies, is to deny the application of new facts to present conditions and to limit progress . . . Where the facts warrant and the public interest demands, this Commission should make its present decision upon the merits of the case before it, without much regard for the decisions of predecessor Commissions, made in the light of then known facts and then existing laws." *Re* Lockport Light, Heat and Power Co., (N.Y. Dept. Pub. Sev., State Div. 1935) 12 P.U.R. (N.S.) 413, 432 (franchise transfer case).

38. KEETON, THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE (1930) 67.

39. "The Commission is not a judicial tribunal in the strict sense. . . . The Commission is essentially an administrative and legislative tribunal and not a court . . . The peculiar effect of a determination of fact operating to conclude the question for other purposes than those of the very proceeding in which the determination is made is confined to strictly judicial determinations alone." Stratton v. Railroad Comm., 186 Cal. 119, 127, 198 Pac. 1051, 1054 (1921), quoted in *Re* Lockport Light, Heat and Power Co., (N.Y. Dept. Pub. Serv., State Div. 1935) 12 P.U.R. (N.S.) 413, 432, cited *supra* note 37.

In Huntington B. & T. Co. v. United Fuel Co., (W. Va. Pub. Serv. Comm. 1929) P.U.R. 1929 D. 502, 515 (complaint against service case), it is said that while the commission is not a judicial tribunal, it does apply the rule of *stare decisis.* It is clear from the context, however, that the statement means no more than that the commission is bound by principles of law announced by a reviewing court.

accounts for the equivocal assertion sometimes made despite a refusal to disturb the rule of a previous case, that commissions do not apply the principle of *stare decisis* as it has been "enforced in courts of law."[40] It may be that the *court* theory of decision is conceived to be, as is the popular notion, a highly technical, arbitrary and absolute rule, permitting of no departure from precedent either for error or because of different circumstances.[41] The inference, therefore, is that as an abstract proposition and as conceived by commissions, the *court* rule of *stare decisis* is not suitable as a theory of decision for public service commissions. Nevertheless a considerable measure of consistency in the cases is sought to be achieved—if not out of respect for a conceptualized theory of decision, at any rate for reasons that underlie the doctrine of precedents. While insisting that the principle of *stare decisis* is not applicable as observed in the regular courts, it is nevertheless commonly asserted that "where a particular situation has previously been presented to the commission and conclusions announced with respect thereto, the views so announced are controlling unless conditions are made to appear in a subsequent presentation which justify or require a different conclusion."[42]

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40. Robinson-Ransbottom Pottery Co. v. New York, C. & St. L. R. Co., (Ohio Pub. Util. Comm. 1930) 3 P.U.R. Dig. 2609 (rate case): *Re* Home Telephone Co., (Mo. Pub. Serv. Comm. 1937) 18 P.U.R. (N.S.) 448, 459 (security issue and certificate case).

41. That such a motion prevails among commissions is fairly evident from language attributing extraordinary inelasticity to the doctrine of precedents. See *Re* Lockport Light, Heat and Power Co., (N.Y. Dept. Pub. Serv., State Div. 1935) 12 P.U.R. (N.S.) 413, 432, cited *supra* note 37. It is inferable also from frequent assertions that a previous decision is not a precedent to be followed blindly without regard to similarity or dissimilarity of facts and circumstances or the rightness or wrongness of a decision. See Manitowoc Malting Co. c. W. C. R. Co., 1 Wis. R. R. Comm. Rep. 69, 74-89 (1906) (joint rate case); *Re* Le Claire (N.Y.) 3 P.U.R. Dig. (Supplement) 262.

42. Robinson-Ransbottom Pottery Co. v. New York, C. & St. L. R. Co. (Ohio Pub. Util. Comm. 1930) 3 P.U.R. Dig. 2609, cited *supra* note 40 (where it was found that the facts were almost identical with those considered by the Commission in an earlier case). See also *Re* Home Telephone Co., (Mo. Pub. Serv. Comm. 1937) 18 P.U.R. (N.S.) 448, 459, cited *supra* note 40 (intervener successfully contended that, in view of the Commission's findings in an earlier case that a certificate of convenience and necessity should not be granted, it was bound by that finding in this case). In *Re* Everett, (Colo. Pub. Util. Comm. 1936) 16 P.U.R. (N.S.) 511, cited *supra* note 34, the Commission, after stating that *stare decisis* generally has no application "to proceedings before a regulatory body," added: "However, this does not mean that the Commission is required to examine over and over again the same questions unless it affirmatively appears that conditions have so changed as to justify re-examination of the questions involved . . . From the above authorities, we believe it is clear that an administrative body is not required to conduct hearings upon every application filed before it where

b. Casual and Incidental Allusions to Precedents.

The term *stare decisis* is itself a rather formidable challenge, especially when it is urged with reference to a regulatory function. Moreover its relation to commissions is likely to seem remote if viewed as a strictly judicial theory or technique of decision. When the matter shows itself in a more casual way, when the attention of a commission is not so pointedly directed to the question of the applicability of *stare decisis* as a rule of decision, a more tolerant attitude is apparent in the language of the reported decisions. An indigenous *court* theory of decision as such does not appear to be involved; nor is a categorical pronouncement as to its place in commission adjudication invited. Allusions to a simpler adjudicative concept—*precedents*—are made more or less unwittingly, and only as incidental to a consideration of the substantive issues that command the almost exclusive attention of the commission. Such casual references are made in five significant situations. (A short excerpt from a decision is quoted by way of illustration in each instance, and for convenience in reading pertinent phrases in text and footnotes are italicized.)

(1) Where a previous decision is said to have established a "precedent," respect for which is at least a substantial reason for deciding the case under consideration in like manner.

"The Commission has held in numerous instances that the Legislature intended to authorize common carriage as a service upon which the public can rely and which will operate regularly. The application does not propose this type of service over Highway 13 between Abbotsford and Marshfield. *Accordingly, upon the many precedents established* (citing two Wisconsin Public Service Commission cases) *this authority cannot be granted.*"[43]

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the questions involved are identical with cases theretofore decided by the Commission, unless there is a clear showing of changed conditions that would justify further examination of the questions involved. No such allegation of changed conditions appears in the instant case that would justify another hearing. . . ." (512-513).

43. J. W. Saunders and J. R. Welty, 9 Wis. Pub. Serv. Comm. Rep. 509 (1935) (certificate case).

In Schenectady R. Co., 9 N. Y. Pub. Serv. Comm. Rep. (2nd Dist.) 403, 407-415 (1920) (rate case) the commission said: "The company complains of this feature of the determination of the previous case, and, realizing that *if the Commission follows the precedent so established,* the new rates will be considerably less than those contemplated, it has filed a special brief on this question." Then after discussing earlier cases decided by the commission it added: "The principle laid down in these cases seems to fully cover the question under discussion and to furnish a just and workable rule to be applied to its solution."

(2) Where a commissioner dissents from a decision arrived at by the commission, assigning as a reason therefor the fact that it offends "precedent" as established by a previous decision.

"In the 116th Street case, the Commission was confronted with a situation similar to that which exists in Flushing Ave. . . . The law on the subject is clearly established, and *a precedent has been set which ought to be followed in this case.* I do not understand that the above facts and statement of the law are questioned. No opinion has been submitted giving the reasons why no action is to be taken in this matter to compel the company to fulfill its obligations, or explaining how the 116th Street case may be differentiated from the present one."[44]

(3) Where a previous case, relied upon as decisive of the one under consideration, is successfully distinguished, thereby disqualifying the cited case as an operative "precedent."

"The petitioners rely upon the decision of this Commission in the case . . . where a readjustment of a similar movement was made on the basis of $1.00 per car. It was admitted, however, that there are distinguishing features to this case, and as a matter of fact, the final decision was based on stipulation and contract which it is unnecessary to here refer to. It may be said that *the decision is not of itself a precedent of any validity* in determining a reasonable charge for the movement."[45]

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44. *Re* Flushing Av. Extension of N. Y. and Gas County Ry. Co., 5 N. Y. Pub. Serv. Comm. Rep. (1st Dist.) 1, 9 (1914) (extension of service case).

The language of the dissenting opinion in *Re* Stock and Bond Issue by Consolidated Gas Co., 5 N. Y. Pub. Serv. Comm. Rep. (1st Dist.) 339, 344 (1914) (security issue case) is similar: "An exactly similar case came before the Commission in 1908. . . . What was good law for the Brooklyn Union Gas Company ought to be good law for the Consolidated Company, and *the Commission should follow the precedent established in the case above cited.*"

45. New Dells Lumber Co. v. C. St. P. M. & O. Ry., 25 Wis. R. R. Comm. Rep. 227, 229 (1921) (rate case).

A case as "precedent" is similarly distinguished in the following instances:

"Stress was laid by the petitioners upon the decision of this Commission in the Lockport case, in which the Commission approved of the merger of two lighting corporations. . . . It will be noted that in this Lockport opinion direct emphasis is laid upon the similarity of the businesses of the two companies proposing to merge. Respecting a proposed merger of companies where each is engaged in supplying a different service, as in the present case, it is evident that the above reasoning does not apply; and thus *the decision in the Lockport case is not necessarily a precedent for this case.*" Watertown Light and Power Co. Consolidated, 1 N. Y. Pub. Serv. Comm. Rep. (2nd Dist.) 496, 502 (1909) (consolidation case).

"This method is based on the assumption that the cost of maintenance of way and structures attributable to the two services forms a measure of the value of the property devoted to each of the services, and is claimed by the railroad carrier to

(4) Where in the course of adjudication it is found necessary to contemplate the possible operation of the decision as a "precedent" for future cases—the commission presumably having in mind, when deciding a case, the effect of the treatment of the particular case upon the treatment of subsequent cases.

"The practice of issuing notes, stocks, and other securities in payment of operating charges is a dangerous one from the point of view of the company. It has been condemned by at least two state Commissions having statutes similar to ours. . . . In the instant case no particular harm would result from the approval of these notes as they are amply secured by the fixed assets of the company. *To approve the same would however establish a precedent contrary to good practice.*"[46]

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have been used in the New York Central Rate Case. . . . *The Commission does not find confirmation of the claim of precedent* for this method set by the second district Commisision in the New York Central Rate Case. Only interest and taxes were thus apportioned in that case. . . ." *Re* Long Island R. Co., (N. Y. Pub. Serv. Comm. 1st Dist. 1917) P. U. R. 1918 A, 649, 678 (rate case).

"The complainant argued that the decision of this Commission . . . *is a precedent for an order such as it desires.* . . . The distinction between that case and the present complaint is obvious." Cumberland Valley T. Co. v. Bell Telephone Co. (Pa. Pub. Serv. Comm. 1925) P. U. R. 1926 A, 170, 172 (extension of service case).

46. *Re* Waldport Telephone Co., (Ore. Pub. Util. Comm. 1935) 11 P. U. R. (N. S.) 272, 274 (security issue case).

See Plumb & Nelson Co. v. W. C. R. Co., 1 Wis. R. R. Comm. Rep. 19, 23-25 (1906) (joint rate case): "We do not see that it will follow, as claimed by the carriers, that if we order a joint rate in this case we must order one in every other case that may hereafter arise. . . . We apprehend that each individual case should be decided on its merits and on the facts before the Commission. *When other cases arise involving similar facts we will follow this decision as a precedent*, if we still think it is right, and disregard it if we are convinced that it is wrong."

See also Brimidge, Commissioner, dissenting in *In the Matter of the Application of the People of the State of California*—Authority to Construct Highway crossing under tracks of Railroad, 29 Cal. R. R. Comm. Rep. 534, 540 (1927): "I feel that I must refuse to be bound in other and similar cases by the rule laid down by the majority in this proceeding. *If, in the years to come this proceeding ever is urged as a precedent* or guide for action by this Commission or any other public body, I wish my unequivocal dissent to appear as a part of the record."

While the effect of this consideration upon the decision of the case is minimized, the requirement of a factual sameness is emphasized in the following language: "At one stage of the hearing, counsel stated that the company did not object so much to the amount that would be directly lost by the reduction, as it did to the *precedent* which would be established.

"With respect to these two points, it is proper to observe . . . second, that in deciding this matter *the Commission* can only consider whether the rate is reasonable, and *cannot be influenced by any consideration of the precedent which may or may not be established.* The Commission is dealing now with this specific case, and every case depends upon its own facts and circumstances. *If the matter of*

(5) Where, because of a relative certainty that the decision about to be made will normally serve as a "precedent" for future cases, a *caveat* is introduced for an unusual reason to specifically exempt it from that role.

"With no *precedents* to guide it, without aid of any suggestions or arguments from outside, the Commission does not think it wise to lay down at this time any hard and fast rule to be observed by it in cases of this character. . . . A percentage has been adopted in this case, but *the Commission will not permit this to be considered as a binding precedent* in future applications of this character should further investigation of the subject convince it that some better method of disposing of this most difficult question can be found."[47]

From this it is fairly apparent that there is no conscious acceptance of *stare decisis* as a settled rule of decision on the part of public service commissions.[48] There is some evidence that this position has been dictated in part at least by the attitude of the older and respected Interstate Commerce Commission toward the doctrine.[49] In the main, however, it comes from a conviction that what is conceived to be a court technique has little relation to the task of public utility regulation. But there is a frank desire for consistency in the decisions and a recognition that mere efficiency requires that questions once settled are not to be examined "over and over again . . . unless there is a clear showing" of facts to justify it.[50] In the more casual use of the word *precedents* there is close agreement between conventional courts and these commissions. Certainly it cannot be said that they

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alleged precedent were to be considered, it would be difficult to determine how much weight should be given to it. It does not follow that in some other case, where the conditions were widely difierent, the same rate would be prescribed by the Commission as has been named with respect to this one." Railroad Comm. v. Bell Telephone Co., (Nev. R. R. Comm. 1915) P.U.R. 1915 D, 276, 277 (rate case).

47. Rochester Corning Elmira Traction Co., 1 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 166, 178 (1908) (security issue case).

"This case, however, is not to be considered as a precedent binding upon the Commission as to other roads, nor even as to this road in any future proceeding." Hudson Valley Ry., 7 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 287, 297 (1918) (rate case). See also Albert Moritz v. Edison El. Il. Co., 7 N.Y. Pub. Serv. Comm. Rep. (1st Dist.) 175, 209 (1916) (rate case); Manitowoc Malting Co. v. W. C. R. Co., 1 Wis. R. R. Comm. Rep. 69, 74 (1906), cited *supra* note 41.

48. Compare Mr. McClintock's finding in this respect in his study of tribunals in the land department: "The land department has in terms adopted the principle of stare decisis." *The Administrative Determination of Public Land Controversies* (1925) 9 MINN. L. REV. 638, 639.

49. See *In re* Long Island R. Co., (N.Y. Pub. Serv. Comm., 1st Dist. 1917) 3 P.U.R. Dig. 2609, cited *supra* note 35.

50. See note 42 *supra.*

serve no purpose in the type of adjustments public service commissions are called upon to make.

3. Technique of Decision

a. The Practice of Citing Cases

The practice of citing cases in court and in the reported decisions bears an intimate relation to the common law doctrine of precedents.[51] It has in fact little practical significance apart from a recognition of the authority of decided cases. Obviously there can be no meaningful citing of cases without a systematic reporting of decisions and their publication in suitable form for the use of an interested bar. The long history of law reports culminating in the present method of systematic reporting and the extraordinarily elaborate devices for "finding the law" is a story of the attempt to accommodate a growing doctrine of strict regard for precedent. In Chancery the development of reports came late.[52] "This by itself" said Maitland, "is enough to show that the Chancellors have not held themselves very strictly bound by case law, for men have not cared to collect cases."[53] When in the eighteenth and nineteenth centuries chancery reports attained a high state of

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51. "In our modern reports and textbooks, the force of precedent is made patent by the prolific citation of cases. In dealing with the history of the doctrine, the citation of cases is a convenient guide for estimating the authority of judicial decisions . . ." Lewis, *The History of Judicial Precedent* (1930) 46 L. Q. Rev. 207. See 5 Holdsworth, History of English Law (1924) 372.

52. "This slow development was the natural result of the auxiliary nature of equitable jurisdiction and of the discretionary character of its early administration." Veedor, *The English Reports* in 2 Select Essays in Anglo-American Legal History (1908) 149.

53. Maitland, Lectures on Equity (1909) 8.

Allen, Law in The Making (2nd ed. 1930) Appendix C, 392-393, gives an account of Fry v. Porter (1670) 1 Mod. 300, to illustrate the notion, fairly prevalent among common law lawyers and judges, that the Chancellor decided cases without reference to past decisions. "As was not uncommon at this time, the Chancellor in this case called upon the Common Law Chief Justices to assist him in his decision. In the course of the argument, Kelynge, C. J., referred to several cases reported in Coke and Plowden. He was thus rebuked by Vaughan, C. J., . . . 'I wonder to hear of citing precedents in matter of equity, for if there be equity in a case, that equity is an universal truth, and there can be no precedent in it, so that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same *in itself;* and if the precedent be not the same with this, it is not to be cited.' But Lord Keeper Bridgeman, answering for the Chancery, said: 'Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded. We shall suppose they did it upon great consideration and weighing of the matter, and it would be very strange and very ill if we should disturb and set aside what has been the course for a long series of time and ages.'"

improvement, the practice of citing cases and relying upon their established authority equalled, if it did not outstrip, the practice in common law courts.[54]

It is quite obvious from a casual reading of the reports that public service commissions depend upon the citation of appropriate cases by counsel, and in turn rely upon the citation of cases to fortify a decision reached. There is a suggestion of doubt in an opinion when it is found that—

> "The Commission can find very little guidance on the questions involved in this case in decisions of other state commissions or in the decisions of the Interstate Commerce Commission, or even the courts."[55]

On the other hand even a hard case is considerably simplified if appropriate citations are at hand.

> "This case has presented some original propositions to this Commission, but it has had the benefit of the decisions of other Commissions and the courts in similar cases, which are in harmony with the conclusions expressed herein."[56]

Yet despite this reliance upon case authority facilities for indulging the traditional practice of citing cases have not been made readily available to public service commissions. Statutes in only a few states specifically provide for the publication of commission decisions.[57] The cases so published form the official "commission reports." Permanently bound volumes are systematically numbered and dated, and something in the way of indexes, digests, tables of cases, and, in some instances, advance sheets, is provided to enhance their utility as materials for the decision of subsequent cases. In most states, however, only a limited number of the decisions—usually

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54. ALLEN, *op. cit. supra* note 53 at 393. For an interesting and amusing account of the practice of citing cases before the less institutionalized Parliamentary election committees, see 2 SERGEANT BALLANTINE'S EXPERIENCES (1882) 41: ". . . the arguments of counsel for the respective parties seemed to consist in pelting each other and the committee with cases. . . ."

55. Drives Fuel Co. v. C. M. & St. P. Ry., 27 Wis. R. R. Comm. Rep. 95, 98 (1923) (joint use of facilities case).

56. Selma Creamery Co. v. Ala. Power Co., (Ala. Pub. Serv. Comm. 1923) P.U.R. 1924 A, 53, 55 (consolidation of service case).

See also *Re* Interstate Pub. Serv. Co., (Ind. Pub. Serv. Comm. 1925) P.U.R. 1926 C, 12, 16 (certificate case): "Many decisions by Commissions and by Courts were cited by both parties in argument and in briefs. These citations have been studied with great care and points of similarity between cited cases and the instant case have been sought."

57. Missouri, New Jersey, Pennsylvania and Wisconsin. Official publication was discontinued in Alabama in 1930, in Massachusetts in 1922, and in New York in 1925. In California the cases are published as commission decisions without statutory authority.

referred to as leading cases—are published, but only as a part of the commission's annual or biennial report to the legislature or governor. A permanent index of all cases and proceedings is maintained in the office of the clerk or secretary, but nothing else is done for the accommodation of practitioners by way of quick and convenient reference to prior decisions.[58]

Where this vast body of adjudicative experience is recorded and organized for ready reference, commissions have from the outset found therein relevant materials of decision. The citation of cases appears in the earliest volumes of the reports, but the cases cited are in the main court cases and those of older commissions in other jurisdictions. As the volumes multiply the commission's own cases are cited with increasing frequency. Some notion of the extent of the practice may be had from the accompanying tables showing the approximate total number of cases cited per volume and the relative distribution between the commission's own past decisions and those of other like commissions.

Missouri Pub. Serv. Comm. Rep.	Total Cases Cited	Mo. Pub. Serv. Comm. Cases Cited	Per Cent of Total	Other Comm. Cases Cited	Per Cent of Total
Vol. 1	279	7	2	60	21
Vol. 2	424	58	14	55	13
Vol. 3	271	28	10	80	29
Vol. 4	373	48	13	24	6
Vol. 5	243	67	27	49	20
Vol. 6	202	52	26	35	17
Vol. 7	113	56	50	24	21
Vol. 8	144	49	34	29	20
Vol. 9	105	55	52	16	15
Vol. 10	88	40	45	12	14

New Jersey Pub. Util. Comm. Rep.	Total Cases Cited	N. J. Pub. Util. Comm. Cases Cited	Per Cent of Total	Other Comm. Cases Cited	Per Cent of Total
Vol. 1	102	0	0	1	1
Vol. 2	115	6	5	4	3
Vol. 3	33	3	9	0	0
Vol. 4	45	5	11	7	15
Vol. 5	80	28	35	0	0
Vol. 6	34	11	32	3	9
Vol. 7	7	2	28	0	0

58. It is the practice in most states to send the more important cases to Public Utilities Reports, Inc., where they are published in a series of commission reports known as Public Utilities Reports (P.U.R.). This service provides useful annotations, a digest, index and table of cases.

Vol. 8	8	4	50	0	0
Vol. 9	40	0	0	4	10
Vol. 10	30	4	13	0	0

New York Pub. Serv. Comm. Rep. (1st Dist.)	Total Cases Cited	N. Y. Pub Serv. Comm. (1st Dist.) Cases Cited	Per Cent of Total	Other Comm. Cases Cited	Per Cent of Total
Vol. 1	16	2	12	5	31
Vol. 2	60	12	20	7	12
Vol. 3	66	25	38	1	2
Vol. 4	95	45	47	5	5
Vol. 5	78	40	51	3	4
Vol. 6	62	32	51	13	21
Vol. 7	40	8	20	10	25
Vol. 8	62	18	29	11	18

Wis. R.R. Comm. Rep.	Total Cases Cited	Wis. R.R. Comm. Cases Cited	Per Cent of Total	Interstate Comm. Comm. Cases Cited	Per Cent of Total
Vol. 1	222	13	6	6	3
Vol. 2	157	17	11	21	13
Vol. 3	124	35	28	3	2
Vol. 4	109	37	34	1	1
Vol. 5	62	27	43	1	2
Vol. 6	85	42	49	6	7
Vol. 7	57	42	74	1	2
Vol. 8	84	31	37	1	1
Vol. 9	23	17	74	0	0
Vol. 10	70	54	77	0	0
Vol. 15	145	64	44	4	3
Vol. 20	62	49	79	6	10
Vol. 25	78	74	95	0	0
Vol. 30	102	61	60	8	8

Wis. Pub Serv. Comm. Rep.	Total Cases Cited	Wis. R.R. Comm. or Pub. Serv. Comm. Cases Cited	Per Cent of Total	Other Comm. Cases Cited	Per Cent of Total
Vol. 1	200	98	49	22	11
Vol. 3	187	133	71	10	5
Vol. 5	187	169	90	0	0
Vol. 7	134	109	81	2	2
Vol. 9	107	91	85	7	7
Vol. 11	184	126	68	18	10

It has already been observed that the citing of cases is rather without significance unless they are collected and organized in suitable form for the use of practitionners and the public, as well as for the convenience of the

commissioners. A mere citation or even a sketchy synopsis of a prior case adds little to the reasoned quality of a decision unless the prior case is available to the scrutiny of a critical bar. Yet the practice appears to be equally extensive in those jurisdictions where little or no effort is made to so organize the cases. It is perhaps too much to say that this aspect of the common law technique is therefore adopted by commissions without reason and solely by way of meaningless imitation. It is more likely to indicate a decided unwillingness to disregard whatever authority may inhere in prior decisions.

Not every decision reported contains citations of cases; on the contrary, in a large number of cases decided there is no reference whatever to past decisions. But this is equally true of a good many court decisions. Where, however, the issue is a controversial one, and stoutly litigated, a public utility commission decision is not at all unlike a court decision as regards the strategic citation of cases previously decided by the same commission or by other like commissions or by the courts. A typical case proceeds in this manner:

> "The remaining proposition urged by the applicant is that it is ready to afford rates for service somewhat less than those which at the present time are being charged by the Albany Southern. This contention calls for a full presentation of the position uniformly taken by this commission since its organization upon questions of this character. In the application of the *Lockport Light, Heat and Power Company,* decided in 1907 (1 P.S.C., 2nd D., 12), the Commission said . . .
>
> "In the matter of the *Niagara Falls Lighting Company,* decided July 1, 1909 (2 P.S.C., 2nd D., 116), the Commission said . . .
>
> "In the case of the application of *Buffalo, Rochester and Eastern Railroad Company,* (1 P.S.C., 2nd D., 543), this Commission said . . .
>
> "The same principles have been recognized by other commissions. In the application of *LaCrosse Gas and Electric Company,* (2nd Wis. R.C.R. 3), the Wisconsin Commission says . . .
>
> "In the Milwaukee case, decided by the same Commission on August 20, 1912, it is said . . .
>
> "As early as 1904, the Massachusetts Gas and Electric Light Commission, in the *Haverhill case,* said . . .
>
> "It is needless to multiply quotations upon this point. All of the language hereinbefore cited represents the well settled convictions of all those who have carefully studied the matter.
>
> "This Commission sees no reason for departing from the rule it has

heretofore followed, and which in its judgment experience has abundantly justified."[59]

b. Use of Expressions Ascribing Imperative Authority to Cases

The doctrine of precedents gives to a decision virtually the same imperative authority ascribed to a statute.[60] Where the doctrine prevails a court is constrained by more than the force of comity to follow its past decisions. But this constraint is operative only in *like cases;* a precedent is said to govern a case *on all fours.* In other words a decision is a precedent for cases in which the circumstances do not materially differ from the circumstances upon which the decision was based. Whether there exists that "substantial identity"[61] essential to the operation of the doctrine is both difficult and important to determine; but if it is found, then the first case is a binding precedent for the second, and the court is bound to reach the same conclusion as it did in the first case. "The prior case, being directly in point, is no longer one which *may* be used as a pattern; it is one which *must* be followed in the subsequent case. It is more than a model; it has become a fixed and binding rule."[62]

That, at any rate, is the theory of the doctrine as the courts understand it. Accordingly one finds in the language of the cases characteristic words and expressions without significance except as they indicate respect for the compelling force of case authority. A prior case is said to reveal a *principle* which *governs, controls* or *applies* to the case at hand. A decision is *binding* or of *binding authority,* or it is *conclusive* of the issue, *decisive, controlling* and *must be followed* or *adhered to.* Or a *fixed and settled rule* is established by a decision and the issue thereafter is *not an open question.* These are some of the expressions that run through and are part of the language of judicial decisions, and they manifest, obviously, recognition of a theory of decision that accords imperative authority to individual cases.

An examination of public service commission decisions shows that similar words are fairly frequently used and under like circumstances. They are more common where all decisions are reported in regular public service commission reports. Where only occasional cases are reported, as in the Public Utilities Reports or as a part of a periodical report of a commission, expres-

59. Red Hook Light and Power Co., 3 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 475, 478-481 (1912) (certificate case).

60. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 20.

61. CHAMBERLAIN, STARE DECISIS (1885) 14.

62. GOODHART, PRECEDENTS IN ENGLISH AND CONTINENTAL LAW (1934) 9.

sions of this sort are rather rare. A possible explanation is the fact that these occasional cases present novel questions for which there are no precise commission cases in point. Moreover, they are ordinarily cases of wide interest, often called "leading cases,"[63] in which citations are largely to cases decided by other commissions and by state and federal courts. In the official commission reports, on the other hand, cases are far more numerous and are likely to include a great many similar cases. Yet even here it is apparent that the expressions lack some of the absolute imperative quality found in court decisions. There is probably no instance of a prior commission case compelling a decision contrary to the judgments of the deciding commission. Occasionally it is said that for sufficient reasons a case will not be permitted to operate as a "binding precedent,"[64] but it is doubtful whether a previous commission case is ever affirmatively referred to as *binding* or *binding authority*. Nevertheless other forceful expressions are used in a manner closely resembling the language of the courts.

There is, for example, the type of situation where the case under consideration is conceived to be *within the principle*[65] of a prior commission case, which principle is therefore "*applicable to the instant case*,"[66] or "*con-*

63. See Ellendale Nat. Bank v. Ellendale Elc. Co., (N.D. Bd. of R. R. Commrs. 1925) P.U.R. 1926 B, 603, 608 (service charge refund case): *Re* Western Natural Gas Co., (Cal. R. R. Comm. 1929) P.U.R. 1930 A, 307, 311 (certificate case).

64. Rochester Corning Elmira Traction Co., 1 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 166, 178 (1908) (security issue case).

"In view of all the circumstances we are not disposed, in this emergency proceeding, to open up the question, but will reserve it for future consideration. This case, however, is not to be considered as a precedent binding upon the Commission as to other roads, nor even as to this road in any future proceeding." Hudson Valley Ry., 7 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 287, 297 (1918) (rate case).

65. See Gerrit Smits-Interestate Certificate, 8 Wis. Pub. Serv. Comm. Rep. 462, 463 (1935) ("case falls within the rule").

The "principle" is referred to in various ways; it may be said to be "well established," E. J. Dailey and Fenton-Parker Material Co. v. San Diego and Ariz. Ry., 27 Cal. R. R. Comm. Rep. 5, 8 (1925) (unreasonable rate case), or one "which has been followed ever since," Application of Edw. Serretto, 23 Cal. R. R. Comm. Rep. 75, 77 (1923) (certificate case), or one which, though well recognized, presents difficulties of application "to the present case," Troy Auto Car Co., 5 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 396, 400 (1916).

66. Beaver Dam Lbr. Co. v. St. P. M. & O. R. R., 5 Wis. R. R. Comm. Rep. 645, 646 (1910) (overcharge case).

See also Application of George B. Mith, 15 Cal. R. R. Comm. Rep. 494, 496 (1918) (certificate case) ("may properly be applied"); Marvelous Marin v. Northwestern Pac. R. R., 31 Cal. R. R. Comm. Rep. 400, 408 (1928) (complaint against service case) ("may be invoked"); *In re* Menominee & Marinette Light & Traction Co., 3 Wis. R. R. Comm. Rep. 778, 814 (1909) (unreasonable rate case) ("directly applicable"); City of Ripon v. Ripon Light & Water Co., 5 Wis. R. R. Comm. Rep. 1, 17 (1910) (excessive rate case) ("apply with equal force").

There is no change in form of expression when the "principle" is one of ju-

trolling"[67] or one which *"will be followed."*[68] More significant, however, and equally common are such forms of language when used with reference to a specific case (as distinguished from the "principle" of a case) theretofore adjudicated by the commission. It is, apparently, a matter of considerable advantage in the determination of a case to find among the cases previously decided one that is *similar*[69] or even *analogous*[70] to the case under consideration, or one in which the *precise question*[71] was involved. If it can be said

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dicial origin. Oakland v. S. F. Oakland Terminal Ry. 23 Cal. R. R. Comm. Rep. 936, 938 (1923) (discrimination case) ("apply with equal force").

67. Joannes Bros. Co. v. C. M. & St. P. R. R., 3 Wis. R. R. Comm. Rep. 422, 425 (1909) (refund for erroneous billing case).

It is sometimes said of "principles" announced by Interstate Commerce Commission cases that they "should govern," Omen Oil Co. v. A. T. & S. F. Ry., 19 Cal. R. R. Comm. Rep. 10, 16 (1920) (reparation case), or of a judicially declared "principle" that it "is decisive," Rates on Construction Material, 1 Wis. R. R. Comm. Rep. 210, 221 (1906) (discrimination case).

68. *In re* Purchase Falls Lt. & Power Plant, 17 Wis. R. R. Comm. Rep. 438, 441 (1916) (case fixing compensation for utility property); Vincennes v. Central States Gas Co. (Ind. Pub. Serv. Comm. 1918) P.U.R. 1919 A, 169, 172 (complaint against service case).

For similar expressions see: *In re* Oro Electric Corp., 1 Cal. R. R. Comm. Rep. 253, 260 (1912) (certificate case) ("under the principle . . . I recommend"); Chamberlain Co. v. A. T. & S. F. Ry., 35 Cal. R. R. Comm. Rep. 63, 65 (1930) (reparation case) ("following the doctrine"); Oswego River Power Transmission Co., 3 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 268, 279 (1912) (certificate case) ("under the principle . . . the Commission must hold"); Akron Motor Cargo Co., 8 Wis. Pub. Serv. Comm. Rep. 698, 699 (1935) (certificate case) ("under the rule laid down").

69. "The Commission has taken the latter position . . . in similar cases (citing two), and we see no reason for withdrawing from the position there taken." Remington v. C. M. & St. P. R. R., 15 Wis. R. R. Comm. Rep. 609, 610 (1915) (crossing construction case).

Other cases are: *Re* Martin (Cal. R. R. Comm. 1926) P.U.R. 1927 A, 88, 92 (operation rights transfer case) ("under similar circumstances the Commission has previously declined"); *Re* B. F. Eyer, (Mo. Pub. Serv. Comm. 1925) P.U.R. 1926A, 140, 143 (certificate case) ("involved a similar situation"); Long v. Lehigh Teleph. Co., (Pa. Pub. Serv. Comm. 1926) P.U.R. 1927 A, 772, 776 (unreasonable rate case) (in a case "involving a similar situation"); Depere v. Green Bay Traction Co., 5 Wis. R. R. Comm Rep. 604, 614 (1910) (discrimination case) ("facts in this case are not materially different").

70. "The latter decision covers a situation which appears somewhat analogous to the present case." Application of the Town of Larkspur, 27 Cal. R. R. Comm. Rep. 801, 803 (1926) (overpass construction case).

See also: California Transit Co. v. So. Pac. Co., 29 Cal. R. R. Comm. Rep. 664, 668 (1927) (excessive charge case) ("this case is in many respects similar"); *Re* Bond Issue of Manhattan Ry., 1 N.Y. Pub. Serv. Comm. Rep. (1st Dist.) 205, 213 (1918) ("circumstances are substantially similar"); Marie K. Osweiler, 11 Wis. Pub. Serv. Comm. Rep. 237, 238 (1935) (certificate case) ("a parallel situation exists").

71. "This precise question was involved, as we recall it, in the case of the *Lancaster Machine and Knife Works* v. *Erie Railroad Co.*, (IV P.S.C. 2nd Dist., 111), and we see no reason for changing the opinion in regard to it which we reached

that *the matter has been passed upon*[72] or *squarely decided*[73] in an earlier case the deciding tribunal is not without authority in precedent for a like decision and well may conclude that therefore the matter is *no longer an open question.*[74] Perhaps an even stronger indication of the imperative character attributed to past decisions is the assertion that in view of a substantial identity of facts and circumstances the earlier decision *controls the instant case*[75] or *governs*[76] its determination or that in any even the rule of the previous case will be *adhered* to.[77]

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at that time." Jackson v. Erie R. R., 5 N.Y. Pub. Serv. Comm. Rep. (2d Dist.) 415, 423 (1916) (switch connection case).

For other forms of this expression see: Pioneer Box Co. v. So. Pac. Co., 1 Cal. R. R. Comm. Rep. 568, 571 (1912) (excessive rate and reparation case) ("this same point was raised"); J. E. Johnston v. So. Pac. Co., 33 Cal. R. R. Comm. Rep. 875, 876 (1929) (unreasonable rate case) ("involves identically the same situation"); *Re* Bond and Stock Issue by Man. & Qu. Tractn. Corp., 5 N.Y. Pub. Serv. Comm. Rep. (1st Dist.) 57, 75 (1914) ("the two cases are entirely similar"); Groggins v. N. Y. Edison Co., (N.Y. Dept. of Pub. Serv., State Div. 1936) 16 P.U.R. (N.S.) 365, 371 (complaint against sales practice) ("this question was squarely before the Commission"); Ripon Veneer Works v. C. & N. W. R. R., 9 Wis. R. R. Comm. Rep. 484 (1912) (excessive rate case) ("matters involved were exactly the same").

See Clark and Henry Const. Co. v. So. Pac. Co., 1 Cal. R. R. Comm. Rep. 837, 838 (1912) (excessive rate and reparation case): "The Interstate Commerce Commission has stated its view upon this identical question. . . . We have already in (case cited) expressed our approval of the view taken by the Interstate Commerce Commission."

72. "The Public Service Commission has recently decided two cases in which it passed upon both of the propositions referred to. . . . The Commission has seen no reason for changing its opinion as expressed in that case and the same ruling will be made in this case. . . . (In the other case) the Commission held that it had no jurisdiction and will so hold in this case." *Re* Kansas City Public Service Co., (Mo. Pub. Ser. Comm. 1927) P.U.R. 1928 A, 582, 585 (certificate case).

Other cases are: A. J. Happe v. Redlands Orange Growers Assoc., 25 Cal. R. R. Comm. Rep. 297, 303 (1924) (operation without a certificate case) ("objection of defendants is met by this Commission's decision"); Graves v. Noteboom, N.J. Bd. of Pub. Util. Commrs. 1923) P.U.R. 1824 A, 94, 95 (service discontinuance case) ("this matter has been passed upon formally by this Board"); Invest. Rates and Practices Wis. Tel. Co., 2 Wis. Pub. Serv. Comm. Rep. 28, 38 (1932) (rate case) ("the questions raised have all been decided").

73. "The Indiana Public Service Commission has decided the question before us squarely in (case cited)." Browne v. Nat. Dist. Teleg. Co., (N.Y. Pub. Serv. Comm. 2nd Dist. 1920) P.U.R. 1921 A, 113, 119 (rate case).

74. "The questions here involved and the principles to be discussed are not new in the experience of the Commission. As a matter of fact they came before the Commission for discussion and decision very shortly after the Commission was constituted. . . . It is, therefore, no longer an open question in this state . . ." *Re* Chicago & Northwestern Ry., (Wis. R. R. Comm. 1921) P.U.R. 1922 A, 545, 550-553 (service discontinuance case).

75. See Stockton Chamber of Commerce v. So. Pac. Co., 21 Cal. R. R. Comm. Rep. 398, 403 (1922) (discrimination case) ("the above quotation (from prior decision) is controlling in the instant cases"); Pub. Serv. Comm. v. Springfield Gas

Whether these expressions mean precisely the same as when used in judicial decisions is another question. It is possible that lack of professional maturity and tradition in the adjudicative process makes for a looser and less exact use of the language.[78] However, there is some evidence that the words are chosen for their full meaning. A decision by a state court construing an act under which a commission functions is referred to as "controlling."[79] When the Interstate Commerce Act is substantially the same as the state act "decisions of the United States Supreme Court interpreting" the Interstate Commerce Act "are properly a controlling authority"[80] in the interpretation of the local act. On the other hand, in the determination of matters not dependent upon identical statutes, decisions of the courts of other states or Interstate Commerce Commission decisions, while entitled to serious consideration as "persuasive authority," are "not controlling"[81] nor "binding upon the Commission."[82] And where a state court case or a United States Supreme Court case is distinguishable it is said not to be "con-

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& Elec. Co., (Mo. Pub. Serv. Comm. 1936) 16 P.U.R. (N.S.) 267, 278 (rate case) ("the ruling in that case rules the instant case"); Kenmeter v. C. St. P. M. & O. R. R., 3 Wis. R. R. Comm. Rep. 518, 519 (1909) (excessive rate case) ("the conclusion reached in that case is controlling in the instant case").

76. See Determination Motor Vehicle Exemptions, 3 Wis. Pub. Serv. Comm. Rep. 320, 322 (1933) ("this case is governed in every material aspect by the opinion of the Commission in (case cited)"); New Richmond Roller Mills Co. v. F. & N. E. R. R., 11 Wis. R. R. Comm. Rep. 272, 273 (1913) (excessive rate case) ("rule laid down (in previous case) governs the instant case").

77. See Anderson v. St. Louis-S. F. R. R., (Mo. Pub. Serv. Comm. 1918) P.U.R. 1919 A, 6, 11 (crossing construction case) (we have held in these cases . . . we adhere to these rulings"); Hudson River and Eastern Traction Co., 3 N.Y. Pub. Serv. Comm. (2nd Dist.) 172, 177 (1911) (security issue case) ("to the opinion (in case cited) this commission still adheres"); Union Center M. Tel. Assoc. v. Celina & M. C. Tel. Co., (Ohio Pub. Util. Comm. 1921) P.U.R. 1922 A, 330, 335 (certificate case) ("this commission held . . . and the commission still adheres to that principle and policy"); Application Green Bay Water Co. to Increase Rates, 21 Wis. R. R. Comm. Rep. 189, 202 (1918) ("conclusions should be adhered to").

78. "It is quite obvious that the Land Department uses the term 'overrule' in a much broader sense than do the courts . . ." McClintock, *The Administrative Determination of Public Land Controversies* (1925) 9 MINN. L. REV. 638 at 641.

79. Golden State Milk Products Co. v. So. Sierras Power Co., 33 Cal. R. R. Comm. Rep. 83, 87 (1929) (reparation case).

"The reasons assigned by the court are here applicable, and the ruling in that case is controlled here." *In re* Purchase Janesville Water Company's Plant, 13 Wis. R. R. Comm. Rep. 29, 31 (1913).

80. Steiger Terra Cotta Works v. So. Pac. Co., 7 Cal. R. R. Comm. Rep. 288, 294 (1915) (reparation case).

81. Sixty-Seven South Munn v. Pub. Serv. E. & G. Co., (N.J. Bd. of Pub. Util. Commrs. 1928) P.U.R. 1929 A, 329, 333 (complaint against service case).

82. Nat. Tube Co. v. Baltimore & O. R. R., (W. Va. Pub. Serv. Comm. 1918) P.U.R. 1918 D, 68, 81 (rate case).

clusive upon the issues here presented"[83] nor to "apply to the facts in this case."[84]

In any event there is much here that resembles the traditional judicial way of deciding cases. A determining factor in these administrative decisions, if the strong language of the opinions is taken at face value, is the imperative quality of past decisions. And there is little to indicate that the expressions used are to be discounted.

c. The Technique of "Distinguishing" Cases

A precedent, it has been seen, governs a case *on all fours;* and conversely, a decision is not a precedent for cases in which the circumstances materially differ from the circumstances upon which the decision rested. Two other matters involved in finding the principle of a case are relevant: first, the caution that "in so far as the words of the judges go beyond the precise doctrine necessary to the decision, laying down a different rule or a broader rule, they are mere *dicta;*"[85] and second, "that a case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the court."[86] In other words, the strict doctrine of precedents limits the authority of a case to the precise issue presented and deliberated upon.

An essential part of the strict doctrine is the intricate art of finding the principle of a case, of ascertaining the proposition of law for which the case is imperative authority. This, together with a determination of the likenesses or differences between the two situations, brings into play the unique process of *distinguishing* cases, of showing how the precise point upon which the case turned is different from the point in a subsequent case. It is, of course, a highly legitimate and proper method for defining and limiting the bounds of legal categories; but it may also, as employed, indicate the degree of respect accorded to decided cases. "The strenuous efforts of the courts to 'distinguish' cases is evidence of a feeling that a precedent must not be overruled."[87]

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83. Racine v. C. & N. W. Ry., 30 Wis. R. R. Comm. Rep. 195, 199 (1926) (viaduct construction case).

84. Mammoth Copper Mining Co. v. So. Pac. Co., 1 Cal. R. R. Comm. Rep. 993, 997 (1912) (rate case).

85. WAMBAUGH, THE STUDY OF CASES (2d ed. 1894) § 16.

86. *Id.* at § 17.

87. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW (1931) 58. See also WAMBAUGH, *op cit. supra* note 85 at p. 67: "The attempt to avoid the appearance of overruling a case is due to the habitual conservatism of lawyers quite as much as to conscious respect for the principle of *stare decisis.*"

The average case to come before any tribunal does not call for "strenuous efforts" to distinguish it from a case cited as controlling. It is ordinarily enough to observe with little or no discussion, as do many public service commission decisions, that "there is a marked distinction between these two cases,"[88] or that the cases cited "are not in point since they presented issues entirely dissimilar to the issues which are presented in the present case."[89] Where, however, a case is strongly urged or where the principle of a cited case is sought to be held within narrow bounds, a more elaborate analysis is made and a suitable distinction carefully indicated. For example:

> "Protestants contend that in view of rulings heretofore made by the Commission, Resler, already being a private carrier, is not qualified to operate as a common carrier, and that authority requested should be denied. It is true that in *Re* Faus, P.U.R. 1933 E, 506, 508, we said:
>
> " 'We believe it is also well settled that one may *not* operate as a common and a private carrier at the same time with the same facilities and within the same territory or over the same route.' "
>
> "But we also held: 'We believe it is a well-settled principle of law that the same person may be engaged in one line of business as a common carrier and in another line of business as a private carrier, and we held in the case of *Re Greeley Transp. Co.* (1931) P.U.R. 1932 A, 55, that the Greeley Transportation Company had the right to operate as a private carrier outside of the territory it was authorized to serve as a common carrier. . . .' "

A rather detailed analysis of the facts of the case follows, and thereafter is added—

> "The Commission holds that the instant case comes within the rule as stated in the *Greeley Transportation Company Case, supra,* and is not in conflict with the holding in the *Faus Case, supra.* . . ."[90]

88. Application of Santa Maria Gas and Power Co., 9 Cal. R. R. Comm. Rep. 514, 518 (1916) (certificate case).

89. J. O. McIntire v. Pac. Tel. and Tel. Co., (Cal. R. R. Comm. 1917) P.U.R. 1917 F, 793, 797 (inadequate service case).

The earnest and emphatic manner in which the alleged inconsistency is disposed of is itself significant. See Shiebler v. Suffolk Gas and El. Light Co., 5 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 33, 40 (1916) (bond issue case) ("this conclusion does not in the slightest degree conflict with the decision of this Commission . . ."); *Re* Erie Power Corp., (N.Y. Pub. Serv. Comm. 1925) P.U.R. 1926 A, 707, 714 (stock acquisition case) ("reference to petitioner's brief shows a claim that this case in analagous to an application of the Empire Power Company . . . the fact is, there is no analogy"); Kiel Wooden Ware Co., 8 Wis. Pub. Serv. Comm. Rep. 136, 138-141 (1935) (rate case) ("complainant also points to the decision of this Commission . . . No such condition exists in the instant case").

90. *Re* Ray R. Mercure (Colo. Pub. Util. Comm. 1935) 11 P.U.R. (N.S.) 281, 282 (certificate transfer case).

This sort of treatment is often accorded a merely *persuasive* decision of a similar

The art of distinguishing cases becomes more complex and requires something in the way of judicial acumen when the distinction is made to turn on the fact that the words of the commission or other tribunal in the case cited went beyond what was necessary to decide the precise issue involved. But there is no evidence that public service commissions are lacking with respect to this technique. A case decided by the Missouri Public Service Commission is illustrative.

> "This was not a formal finding or order that the Panhandle Eastern was an interstate pipe line over which the Commission had no jurisdiction. There was nothing in the record in these cases as to the manner in which Panhandle Eastern conducted its business. Reference to its status and to the Commission's jurisdiction was *obiter dictum.*"[91]

It was the contention of the defendant that in the previous case the commission had disclaimed jurisdiction over the pipe line. What the commission said in the prior case (and what the commission now refers to as *obiter dictum*) was this:

> "It appears that the Panhandle Eastern Pipe Line Company is an interstate pipe-line company over which the Commission has no jurisdiction, and for that reason the question whether the pipe-line company can profitably extend lines to the towns herein is not before the Commission for consideration."[92]

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commission in another jurisdiction. See *Re* Noblesville Heat, Light and Power Co., (Ind. Pub. Serv. Comm. 1920) P.U.R. 1921 A, 193, 198-199 (stock issue case): "The brief also cites the case of *Re* Northern C. R. Co., 2 Md. P. S. C. 108, and suggests that petitioner's case could be made an exact parallel to the Maryland case, if petitioner should enter into agreement with its stockholders for the issuance of a stock dividend. To this suggestion there are three answers. In the first place, the agreement in the Maryland case was in reality consummated before the enactment of the Public Service Commission Act of Maryland, and the Commission gave this circumstance great weight, in holding that it created an 'obligation' . . .

"In the second place, the facts would still be essentially different . . .

"In the third place, their brief ignores the fact that even though the facts were identical and the 'obligation' could be held to exist, this Commission is prohibited by sec. 89 from authorizing the stock dividend, while the Maryland Commission was not so prohibited."

91. Fulton v. Panhandle Eastern Pipe Line Co., (Mo. Pub. Serv. Comm. 1932) P.U.R. 1933 B, 202, 203.

92. *Ibid.*

". . . the exception mentioned was unnecessary to a determination of the question at issue in the case. The statement of the exception was therefore purely an *obiter dictum.*" Strauss v. Amer. Express Co., 3 Wis. R. R. Comm. Rep. 556, 563-564 (1909) (discrimination case).

"But what the court said in that case was simply *obiter,* was not necessary for the decision of the case, and cannot be used as an authority . . ." (Dissenting) Horseheads v. Elmira Water, Light and R. R., 9 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 370, 377 (1920) (excessive rate case).

The commissions recognize, quite as much as do the courts, the vast difference between *dictum* and the essential holding of a case. The one is a mere statement concerning a matter not necessarily nor directly involved in the case and is, therefore, "not binding"[93] (unless, perhaps, it is made by a court having jurisdiction finally to review the administrative decision).[94] The other establishes the doctrine of the case, the proposition for which the case is authority, and therefore is of vital importance to the decision of subsequent cases. There appears to be no other reason, at any rate, for such a discriminating appraisal of the words of a decision.

The rule that *obiter dicta* are not binding, that judges should limit their decisions to the facts of the cases before them, is probably conformable to the view that courts decide concrete cases but have no authority to legislate. They are not to use the precise case as the occasion for giving pronouncements on the general principles of law which the case may involve. But even as a court doctrine it has not remained unchallenged.[95] Public service commissions, on the other hand, are regulatory bodies. They are authorized and equipped to perform that function both by deciding individual cases and by promulgating rules, legislative in character, for the governance of utility enterprises. There is, therefore, some reason why a commission should take the opportunity, when an important case is before it and valuable arguments are presented from various points of view, to make a comprehensive declaration of the principles generally involved in the case. Certainly there is less reason to summarily dismiss *obiter dicta* as without significance.

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93. Stein v. Illinois Bell Teleph. Co., (Ill. Pub. Util. Comm. 1921) 3 P.U.R. Dig. 2610.

Not infrequently the deciding commission itself undertakes to restrict the case to the precise point in issue by discounting other words used in the decision. For example: "It will be borne in mind that in the decision we render herein this Commission does not pass upon what would be a proper charge, if any, to be paid by the San Francisco-Sacramento, but solely upon the right of the San Francisco-Sacramento to the same privileges as are accorded other roads. There is before this Commission, as heretofore stated, no question as to proper or improper compensation to defendant. That matter has not been raised by defendant and is not before the Commission for determination." San Francisco-Sacramento R. R. v. Cent. Cal. Traction Co., (Cal. R. R. Comm. 1922) P.U.R. 1922 D, 78, 85 (interchange track service case).

94. "This dictum was not essential to the decision of the case . . . but it being an expression of opinion of the court of last resort we have felt ourselves bound to treat it as binding upon us." Adirondack Electric Power Corp., 3 N.Y. Pub. Serv. Comm. Rep. (2nd Dist.) 242, 249 (1912) (stock and bond issue case).

95. See MULLINS, IN QUEST OF JUSTICE (1931) 105.

d. "Overruling" Cases

There is indeed little that can be said of the practice of overruling past decisions. Cases are overruled, and they are expressly referred to as having been overruled, but only in exceedingly rare instances. Considering the great mass of decisions by public service commissions in the past twenty or thirty years it is quite remarkable and perhaps significant that the number of overruled cases is virtually negligible.

It is fairly evident that a departure from the principle of a previous case is undertaken with caution and is strictly circumscribed by limiting words. For example:

> "True, we yielded this principle to some extent in the Helena Light & P. Co. Case, 13 Mont. R. & P.S.C. 191, P.U.R. 1920 D, 668, but as there noted, our action was expressly limited to that particular proceeding and is not to be taken as formulating a general principle."[96]

Where it is recognized that the departure operates effectually to overrule a prevous case the language is that "to this extent" the case "is overruled."[97] The Missouri Commission made a critical appraisal of its previous holdings in two unreported cases and concluded that—

> "Therefore we are of the opinion that the conclusion expressed in (those cases), in so far as they conflict with the principles announced above, should no longer be followed."[98]

This apparent reserve, however, is only in the language of the overruling case. After the event, the fact that a certain case has been overruled is readily recognized in subsequent cases.[99]

4. Conclusion

In general, regulatory control of utilities by public service commissions is predicated upon authority to grant or refuse a certificate of convenience and necessity and to allow or refuse its transfer; to allow or refuse to allow

96. *Re* Montana Power Co., (Mont. Pub. Serv. Comm. 1932) P.U.R. 1932 B, 275, 280 (abandonment case).

97. Application of the Wis. Tel. Co., 1 Wis. Pub. Serv. Comm. Rep. 37, 65 (1931) (rate case).

98. *Re* McCoy, (Mo. Pub. Serv. Comm. 1934) 8 P.U.R. (N.S.) 322, 326 (sale of utility and certificate case). A concurring opinion disagreed "with the discussion resulting in overruling" the previous cases.

99. "In spite of the fact that the Commission has heretofore overruled its decision in Case No. 281, *supra,* we are constrained to and do hold in this case . . . that the applicants should not be penalized for acting in reliance upon that decision . . ." *Re* Giacomelli Bros. (Colo. Pub. Util. Comm. 1927) P.U.R. 1938 A, 425, 429 (certificate case).

the issuance of securities; to permit or refuse to permit the sale or transfer of securities, property or franchises; to determine the reasonableness of rates and charges and to fix rates; and to require improvements and extensions in service and to allow or refuse to allow its abandonment.[100] This authority is largely asserted in case to case proceedings resulting in the orders and opinions given in connection with particular controversies.[101] Moreover it is a form of control highly congenial to the common law system of precedents which accords to the decision of a particular case the force of law.

To say that the principle of *stare decisis* is not applicable to proceedings before public service commissions or that it is not "binding" upon them is not decisive. It is, after all, a *self-imposed* restraint, depending for its effectiveness upon the faculties and sensibilities of the deciding tribunal. What is more to the point is whether a commission voluntarily subordinates its judgment in a matter to its own case experience or to that of other like commissions; whether decided cases are regarded as so authoritative as to be a substantial and controlling factor in the decision of subsequent cases. This is not to suggest that other reasons are of no force in coming to a decision. It has always been recognized by the courts that other factors speak out and are given full consideration; and if expressly overruling is rare, the process of distinguishing has proved effective to limit the authority of an undesirable decision.

In form, in language and in technique public service commission decisions closely resemble court decisions, and it is doubtful whether the manner of decision is fundamentally different from that of traditional courts. In two respects there is some disagreement. While expressions used in reference to prior commission decisions are often forceful enough, they do not so surely ascribe to them absolute, imperative authority characteristic of judicial language. Also, there is little evidence of "strenuous effort" to dis-

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100. Hyneman, *The Case Law of the New York Public Service Commission* (1934) 34 COL. L. REV. 67.

101. Distribution of the cases herein cited among the various forms of utility control is as follows:

Certificates of convenience and necessity	20%
Issuance of securities	10%
Transfer of securities, property, franchises	8%
Rates	41%
Service	21%

With respect to the form or language and technique of a decision there is no appreciable difference between one type of proceeding and another. Nor are there any noticeable differences in the commission decisions of different states, except as indicated at page 50 *supra.*

tinguish cases in order to avoid the appearance of overruling them. This, however, may in part be accounted for by the new and unique quality of the problems with which commissions deal, allowing for a time, at least, a wide latitude for differentiation. But the wholesale importation of practices and forms of thought and expression essentially a part of the doctrine of precedents is not likely to preserve for long whatever differences may now exist.[102]

102. See Note, *Stare Decisis in N.L.R.B. and S.E.C.* (1939) 16 N.Y.U.L.Q. REV. 618 for a similar analysis of the decisions of the National Labor Relations Board and the Securities and Exchange Commission.