Under these cases, therefore, the addition or substitution of a party plaintiff will be allowed unless to do so would have the effect of creating a new cause of action.[31] This would also prevent the adding of a new defendant. In *Laute v. Gearhart*[32] a suit was instituted against the guardian of an infant. After the Statute of Limitations had run, it was held that the infant could not be made a party to the suit instituted against his guardian, since he was not sued or served with process.

NEWLY DISCOVERED EVIDENCE AS A GROUND FOR NEW TRIAL.—It is undeniable that it is highly desirable and convenient that judgments and decrees of courts of competent jurisdiction be dispositive of the matter controverted.[1] It follows that applications for new trials or for rehearings on the ground of newly discovered evidence are not favored by the courts and will not be entertained unless special circumstances are shown.[2] The grounds for giving relief in both law courts and chancery are based on equitable considerations.[3]

Prior to 1885, the New Jersey law court had no power to set aside its judgment, after the term in which it was rendered, on the ground of newly discovered evidence. When the unsuccessful party discovered new evidence subsequent to the end of the term, it was necessary for him to go into equity for relief.[4] Although the court of equity had no power to set aside a judgment of the law court, it could, if the judgment had not been paid, perpetually restrain the successful party from enforcing his judgment unless he would consent to a new trial, or, if the judgment had been enforced, it could require restoration.[5] In *Cairo & Fulton R.R. Co. v. Titus,*[6] Chancellor Runyon pointed out that there might be some special circumstances where there would be no propriety in referring a matter again to the law court, as, for example, where a release or receipt is discovered, and intimated that in such a case the Court of Chancery would enter a decree which in effect would grant a new trial in the Court of Chancery instead of in the court of law in which the matter was originally tried.

---

of the auto. See also Di Lello v. Manufacturers' Land & Imp. Co., 11 N.J. Misc. 164 (Sup. Ct. 1933).

[31] Farrier v. Schroeder, 40 N.J.L. 601 (E. & A. 1878).

[32] 11 N.J.Misc. 117 (Sup. Ct. 1933).

[1] Grant Inventions Co. v. Grant Oil Burner Corp., 104 N.J.Eq. 341 (Ch. 1929); Miller v. McCutcheon, 117 N.J.Eq. 123 (E. & A. 1934).

[2] Christie v. Petrullo, 101 N.J.L. 492 (Sup. Ct. 1925).

[3] Jessup v. Cook, 6 N.J.L. 434 (Sup. Ct. 1798).

[4] Cairo & Fulton R.R. Co. v. Titus, 32 N.J.Eq. 397 (E. & A. 1880); Hayes v. U. S. Phonograph Co., 65 N.J.Eq. 5 (Ch. 1903).

[5] Cairo & Fulton R.R. Co. v. Titus, 35 N.J.Eq. 384 (Ch. 1882); Hayes v. U. S. Phonograph Co., *supra* note 4.

[6] *Supra* note 5.

Where relief could be obtained in the law court, the court of equity would not entertain a bill to enjoin the enforcement of the judgment, and when, in 1885,[7] the legislature extended the jurisdiction of the law court to the granting of new trials after term, the Court of Chancery withdrew from the exercise of jurisdiction[8] except in cases of fraud.[9]

The law courts in New Jersey having exclusive jurisdiction in the determination of factual questions by the state constitution, applications for new trials are addressed to the discretion of the court and are not reviewable except, of course, in cases of abuse of discretion.[10] In Chancery, however, although applications for rehearings are also addressed to the judicial discretion of the court, determinations seem to be appealable.[11]

An application for a new trial in the law court on the ground of newly discovered evidence is made by rule to show cause. Formerly an application for a rehearing in Chancery, after the time for appeal had expired, was made by petition and bill of review.[12] The modern practice, however, is to make the application by petition and order to show cause whether filed before or after the time of appeal had expired.[13]

Certain general principles regarding the character of the newly discovered evidence which govern the court in granting new trials at law and rehearings in equity have developed through precedents. These principles are applicable to applications both for new trials and for rehearings.[14] They are commonly listed as follows: (1) that the evidence must be such as will probably change the result if a new trial is granted; (2) that it must have been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it must be material to the issue; (5) that it must not be merely cumulative, or impeaching.[15] These guiding rules have been adopted by the New Jersey courts in substantially the same form as above stated.

Even though the newly discovered evidence would have been material at the trial or hearing, before the court will set aside a judg-

---

[7] P.L. 1885, p. 71.

[8] Hayes v. U. S. Phonograph Co., *supra* notes 4 and 5; Kearns v. Kearns, 70 N.J.Eq. 483 (Ch. 1905).

[9] Povey v. Ready, 87 N.J.Eq. 199 (Ch. 1917). Decree adjudged that the judgment was null and void. Modified so as to restrain the enforcement of the judgment, but otherwise affirmed, by the Court of Errors and Appeals in an opinion reported in 88 N.J.Eq. 342.

[10] State Mutual B. & L. Ass'n. v. Williams, 78 N.J.L. 720 (E. & A. 1910); State v. Comstock, 95 N.J.L. 321 (Sup. Ct. 1920).

[11] Kirschbaum v. Kirschbaum, 92 N.J.Eq. 7 (Ch. 1921); Mitchell v. Mitchell, 97 N.J.Eq. 298 (E. & A. 1925).

[12] Watkinson v. Watkinson, 68 N.J.Eq. 632 (E. & A. 1905).

[13] Mitchell v. Mitchell, *supra* note 11.

[14] Feinberg v. Feinberg, 70 N.J.Eq. 420 (Ch. 1906).

[15] 20 R.C.L. 290.

ment or open a decree, it must appear that in all probability, it would have changed the result on the merits.[16] The newly discovered evidence must be so persuasive as to scarcely leave it debatable that the verdict is wrong.[17] The Court will look to the probability of the new evidence being true in fact.[18] The determination of the likely effect of the new evidence is for the court.[19]

It must appear that the evidence was in fact discovered since the trial or hearing and that it could not possibly have been used.[20] Forgetting the evidence or being mistaken as to its materiality or importance is not considered by the court as sufficient ground for opening a judgment or vacating a decree.[21] The fact that a material witness was out of the jurisdiction at the time of the trial and not subject to process is ordinarily not a basis for a new trial or rehearing.[22] A rehearing has been denied where the failure of the solicitor to produce essential evidence was caused by his illness.[23] Failure of a party to acquaint his counsel with the evidence at his command is not a sufficient ground.[24]

A new trial in law or a rehearing in equity will not be granted where the party might have had the evidence at the first trial or hearing if he had exercised reasonable or due diligence.[25] In *Christie v. Petrullo,*[26] Justice Katzenbach stated that "the aim of the law should be to force litigants to the fullest preparation of their cases before trial." Where a party fails to inquire as to the facts from witnesses who obviously knew all about them, he has not exercised reasonable diligence.[27] If the same facts could have been proven at the trial by other evidence, a new trial will not be granted unless the party can satisfactorily explain why he did not attempt to use it.[28]

In New Jersey the requirement that the newly discovered evidence must be material to the issue as framed at the trial is followed.[29]

The newly discovered evidence to justify a new trial or a rehearing

---

[16] Hoban v. Sandford & Stillman Co., N.J.L. 426 (Sup. Ct. 1900); Watkinson v. Watkinson, *supra* note 12.

[17] Miller v. Ross, 43 N.J.L. 552 (Sup. Ct. 1881).

[18] O'Brien v. Staiger, 2 N.J.Misc. 994 (Sup. Ct. 1924).

[19] Hoban v. Sandford & Stillman Co., *supra* note 16; McKeon v. Delaware &c. R.R. Co., 100 N.J.L. 258 (Sup. Ct. 1924).

[20] Watkinson v. Watkinson, *supra* notes 12 and 16; Ellis v. Martin Automobile Co., 77 N.J.L. 339 (Sup. Ct. 1909).

[21] McDowell v. Perrine, 36 N.J.Eq. 632 (E. & A. 1883); *In re* Roberson, 95 N.J.Eq. 672 (E. & A. 1924); Christie v. Petrullo, *supra* note 2.

[22] Servis v. Cooper, 33 N.J.L. 68 (Sup. Ct. 1868).

[23] Richardson v. Hatch, 68 N.J.Eq. 788 (E. & A. 1905).

[24] *In re* Roberson, *supra* note 21.

[25] Thomas v. Consolidated Traction Co., 62 N.J.L. 36 (Sup. Ct. 1898); Murphy v. Skelly, 101 N.J.Eq. 793 (E. & A. 1927).

[26] *Supra* notes 2 and 21.

[27] Plaskon v. National Sulphur Co., 114 N.J.L. 109 (E. & A. 1935).

[28] Hoban v. Sandford & Stillman Co., *supra* notes 16 and 19.

[29] Van Riper v. Dundee Mfg. Co., 33 N.J.L. 152 (Sup. Ct. 1868).

must not be just cumulative or impeaching evidence.[30] In *Van Riper v. Dundee Mfg. Co.*,[31] the New Jersey Supreme Court, adopting the definition of cumulative evidence of the New York Supreme Court in *The People v. Superior Court of New York*,[32] defined it as "evidence to support the same point, and which is of the same character with evidence already produced." So, if the evidence is on the same point but of different character it is not objectionable as being cumulative.[33] The new evidence, as pointed out by Justice Ford in *Den v. Wintermute*,[34] "ought to respect a new point, one that has come to light since the trial, on which the party has never been heard." The purpose of this prerequisite is also to insure adequate preparation for trial. If every additional circumstance bearing upon the facts proven at the trial was a ground for a new trial or rehearing, new trials and rehearings would be endless.[35] Where the sole purpose of the new evidence is to discredit the testimony of one or more of the adversaries' witnesses, a new trial will not be granted.[36]

A number of decisions in other states have, in addition, laid down the rule that the newly discovered evidence must be evidence of facts existing at the time of the trial or hearing and not of matters and things which happen after[37] There are, however, many cases to the contrary. It is well to note that most of the decisions holding that such evidence is a ground for a new trial are cases where the new evidence clearly shows perjury or fraud on the part of a party;[38] for instance, in personal injury actions where the new evidence shows a

---

[30] Thomas v. Consolidated Traction Co., *supra* note 25; Christie v. Petrullo, *supra* note 2.

[31] *Supra* note 29.

[32] 10 Wend. 285, 11 N. Y. Com. Law R, 859 (1833).

[33] Mulock v. Mulock, 28 N.J.Eq. 15 (Ch. 1877); Kirschbaum v. Kirschbaum, *supra* note 11.

[34] 13 N.J.L. 177 (Sup. Ct. 1832).

[35] Deacon v. Allen, 4 N.J.L. 391, *338 (Sup. Ct. 1816).

In Den v. Wintermute, *supra* note 34, Justice Ford, speaking for the Supreme Court, said at page 182:

> "A new witness to character, credit, hand writing, dates, absences, violence and the like, might be found after a half a dozen trials, and render new trials endless, if every piece of cumulative evidence not known of before, was ground for setting aside a verdict."

[36] Den v. Gerger, 9 N.J.L. 225 (Sup. Ct. 1827); *In re* Roberson, *supra* notes 21 and 24.

[37] Putman v. Macleod, 23 R.I. 373, 50 Atl. 646 (1901); Johnson v. Johnson, 18 Colo. 493, 72 P. 604 (1903); Cassidy v. Johnson, 41 Ind. App. 835, 84 N.E. 835 (1908); Herrman v. Altman, 139 App. Div. 930, 124 N.Y.S. 39 (1910); Hensley v. McHan, 135 Ga. 834, 70 S.E. 654 (1911); Hutt v. Young, 47 Ohio App. 390, 191 N.E. 879 (1934).

[38] Guth v. Bell, 153 Iowa 511, 133 N.W. 883, 42 L.R.A. (N.S.) 692 (1911); State v. Watrous, 177 Minn. 25, 224 N.W. 257 (1929); Johnson v. Rule, 164 Atl. 681 (Vt. 1933).

condition of the injured person after the trial inconsistent with the showing of his condition made at the trial.[39]

An interesting question is whether a change of law on which a decision is based by a subsequent decision of a court of last resort is ground for a new trial or rehearing. It has been said that a new trial or rehearing may be granted on newly discovered matter as well as on newly discovered evidence.[40] In the case of *In re O'Mara,*[41] Ordinary Walker decided that a change of law by the Court of Errors and Appeals was new matter within the scope of the rules on newly discovered matter and newly discovered evidence, and ordered the Orphans' Court to amend a decree entered more than two years before to conform with a decision of the Court of Errors and Appeals overruling previous decisions on which the decree had been based.

Recently the O'Mara case was expressly disapproved by the Court of Errors and Appeals, in *Miller v. McCutcheon,*[42] in reversing an order of the Ordinary, as advised by Vice-Ordinary Buchanan,[43] vacating a decree of the Prerogative Court, entered almost eight years before, and granting a rehearing because of a decision of the United States Supreme Court declaring a statute, similar to that on which the original decree was based, unconstitutional, and overruling previous decisions of that court upholding the constitutionality of such a statute. The reasons given by the Court of Errors and Appeals for reversing the

---

[39] Colorado Springs & Interurban R. Co. v. Fogelsong, 42 Colo. 341, 94 Pac. 356 (1908); Southard v. Bangor & A. R. Co., 112 Me. 289, 91 Atl. 948, L.R.A. 1915 B. 243 (1914).

[40] Watkinson v. Watkinson, *supra* note 12, Justice Vroom, speaking for the Court of Errors and Appeals, said on page 634:

> "Such a bill [bill of review] must rest on error in law upon the face of the decree without further examinations of matters of fact, fraud in procuring former decree, new facts, or upon some new matter which has been discovered after the decree and could not possibly have been used when the decree was made.

[41] 106 N.J.Eq. 311 (Prer. Ct. 1930). This case involved the construction of the Distribution Act, section 169, paragraph 3, as amended by P.L. 1918, p. 180. The Prerogative Court affirmed the construction arrived at by the Orphan's Court, in an opinion reported in 101 N.J.Eq. 713, following prior rulings by the Court of Errors and Appeals. Later in the case of *In re* Estate of Oliver D. Miller, deceased, the same question was presented, and the Court of Errors and Appeals, in construing the same act, overruled its previous rulings. The Miller case is reported in 104 N.J.Eq. 491.

[42] *Supra* note 1. In this case an inheritance tax had been assessed on stock in a New Jersey corporation held by the deceased, a non-resident, the validity of which tax was questioned and upheld in the original proceedings. The question of the constitutionality of the statute under which the tax had been assessed was raised in the original pleadings but was not argued, the question having been considered as settled under decisions of the United States Supreme Court. The ground urged for the rehearing was the decision of the United States Supreme Court in First National Bank of Boston v. Maine, 284 U. S. 312, 76 L. Ed. 313 (1932) declaring an inheritance tax statute, similar to the one under which this tax had been assessed, unconstitutional, overruling the prior decisions on the same question.

[43] 115 N.J.Eq. 459.

order of the Ordinary were that a change of law is not newly discovered evidence, and that public policy requires that there should be finality to judgments of courts of competent jurisdiction.

In other jurisdictions there seem to be a split of authority on this question. The Federal courts have denied relief in such cases, basing their decisions mainly on the desirability of having a finality to judgments and decrees.[44] In New York, however, the courts have reached an opposite result, holding that a subsequent decision of a controlling court, overruling a former decision or former decisions, is newly discovered matter and have in several instances granted new trials or rehearings.[45]

If a court follows the theory that a decision of a court of supreme jurisdiction overruling former decisions states the law as it always was and that previous decisions never were the law, the rule of the *Miller* case and of the federal cases can be legally explained under the doctrine that everyone is presumed to know the law. Applying this doctrine, the prerequisite that the evidence or matter must have in fact be discovered since the trial[46] would preclude a new trial. On the other hand, if the theory that a decision overruling previous decisions changes the law be followed, those states following the rule that the newly discovered evidence must be evidence of facts existing at the time of the trial[47] could refuse a new trial on the ground that the occurrence took place after the trial, but those courts now following the rule that the newly discovered evidence must be evidence of facts happening after the trial[48] would find difficulty in basing a refusal to grant a new trial on the general principles regarding newly discovered evidence.

However, a refusal to grant a new trial because of a change of law may be based on broader grounds of public policy. Applications for new trials and rehearings being addressed to the judicial discretion of the court[49] it is clear that the general principles regarding newly discovered evidence in the final analysis are merely rules of convenience and should be disregarded where public policy is involved. The decisions in the New York cases open the door to prolonged litigation and have the effect of leaving the litigants in a position where that right may never be finally and fully settled. The policy of the law

---

[44] Tilghmam v. Werk, 39 Fed. 680 (C.C.S.D. Ohio, W.D. 1889); Hoffman v. Knox, 50 Fed. 484 (C.C.A. 4th Circ. 1892); Scotten v. Littlefield, 235 U.S. 407, 59 L. Ed. 289 (1914); John Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 66 L. Ed. 475 (1921); Swift v. Parmenter, 22 Fed. (2d) 142 (C.C.A. 8th Circ. 1927).

[45] Smith v. Frankfield, 77 N.Y. 414 (1879); *In re* Scrimgeour's Estate, 175 N.Y. 507, 67 N.E. 1089 (1903).

[46] *Supra* note 20.

[47] *Supra* note 37.

[48] *Supra* note 38.

[49] *Supra* notes 10 and 11.

should not and does not favor such a result.[50] It would therefore seem that courts are justified in refusing a new trial where the only ground for the application is a subsequent decision of courts of last resort overruling prior decisions on the same point.

There is a line of cases which should be considered in this connection, in order that they not be confused with the "change of law" cases, holding that where a decision is based on another decision, the latter being *res adjudicata* and determinative of the former, a reversal of the later is ground for opening a judgment or decree in the former. On this point the decisions are uniform.[51]

---

[50] *Supra* note 1.

[51] Ballard v. Searls, 130 U.S. 50, 32 L. Ed. 846 (1888); Butler v. Eaton, 141 U.S. 240, 35 L. Ed. 713 (1890); Boynton v. Chicago Mill & Lumber Co., 84 Ark. 203, 105 S.W. 77 (1917).