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THE DEVELOPMENT OF THE DOCTRINE OF STARE DECISIS AND THE EXTENT TO WHICH IT SHOULD BE APPLIED

FRED W CATLETT

The number of recent decisions by the Supreme Court of the United States overruling earlier decisions of that Court[1] has profoundly disturbed a large section of the bar of the United States and a considerable number of its thoughtful citizens It has even induced protest and caused foreboding among the members of that Court itself [2]

This feeling does not arise from the fact that the bar and public are entirely unaccustomed to reversals of its former decisions by the Supreme Court of the United States Such reversals have occurred in the past [3] But they have been by no means so frequent as within the last few years The effect of these recent reversals has been not only to alter specific long-established principles or interpretations of constitutions and statutes, but to create a feeling of general uncertainty as to the reliance which may be placed upon all decisional law This feeling is due to the apparent attitude of the majority of the present Court toward established principles Although it has rendered lip service to the doctrine of stare decisis,[4] its opinions have given the impression to many that it takes rather positive delight in overthrowing principles long established and, by many, well cherished Quite naturally, then, the question has arisen what has happened or is happening to the doctrine of stare decisis? Is it being in effect discarded, or simply violated? Does it still rest upon sound reason, and should any effort be made to re-establish its authority? Can the rule as it now exists in this country be modified in any way to the advantage of our law and our society?

The doctrine of stare decisis, which means "to stand by decisions and not to disturb settled matters," is of ancient lineage Some writers find evidences of it in Bracton and in the Year Books,[5] although one very careful scholar, who has gone through the Year Books for the

[1] U S v Darby, 312 U S 100; 85 L ed 609 (1940); Erie Railroad v Tomkins, 304 U S 64, 82 L ed 1188 (1938); Williams v North Carolina, 317 U S 287, 87 L ed 279 (1942); Jamieson v Texas, 318 U S 413, 87 L ed 869 (1943); West Virginia State Board of Education v Barnette, 319 U S 624 87 L ed 1628 (1943); U S v S E Underwriters' Assn, 322 U S 533 88 L ed 1440 (1944) See more complete list in Smith v Allwright, 321 U S 649 88 L ed 987, 988 n 10 (1944)

[2] Smith v Allwright, 321 U S 649, 88 L ed 987 (1944); Mahnick v Southern Steamship Co, 321 U S 96, 88 L ed 561 (1944); U S v S E Underwriters' Assn, 322 U S 533, 88 L ed 1440 (1944)

[3] See lists in notes to Burnet v Coronado Oil & Gas Co, 285 U S 406-410 76 L ed 815, 823-5 (1931)

[4] Smith v Allwright, 321 U S 649, 88 L ed 987 (1944); Helvering v Hallock, 309 U S 106, 84 L ed 604 at 612 (1940); Burnet v Coronado Oil & Gas Co, 285 U S 393, 76 L ed 815 (1932)

[5] ROBERT VON MOSCHZISKER, STARE DECISIS, Philadelphia, Cyrus M Dixon (1929)

special purpose of determining to what extent the doctrine of stare decisis was recognized in that early period, concludes that it cannot be said that the doctrine was firmly established then [6] Other writers have been of the opinion that the essence of the doctrine can be found in the Roman Civil Law and even in the Code of Justinian [7]

The exact time when the doctrine first appeared or was definitely accepted in English Law is of small practical importance It appeared early and is certainly a very useful and a natural doctrine of any system of law which is based upon usage and custom Unlike some of the other early doctrines of the common law, it is still easy to perceive the reasons lying at the base of stare decisis Those reasons are stability and certainty in the law, convenience, and uniformity of treatment of all litigants To the English or American mind, a system of law which lacks certainty and stability would be faulty and undesirable [8] It would be exceedingly difficult for a citizen to conduct his business or to deal with his property or to carry on satisfactorily many of the affairs of life, if he could not count upon the continued recognition of the principles of law in effect when he is compelled to act It would be impossible for a lawyer to give any dependable advice to a client If the courts were free to apply to each particular case the personal views of the particular judge or judges sitting, or if a judge were free to settle controversies in accordance with his own personal desires, the conduct of business would involve an added hazard and the decision of controversies between litigants would lose all semblance of justice or fairness Confidence in the honesty and integrity of the courts and in their impartiality could not be maintained We should have a government of men and not of laws

The acceptance of the doctrine of stare decisis was a gradual one

[6] T Ellis Lewis, *The History of Stare Decisis* (1931) 47 L Q Rev 411

[7] Daniel H Chamberlain, The Doctrine of Stare Decisis, New York, Baker, Voorhis & Co (1885)

[8] In Hole v Rittenhouse, 2 Phila 411, 417-418, appears this forceful statement:

> "The majority of this court changes on the average once every nine years, without counting the changes of death and resignation If each new set of judges shall consider themselves at liberty to overthrow the doctrine of their predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain and vicious that the civilized world ever saw A French constitution, or a South American republic, or a Mexican administration, would be an immortal thing in comparison to the short-lived principles of Pennsylvania law. The rules of property which ought to be as steadfast as the hills, will become as unstable as the waves To avoid this great calamity, I know of no recourse but that of stare decisis I claim nothing for the great men who have gone before us on the score of their marked and manifest superiority But I would stand by their decisions, because they have passed into the law and become part of it—have been relied and acted on—and rights have grown up under them which it is unjust and cruel to take away"

See also McLoud, *The Value of Precedent* (1894) 28 Am L Rev 218

Assertions of the doctrine can be found in the Year Books[9] and undoubtedly it increased in strength and acceptance by the courts as experience drove home to the judges and the people the very sound reasons which justified it It was not, however, until the latter half of the nineteenth century that even in England the doctrine became established in its most rigid form[10] At the present time, a decision by the final court of appeal in England upon a point raised in a case before the court and actually passed upon and decided by the court, is regarded as binding, not only upon all inferior courts but upon the appellate court itself, if and when the same point is presented to it The rule established can be changed only by an act of Parliament The real test of the doctrine arises, of course, only when the judges in a given case are convinced that the rule established by the earlier decision is wrong and yet apply it in the case before them Contrary to the weight of authority in the United States, the House of Lords has applied its rigid doctrine of stare decisis even where the earlier decision was made by an evenly divided court, the effect of the even division being an affirmance of the judgment of the lower court[11]

It does not appear that the courts of the United States ever accepted the rigid doctrine now held by the English courts[12] A distinguished scholar, nevertheless, is authority for the statement that, on the whole, the stare decisis doctrine in the United States approximated that of the English courts up to the beginning of the twentieth century He says that, beginning with that century, a decided difference appeared in the attitude of the courts toward the maxim, and that this change of attitude may be attributed to what Dean Pound characterizes as the "socialization of the law"[13]

If the doctrine of the American courts is not the rigid one of the English courts, it becomes important to determine just what the American doctrine is There have been various attempts to phrase it Two of those attempts seem to have been more successful than the others and have produced definitions which have received wide approval The first is the definition by Kent[14]

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[9] *Supra*, note 6

[10] Attorney Gen v Windsor, 8 H L Cases 389; 11 Eng Rep 481 (1860) Beamish v Beamish, 9 H L Cases 274; 11 Eng Rep 431 (1861) London Street Tramways, Ltd v The London County Council, 1898 App Cas 375

[11] Beamish v. Beamish, *supra*

[12] Gray, *Judicial Precedents* (1895) 9 HARV L REV 27

[13] Albert Kocourek and Harold Koven, *Renovation of the Common Law Through Stare Decisis* (1934) 29 ILL L REV 971; Arthur L Goodhart, *Case Law in England and America* (1929) 15 CORN L Q 173

[14] I KENT'S COMMENTARIES (14th ed 1896) 475 If the previous decision has been made in the same case, it becomes the "law of the case" and is generally regarded as absolutely binding Gange Lumber Co v Rowley, 22 Wn (2d) 250, 155 P (2d) 802 (1945) *But see* Johnson v Cadillac Motor Co, 261 Fed 878, 886 (1919) It is also almost the universal rule that an inferior court is bound by the decisions of the superior court until it is overruled *But see* Barnette v West Virginia State Board of Education 47

> "A solemn decision upon a point of law arising in any given case becomes an authority in a like case because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case"

The second definition, formulated by Daniel H Chamberlain in a prize essay written in 1885 for the New York State Bar Association, reads as follows:

> "That 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 that 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 actual law; and that the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual rather than arbitrary or inflexible"[15]

This last statement, it will be observed, was framed prior to the lessened emphasis upon the maxim observed in the decisions after the beginning of the twentieth century An examination of the authorities leads to the conclusion that this statement rather accurately summarizes the American doctrine then and today

The acceptance of this statement, however, as the true rule of stare decisis in this country will lead to confusion in thought unless one is careful to observe that on many occasions a judge or an author, when referring to the rule by name, has in mind the inflexible rule of the English courts When the United States Supreme Court, for instance, has said, as it frequently has, that the doctrine is not inflexible or inexorable, it has reference to the strict rule, for the flexibility of the stated rule is perfectly obvious

The American rule, then, does not destroy the value of prior decisions nor deny that they should be regarded as controlling until author-

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Fed. Supp 251 (D C 1942), where the district court refused to follow a recent decision of the Supreme Court of the United States The situation, however, was extraordinary Four of the seven judges of the U S Supreme Court who had participated in the decision of the case of Minersville School Dist v Gobitis, 310 U S 586, 84 L ed 1375 (1939), had given public expression of their disapproval of the decision, the chief justice in his dissenting opinion, and three other justices in a special dissenting opinion in Jones v City of Opelika, 316 U S 584, 86 L ed 1691, 1715 (1941) The lower court guessed correctly and was affirmed in West Virginia State Board v Barnette, 319 U S 624, 87 L ed. 1628 (1942) *But see* comment in note on case in (1943) 57 HARV L REV 652, 654

[15] *Supra* note 7

itatively reversed Mr Justice Brandeis, one of the early leaders in the attack upon the rigid rule, has said:

> "Stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation "[16]

And Mr Justice Cardozo, another acknowledged liberal, has written in his masterful essay on "The Nature of the Judicial Process":

> "I think adherence to precedent should be the rule and not the exception "[17]

If, then, the binding effect of precedent is to be recognized as the general rule, when or under what circumstances is it to be disregarded?

In the first place, it is agreed that a previous decision, to be binding, must be upon the identical point of law involved in the succeeding case In the English courts, the emphasis seems to have been placed upon the decision of the earlier court and not upon the reasons given for it In the United States, although greater consideration has been given to the opinion, it is likewise the actual decision which governs [18] As a corollary, it is also generally agreed that the decision of the court upon a point not properly before it and not actually raised in the case is not binding as a precedent;[19] obiter dicta are in no wise controlling It would seem that one decision on a particular point should constitute a sufficient precedent,[20] but that has not been the view of some courts [21]

The prevailing American view is that a decision of a court is but evidence of the law [22] If so, it may be weighed like any other evidence If it is by a divided court, if there be vigorous dissenting opinions, if it be a single decision,[23] a case of first impression, or one of a line of cases, if it be a decision of long standing, or a recent one upon which

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[16] Burnet v Coronado Oil & Gas Co, 285 U S 405; L ed 815 (1931) *See* Smith v Allwright, 313 U S 299, 88 L ed 709 (1944); Louis B Boudin, *The Problem of Stare Decisis in Our Constitutional Theory* (1931) 8 N Y U L Q REV 589

[17] BENJAMIN CARDOZO THE NATURE OF THE JUDICIAL PROCESS, Yale Univ Press (1921), 149

[18] Max Radin *Case Law and Stare Decisis* (1933) 33 COL L REV 210; John C Gardner *A Comparison of the Doctrine of Judicial Precedent in American Law and in Scots Law* (1940) 52 JURIDICAL REV 144; Herman Oliphant, *A Return to Stare Decisis* (1928) 14 A B A J 71, 159

[19] *In re* Brolasky's Estate, 302 Pa 439, 153 Atl 739 (1931); Swetland v Curtiss Airport Corp, 41 F (2d) 929 (1930); Koerner v St Louis Car Co 209 Mo 141, 107 S W 481 (1907); Ingham v Harper & Son 71 Wash 286 128 Pac 675 (1912); State *ex rel* Todd v Yelle, 7 Wn (2d) 443 110 P (2d) 162 (1941)

[20] Max Radin, *Case Law and Stare Decisis* (1933) 33 COL L REV 201

[21] Quaker Realty Co v Labasse, 131 La 996, 60 So 661, 665 (1913); McDonald v Davey, 22 Wash 366, 60 Pac 1116 (1900)

[22] I BLACKSTONE (Cooley's 4th ed) 63

[23] Raphael v Morris Plan Industrial Bank (C C A, 2d Cir) 146 F (2d) 340 (1944)

the public has had no time to act, if the opinion is written by a judge of acknowledged ability or eminence, its importance as a precedent may be increased or diminished

In addition, the weight to be given to a previous decision is affected greatly by the character of the question which has been decided If the rule in question is a rule of property or a rule affecting trade, business or commerce, in reliance upon which the people have acted for a long period of time, the courts are slow to upset it [24] If the matter is one which can be easily changed by the legislature and the legislature has had an opportunity to act and has not done so, the courts will assume that the earlier rule has not been found unsatisfactory [25]

In criminal cases, a change in an applicable rule has the appearance of *ex post facto* legislation In interpreting a criminal statute, therefore, the court is very likely to regard the former interpretation as having become in effect a part of the statute and not thereafter subject to change by the court [26] The same principle has been applied to the interpretation of other types of statutes upon which the business community can be said to have relied [27] On the other hand, on questions of procedure or evidence, our courts have felt less firmly bound by prior decisions [28]

It is on questions of constitutional law, however, that the courts of this country have been most ready to decline to follow precedent Justice Brandeis has expressed the feeling of many of the judges, including the majority of the present United States Supreme Court:[29]

> "But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error so fruitful

[24] Hines v Driver, 89 Ind 339 (1883); Diamond Plate Glass Co v. Knote, 38 Ind App 20, 71 N E 954 (1906); American Mortgage Co v Hopper, 64 Fed 553 (1894); Treon v Brown, 14 Ohio 482 (1846); Newberry v Trowbridge, 4 Mich 390 (1857); Liberty National Bank v Loomis, 275 Ky 445, 121 S W (2d) 947 (1938); Boca v. Chavez, 32 N M 189, 252 Pac 987 (1927); Wisconsin Power & Light Co v. Beloit, 215 Wis 349, 254 N W 119 (1903); Shoemaker v Cincinnati, 68 Ohio St 603, 68 N E 1 (1903)

[25] *But see* criticism of this assumption by Mr Justice Frankfurter in Helvering v Hallock, 309 U S 106, 84 L ed 604 (1934)

[26] Robert Freemen, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision* (1918) 18 COL L REV. 230; Florida Forest & Park Service v Strickland, 154 Fla 472, 18 S.(2d) 152 (1944); State v Mellenberger, 163 Ore. 103, 95 P (2d) 709 (1944); 128 A. L R 1506, distinguishing between offenses *malum in se* and *malum prohibitum;* Commonwealth v Trousdale, 297 Ky 724, 181 S W (2d) 254 (1944)

[27] Pouch v Prudential Ins Co, 204 N. Y 281, 97 N. E 731 (1912); Yakima Valley Bank & Trust Co v Yakima County, 149 Wash 552, 271 Pac 820 (1928); Falconer v Simmons, 51 W Va 172, 41 S E 193 (1902)

[28] State v Brunn, 22 Wn.(2d) 120, 154 P (2d) 826 (1945), overruling earlier cases on the meaning of "double jeopardy"; Whittaker v Lane, 128 Va 317, 104 S E 252 (1920)

[29] *Supra* note 14.

> in the physical sciences is appropriate also in the judicial functions
>
> "In cases involving the Federal Constitution, the position of this court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases Parliament is free to correct any judicial error and the remedy may be promptly invoked The reasons why this court should refuse to follow an earlier Constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may be called interpreting, the Constitution "

Admittedly, it would be much simpler if the courts in this country felt free to adopt the stringent rule of the English courts and hold fast to the former decision, leaving it to the legislature to make any desired changes But here changes are not so readily made Legislatures are not always in session and, indeed, in most states meet but once in every two years Constitutional changes are much more difficult And, although courts do not often expressly admit it, many of them doubtless indulge in the belief that they are better equipped to determine the correct principle of law than is the legislature For these reasons, the rigid doctrine has not been regarded as suited to American conditions, and is not likely to be

Many authors and judges have undertaken to state the conditions justifying a departure from the basic rule of stare decisis Blackstone says:[30]

> "Yet this rule admits of exception when the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law "

As appeared in his definition previously set forth, Kent would apply the general rule "unless it can be shown that the law was misunderstood or misapplied in that particular case " Likewise, in the rule as formulated by Mr Chamberlain, the degree of authority belonging to a precedent depends "on its agreement with the spirit of the times and the judgment of subsequent tribunals upon its correctness as a statement of existing or actual law " In the last analysis, he says the compulsion of the doctrine is only "moral and intellectual " Judge Robert von Moschzisker, in his excellent essay on "Stare Decisis, "[31] expresses the belief that earlier decisions should be reversed when the court can say "practically beyond reasonable doubt that they were wrongly decided and the ends of justice require their overruling " The court in subsequent cases ought not to disturb its prior decision "except for very cogent reasons and on a clear conviction of error " Later in the same article, he says that the earlier decision should stand unless

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[30] *Supra* note 20

[31] *Supra* note 5

the court believes "the prior ruling to be wrong or that it has become inapplicable through lapse of time and change of conditions" Many state supreme courts have expressed similar views [32]

The most authoritative statements, however, appear in late cases in the Supreme Court of the United States Chief Justice Stone has said that "before overruling a precedent in any case, it is the duty of the court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity," and "these considerations might well stay a reversal of long established doctrine which promises so little advantage and so much of harm" In the same case, Mr Justice Jackson wrote, "Judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical, and, in part, on policy considerations"[33] And Mr Justice Frankfurter has declared that the doctrine, which is one of social policy, should be departed from when adherence to a former decision "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience"[34] In an earlier case, Mr Justice Brandeis gave it as his opinion that whether the prior decision "shall be followed or departed from is a question entirely within the discretion of the court"[35] Many other attempts to state the circumstances or conditions under which a court is justified in refusing to follow prior decisions have been made, but they have been no more helpful than those quoted

Such a situation is unsatisfactory to the person who demands certainty Nevertheless, the decisions of the courts and the statements of the judges foreclose any conclusion other than that the recognition of the binding effect of a prior decision ultimately depends only upon the sound judicial discretion of the particular court The sole protection against the frequent exercise of the undoubted power to overrule prior decisions is to be found in the court's "own sense of self-restraint"[36] Admittedly, the reasons inducing the court to disregard a

[32] Adams Express Co v Beckwith, 100 Ohio St. 348, 126 N E 300 (1919); *In re* Hood River, 114 Ore 112, 227 Pac 1065 (1924); State *ex rel.* La Brode v. Cox, 43 Ariz. 174, 30 P (2d) 825 (1934); Commonwealth v Walsh, 196 Mass 369, 82 N. E. 19, 13 Ann Cas. 642 (1907); McGregor v Providence Trust, 119 Fla 718, 162 So. 323 (1935); State *ex rel* Blodel v. Savage, 144 Wash. 302, 258 Pac 1 (1927); Riedling v Harrod, 298 Ky 232, 182 S W (2d) 770 (1944)

[33] U S v Southeastern Underwriters Assn, 322 U S 533, 88 L ed 1440 (1944).

[34] Helvering v. Hallock, 309 U S 106, 119, 84 L ed 604 (1940).

[35] Burnet v Coronado Oil & Gas Co, 285 U S 393, 406, 76 L ed 815 (1932)

> "The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible Whether it shall be followed or departed from is a question entirely within the discretion of the court which is again called upon to consider a question once decided" Mr Justice Lurton in Hertz v Woodman, 218 U S 205, 212, 54 L ed. 1001 (1910)

[36] Stone, C J, in U S v Butler, 297 U S 1, 78, 80 L ed. 477 (1936)

prior holding should be cogent and convincing The court should be satisfied beyond reasonable doubt that the earlier decision was wrong It should weigh the considerations on both sides and must in the end decide the question whether more harm is to be done by standing by the rule already laid down or by overruling the earlier case and announcing a new rule The unavoidable difficulty is that different judges will give different weights to the several considerations If dissatisfaction with the former rule is very great, a judge will be likely to conclude that the evils resulting from a change of the rule are less than from its maintenance Certain judges, because of their education, or political or social philosophy, or individual temperaments, place less weight upon precedents and the value of certainty in the law than others As Justice Brandeis has emphasized, where decisions are a combination of facts and law, judges who take an opposite view of the facts will not be likely to feel bound to follow prior decisions They would undoubtedly insist that the same principle of law is being applied to different conditions and deny that the doctrine of stare decisis was being in any way departed from In cases of that sort, it is not surprising that we should find judges today not only ready but at times even anxious to overrule the earlier decisions Perhaps certain judges are a bit overconfident of the possession of wisdom superior to that of the judges who have gone before them On the other hand, no age of society should be absolutely chained to the past A great jurist has well stated the modern American view:[37]

> "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment We have had to do this sometimes in the field of constitutional law Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years
>
> "If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors"

Many of the decisions overruling earlier decisions in recent times have been on constitutional questions In a number of cases, the result of the change or decision has been to extend the federal power or to

[37] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, New Haven, Yale Univ Press, 160

strike down limitations upon the power of the states [38] This type of case furnishes special justification for disregard of the general rule Constitutional revision, particularly United States constitutional revision, is a difficult matter requiring a number of years for its accomplishment It is extremely doubtful whether a change in constitutional interpretation can be effected by legislative action A period anxious for social change is unwilling to wait such a length of time to accomplish what it strongly believes to be beneficent results A form of government, if it is to exist for a long period of time, must be flexible enough to permit within it such change and growth If it does not, and such change or growth cannot be accomplished by peaceable methods, the form of government is likely to prove unsatisfactory and be basically altered Fortunately, the Constitution of the United States, a brief document and phrased in general terms, has permitted such a growth within those terms, and undoubtedly some of that growth has been made possible by the overruling of previously limiting constitutional decisions

It would have been possible for the American courts to have taken a view intermediate between the present rigid English doctrine and the flexible American one American courts could have relaxed the rule in cases of constitutional interpretation or application, and held to the strict rule in all other cases. They could have said that it was the province of the legislature to make laws; that if the legislature did not like rules of conduct laid down by the courts, it could change them; that it was more important to have the law certain than to have it at all times theoretically right Such a rule would be more easily applied than the one now followed by our courts, and much can be said in its favor But the fact is that the American courts have not taken this intermediate position

An unfortunate logical consequence of an overruling decision under present legal theory is its retroactive effect Parties who have dealt in reliance upon the earlier decision suddenly find that the law upon which they had a right to rely has been changed Acts which were at the time they were committed legal may suddenly turn out to have been illegal [39]

The courts have tried to avoid this injustice in various ways [40] In the case of the interpretation of statutes, they have established the doctrine that the construction of a statute by the court becomes in effect a part of that statute [41] It cannot be changed except by act

[38] West Coast Hotel Co v Parrish, 300 U S 379, 81 L ed 703 (1937); U S v Darby, 312 U S 100, 85 L. ed. 609 (1941); Erie Railroad Co. v Tompkins, 304 U S 64, 82 L ed 1188 (1938); Smith v Allwright, 321 U S 649, 88 L ed 987 (1946)

[39] *Supra* note 28

[40] *Supra* note 24

[41] Henges v Dentler, 33 Pa 496 (1858); Farrior v New England Mort

of the legislature This is particularly true of penal statutes Some courts have applied the old law to the case at bar but announced that in the future they would apply a new rule [42] Sometimes the courts have clung to the old rule in the case before them but called the attention of the legislature to the fact that the court believed the rule to be wrong and suggested its change by the legislature

It has been advocated also by certain writers that the courts can protect against such injustices, either by changing their view that the decision of a court is merely evidence of the law and regarding their decision as actually establishing the law, in which case a change of decision would merely mean a change of the law in the future; or, without changing their view of the nature of court decisions, they could adopt the principle that their decisions as to the law should have no retroactive effect The great objection voiced to the latter suggestion is that such action would be nothing but sheer judicial legislation, to which, however, the rather effective answer has been made:

> "If overruling a prior decision has not been condemned as amounting to judicial legislation, it is difficult to see how giving an overruling decision prospective effect only would be any more a matter of legislation "[43]

The conclusions which have been reached as to the rule of stare decisis in this country and its proper application will not satisfy the mind which seeks certainty Nor can it be denied that there is apparent in the courts of last resort, at the present time, less regard for precedent and prior decision and a greater inclination to examine a question anew in the light of present day conditions, and to reverse the former holding if it appears to establish what seems now to be an undesirable principle or rule We even find courts going so far as to state that they are not bound by their own prior decisions [44] It is this apparent tendency in many quarters on the part of the courts to throw off all restraints, and act in disregard of precedents, that has alarmed the major portion of the membership of the bar, which is convinced that any satisfactory legal system must have a consistent element of stability

It has been suggested in high quarters that the cause for this lessened respect for precedent is the tremendous output of judicial decisions It is said that the multiplication of precedents is having the same effect upon their value as inflation has, or would have, upon the value of the

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Security Co, 92 Ala 176, 9 So 532 (1891); Gelpecke v Dubuque, 1 Wall 175, 17 L ed 520 (1864); Douglas v Pike County, 25 L ed 968 (1880); Loeb v Trustees of Columbia Township, 179 U S 472, 45 L ed 280 (1900)

[42] State v Bell, 136 N C 674, 49 S E 163 (1904); State v Longine, 109 Miss 125, 67 So 902 (1915) *See also* Great Northern Ry Co v Sunburst Oil & Refining Co, 287 U S 358, 77 L ed 360, 85 A L R 262 (1932)

[43] Albert Kocourek and Harold Koven, *Renovation of the Common Law Through Stare Decisis* (1935) 29 ILL L REV 971, at 996

[44] *In re* Mitchell, 61 Ariz 436, 150 P (2d) 355 (1944)

dollar [45] It is doubtless true that the great increase in the number of judicial opinions has had the effect of depreciating the value of precedent The real cause, however, would seem to lie much deeper We are in a period of great social and political change Conceptions which have seemed to many established and fundamental have been questioned and modified or discarded There is no longer, even among lawyers, as general agreement as there was in the earlier days upon fundamental legal and political principles These changes were beginning to be felt in the latter part of the last century, but it has not been until comparatively recent years that individuals imbued with the new views have, in large numbers, obtained positions on our courts In the last decade, such a change has occurred in the Supreme Court of the United States and in the Federal courts, and also in some of the courts of last resort in the states, and these judges are writing their new ideas into our law Are we not, then, only viewing the age-long process of growth or adaptation? A change in law is simply reflecting a change in the thinking of many, if not a majority, of our people Indeed, it would be rather difficult to prove that the American rule of stare decisis is being violated The whole problem must be viewed in proper perspective Precedent still governs in most of the law's domain Even the judges who are presenting the new social views are giving allegiance to it, and it is highly probable that if there should be a swing in the political pendulum, these same judges would be heard extolling the virtues of the rules of stare decisis in protection of the decisions which they have rendered

Undoubtedly, too, the methods of teaching in our law schools have tended to produce the result we are observing The case system and the critical analysis of all decisions and the thorough examination of the reasons which lie behind them, all tend to lessen the respect for the omniscience of judges and the authority of precedent

If one is to judge from the opinions of our courts, no change in the doctrine of stare decisis, as formulated in America, is likely It is possible that the courts will go further than they have gone in protecting against the unjust retroactive effect of overruling decisions The one effective action which the bar can take is to undertake to develop among its members a stronger sentiment that more careful consideration should be given to the principles and rules which have existed for years before it is decided to overturn them It is possible that recently appointed or elected judges have given too little weight to the value of certainty and stability in the law and have been too eager to accomplish by judicial decision social changes which they considered desirable and which they were unwilling to entrust to the somewhat slower process of legislation The creation of such a sentiment would, in time, have

[45] Mr Justice Jackson in (1944) 30 A B A. J, 334-5

its effect, for the judges come from members of the bar The law schools might also be encouraged to emphasize to a greater extent the value of precedent and the disadvantage of frequent changes in decisional law Without question, a proximate cause of the present weakened state of health of the doctrine of stare decisis is the presence upon our courts of men whose experience in law has been largely academic If results along these lines can be accomplished, it is believed the present flexible rule of stare decisis will prove to be as practical a solution of the problem as can be found [46]

[46] In commenting upon the decision in Johnson v Cadillac Motor Co, 261 Fed 878 (1919), Judge Cardozo well stated the problem:

"The conclusion of the majority of the court, whether right or wrong, is interesting as evidence of a spirit and tendency to subordinate precedent to justice How to reconcile that tendency, which is a growing and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day We shall have to feel our way here as elsewhere in the law Somewhere between worship of the past and exaltation of the present, the path of safety will be found" BENJAMIN CARDOZO THE NATURE OF THE JUDICIAL PROCESS, Yale Univ Press (1942), 149