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STARE DECISIS

Not the least meritorious feature of the Common Law has been its undeviating adherence to the doctrine of stare decisis—the law of precedents. It has been declared that this feature of the Common Law gives it a desired stability, yet does not make the law inflexible as to exclude growth. Every lawyer, producing a case in point, relies thereon, knowing that by the action of the law of stare decisis, his cause is nearly won.

Dillon defines the law of precedents to be, shortly, this: "That a decision by a court of competent jurisdiction of a point of law lying so squarely in the pathway of judicial judgment that the case could not be adjudged without deciding it, is not only binding upon the parties to the cause in judgment, but the point so decided becomes, until it is reversed and overruled, evidence of what the law is in like cases, which the courts are bound to follow not only in the cases precisely like the one which was first determined but also in those, which however different in origin, or special circumstances, stand, or are considered to stand, upon the same principle."1 According to this definition, the judicial decision has all the effects of law. It establishes a rule of conduct, which may be repealed only by the court’s own will, for a valid reason, or

1Dillon: Laws and Jurisprudence, 232.
arbitrarily by the positive enactment of the legislature. Blackstone saw, in the practice of adherence to the law as adjudged in the cases, a manifestation of the perfection of the Common Law, but Jéremy Bentham contemptuously called it "judge made law."

The origin of the doctrine of *stare decisis* is lost in antiquity. It is known to have been in effect long before the days of Hale and Blackstone. Some theorize that it originated in the Witenagemote, where all the men both made the laws and adjusted them, and that power of judging was afterwards assumed by the advisors who became the earliest judges. Others, like Spence, contend that the rule of precedent had its origin in the *ius prae- torium* of the Roman Law, where the praetor issued irrevocable edicts having the effect of laws. Whatever be its true origin, the law of precedent was, in the early development of the Common Law, necessary to insure that at first so frail structure, the power to withstand the absolute power of the sovereign. When Parliaments were dissolved, the judges continued to legislate. When constitutions could not be exacted, precedent established the bounds of sovereign action.

Though the doctrine of *stare decisis* may possibly have had a Praetorian origin, the doctrine itself finds no place in the modern Civil Law—derived directly from the Roman Law—as administered in continental Europe. In Prussia, by legislative provision cases decided can not be used as precedents. In other European countries, judicial decisions have generally no binding effect as precedents, hence judicial reports are relatively few.

The principle of precedents has undoubtedly done much to develop the law in the past. It has established a not too inflexible certainty. It has established for English Common Law, a body of case law, the examination of which necessitates no step, either by judge or legislature, without the light of previous judicial experience embodied in the volume of case reports. But it has, by giving the effect of law to prior decisions, given rise to the necessity of the publication of each one. And this necessity has created the imponderable volume of case law which overwhelms the attorney of today. Decisions of state courts, having decisive authority, are quite as necessary today to the practi-

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tioner as are the statutes. He must have statutes annotated, and statutes compiled; he must have official reports, and reports digested; federal reports, federal digests; and if he make any pretensions at adequate working facilities in his library, he must have various systems of collections of decisions which are antiquated even before they are entirely completed.

The doctrine that so long existing, has built up such an imponderable system of law, has long been receiving much criticism. That fifty more years of collections of cases will overcrowd the libraries of our attorneys and strain their purses, requires but little imagination. No doubt some remedy for the burden shall be found by the primal interests of justice when under the present system, justice will no longer be promoted. Some suggest codification in imitation of the Corpus Juris of Justinian. Such seems to be the present tendency, as exemplified by the adoption of the various Uniform State Laws.

But the policy of almost implicit adherence to past decisions has many other critics. As has already been stated, Bentham, that great constructive critic of the Common Law, unlike Blackstone, saw no virtue in it. Austin says that judicial law "compels the judge to take the narrowest possible view of every subject, and consequently the law he makes is necessarily restricted to the particular case which gives occasion for its promulgation." Thus the development of law by judicial precedents is precisely the opposite of the development of principles of science. In the law, the principle is deduced from examination of one particular case; in science all possible manner of cases must be examined before a scientific principle is admitted. Considering the law as a science, does examination of one state of facts sufficiently consider every possible digression that may necessitate the abandonment of the principle so immaturely laid down?

Another criticism is that judicial establishment of principles is often contrary to reason or justice. Perhaps the case was not well argued; perhaps the expediency (which, Justice Holmes asserts, is never admitted but nevertheless has a great influence on the decision) had an overpowering influence on the judges; perhaps other reasons existed; but still the principle was wrong. The rule of stare decisis requires that it nevertheless be followed for "Courts should ordinarily bow to the considerations that certainty of the law is more essential to justice than absolute

"Austin: Juris., II, p. 657."
correctness; that a rule of law, adopted and long adhered to, may have reasons to warrant it which were apprehended by the judges who declared it and are approved by the people, who having authority to change, have abided by it although no such reasons are discovered by those later considering it." Such is the declaration of the Wisconsin Supreme Court, in support of a principle of law, probably unjust and sustained by no present reason, but adhered to simply because a reason for the rule may at one time have existed. It does so on the theory that the people have acquiesced to the rule by not abrogating the same by legislation. Can a system which credits its merits to a principle of precedents, disown its mistakes by blaming them to the passivity of the people in failing to legislate them out of existence? Ought not those trained in the principles of justice, know more of its substance than the ordinary person, by whom legislation is demanded, can ever learn of a science so intricate that it requires years of specialization to comprehend? According to the strict adherence to precedents, both reason and justice, the foundations of all law, must be sacrificed to stability. The reasons are discovered by those later considering it." Such is any application.

Thus the law gains in stability but does it not become inflexible? Consider Real Property Law, where the law of precedents has been most adhered to. The rules of Real Property, having their origin in feudal England, remain to this day, not greatly changed, for the reasons prevailing at the time of the Norman Conquest. Public sentiment respecting it has not yet been sufficiently crystalized to demand reform legislation in America. In England, an act was recently introduced in Parliament by Lord Birkenhead having for its purpose the abolition of fee simple tenures and the laws pertaining thereto and substituting for the fee simple estate a perpetual leasehold, and applying to property thus held, the laws pertaining to chattels real. That such a law, if ultimately passed, would greatly simplify the precedent bound law of Real Property is certain. Whether it is expedient, is the greater question.

That the blind adherence to precedent has not infrequently led the law into error, cannot be doubted. But the erroneous precedent has been established; it comes up to embarrass the

1Lonstorf v. Lonstorf, 118 Wis. 159.
court in judicial administration. Usually the principle is gradually destroyed by judicial exceptions, producing a confused state of the law, rather than by an express reversal. Precedent has had its day. Law, primarily a rule of reason, becomes a rule of precedent. Small wonder that the Texas judge speaks of the principle thus: "The purpose of prolonging this opinion is to show the bench and bar of Texas how utterly unreasonable and unjust to contracting parties the rule (as before established) has become, and how like a fetish the courts of this country have bowed down and worshipped around the old dictum out of idolatrous reverence for precedents and, because it smells old and musty, though it has long enough retarded the progressive young genius of American Commerce and in fact, it should never have been born. It is a rule now more honored in the breach than in the observance, and the writer hopes that when our Supreme Court gets even as good an opportunity as this it will bury its skeleton so deep that no lawyer will ever scent it out and offer it as authority in Texas again, as he would have done in this instance had he had the power."9

That such revolutionary views as those advocating the total abandonment of the principle of stare decisis are unwelcome need scarcely be argued. However, it is apparent that the doctrine is much abused in our day. Witness that, in our inferior courts, legal reasoning is rare, and that citation of cases in lieu of reason is the rule. See how a "case in point" carries the day, most frequently without an examination of the reasons whereon sustained. Facts only are examined. Modern briefs have too often become mere complications of authorities rather than a series of legal deductions of reason. Many cases, one hundred, two hundred, even more, are cited in a single brief. It is manifest that it is impossible for the appellate court to examine them all. The progress of justice is cluttered by citations. The rule among lawyers seems to be that the more the citations, the stronger the authority. They search for precedents, not for reasons. The most dextrous case finder has the advantage. From the maze of the case law, as collected in digests and compilations, cases on either phase of a proposition may readily be found.

Allowing for the necessity of the doctrine of stare decisis in cases involving the same principles, is it necessary that we

extend them so freely to cases that are merely analogous? Now, broad principles of law are stretched to cover cases scarcely analogous; and those misapplied principles are stretched to cover still additional merely analogous cases. Is it probable that the principles applicable to negligence in the rural villages of England can apply unchanged, to life in the modern highly industrial cities? Can the authorities defining the laws regarding the horse cars of even fifty years ago, adequately establish principles befitting the present era? Should our judges of today establish the rules of tomorrow, and bind tomorrow therewith?

Shall the system of precedents that gave to the established law its strength during its youth, that furnished the unifying principle during its growth, and that gives to it a stability even now, be discarded? It is contended that the body of the law is now sufficiently mature in development to be codified in imitation of the Civil Law codes. Codification appears to be the present tendency. But codification means inelasticity, though absolute certainty. Are we prepared to adopt an inflexible system of law? However, a code is not inflexible. There is always recourse to the legislature, which Bentham insisted, was the only body empowered to prescribe the law. Should the older established principles be applied in the light of present social, economic and governmental circumstances, as they are disclosed by the circumstances of each case, then the objections to the antiquity of the rules would have little foundation. But the principal objection to the long continuance of the doctrine of stare decisis, that every decided case be published as part of the law, still remains. Within a few years the volume of case law will have become unwieldy. Must the principle inducing such a volume of case law ultimately be abandoned? Will substantial justice be better served when law is founded on reason and justice irrespective of authorities?

W. F. Kuzenski, Editor.