January 1952

Stare Decisis — The Montana Doctrine

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Due either to misapprehension or misapplication, the doctrine of stare decisis has just emerged from a succession of buffettings and probings, the most serious in its some four-hundred year history. Many, holding that it is a mortmain doctrine leading inexorably to the stagnation of the common law, have vehemently urged its discard. Others, regarding it as a paternal, albeit severe guiding hand, have just as fiercely demanded its retention intact. But out of the conflict have come ameliorating views which urge the doctrine be reset in its proper perspective and retained while insuring at the same time that the harsh and stagnating tendencies be replaced with a true growth principle. It is the boast of the common law that it is flexible and adaptable to the needs of the times. The need today, no less than in days gone by, is for a system of law which can supply a growth principle and still retain that degree of stability necessary for the survival of a highly complex civilization. Cardozo summed the problem up very well in these words:

“The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law. . . . We fancy ourselves to be dealing with some ultra-modern controversy, the product of the clash of interests in an industrial society. The problem is laid bare, and at its core are the ancient mysteries crying out for understanding—rest and motion, the one and the many, the self and the not-self, freedom and necessity, reality and appearance, the absolute and the relative. We have the claims of stability to be harmonized with those of progress. We are to reconcile liberty with equality, and both of them with order. . . . The precedent or the statute, though harsh, is to be obeyed, yet obeyed also . . . are to be the meliorating precepts of equity and conscience.”

The solution to these seeming contradictions lies not within the field of law alone but also within the fields of philosophy,
psychology and the other fields of human relations. The field of law is but a part of the whole. If instead of putting law in a mental straight-jacket, law is viewed as having essence and existence (in the philosophical sense) then a sound basis for resolving these conflicts becomes available. But to reach a solution there remains the necessity of giving content to this unchangeable essence and changing existence. Both speculative and practical effort is here needed.

The attempt to limit "law" to a single, well-defined concept has been productive of needless confusion and has seriously retarded the "patterned progress" of the common law. It is self-evident that law contemplates a law-maker and a law-obeyer, for the main purpose of law (whatever its essence is deemed to be) is to regulate human conduct. If there is no one who is to obey, then the law-maker is indulging in empty rhetoric. And it has been just such empty rhetoric emanating from those obsessed, consciously or subconsciously, with the idea of law for law's sake which has led to a great deal of the dissatisfaction and adverse criticism of the doctrine of stare decisis.

The nature of law is uniquely important in a consideration of the doctrine of precedent because it gives character and form to the entire judicial process. Despite the conflicting and multifarious views on the subject, enough has been given general acceptance to provide a working basis. Enough general agreement also obtains as to what constitutes a precedent, when it can be overruled, and the force and value to be assigned it.

Our concern with the doctrine of precedent is the effect to be given an overruling decision. Not until the Montana decision,

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5"Most of the discussion as to the nature of law which has been the staple of Anglo-American writing on jurisprudence has suffered from an initial false assumption that 'law' is a single simple conception; that the one short word has one simple analytically-ascertainable meaning. As one reads the voluminous literature upon this subject he soon feels that the disputants are speaking of different things, although calling them by one name."—Pound, The Theory of Judicial Decision, 36 HARV. L. REV. 643 (1923).

6"To be strictly accurate the word "case" instead of "decision" should be used, but in the literature the word "decision" predominates. See BLACK, LAW OF JUDICIAL PRECEDENT, §§ 6-10 (1912); and GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW, pp. 1-26 (1931) for what in a case constitutes a precedent.
soon to be noted, was this precise "point" of the effect treated squarely, though beginning as early as 1853 and regularly ever since, the "effect" was considered in varying degrees of indirectness. The rule which has been and still is accepted by the majority of America courts is that retroactive effect must be given an overruling decision.* This necessity has traditionally been ascribed to the Blackstonian, or "declaratory theory" of law which holds that when a case is overruled no new law is declared but the old law is vindicated from misrepresentation; not that the old was bad law, but that it was never law.** The courts then accepted as inevitable that a void would result between an

*Ohio Life Insurance & Trust Co. v. Debolt, 57 U.S. 416 (1853), which in dicta on p. 432 supplied the basis for the "municipal bond" cases the most important of which were Gelpcke v. City of Dubuque, 68 U.S. 175 (1863), and Douglass v. County of Pike, 101 U.S. 677 (1879), especially at p. 687 at top beginning "The true rule...." Next in importance were the "legal tender" cases Hepburn v. Griswold, 8 Wall. 603, 19 L. Ed. 513 (1870), and Knox v. Lee, 12 Wall. 457, 20 L. Ed. 287 (1871). Other interesting cases on varied points of the "effect" are: Farrior v. New England Mortgage Security Co., 92 Ala. 176, 9 So. 532 (1891); Muhler v. Harlem RR, 197 U.S. 53 (1905); Hill v. Brown, 144 N.C. 117, 56 S.E. 693 (1907). See any of the law review articles cited in footnote 15 for a complete citation, as these two: Carpenter, Court Decisions and the Common Law, 17 Col. L. Rev. 593 (1917), and Freeman, The Protection Afforded Against the Retroactive Operation of Overruling Decisions, 18 Col. L. Rev. 230 (1918).

**Cases denying retroactive application by way of exception give the rule a progeny so numerous and so exceedingly strange that chaos reigns. Theories advanced to explain the deviations from the rule have been abandoned, picked up, combined and re-abandoned. Prof. Snyder in Retrospective Operation of Overruling Decisions, 35 Ill. L. Rev. at pp. 130-148 (1941) traces the history with full case citations of these exceptions and concludes that there exists no constitutional basis, and that the only consistent basis is to be found in what the courts in the cases themselves have called the "principles of justice." These "principles of justice" he says are rooted in that same principle underlying the constitutional guaranty against ex post facto legislation. He is careful to point out that it is the principle behind the guaranty not the guaranty itself which gives validity to the exception to the rule. See also Tidal Oil Co. v. Flanagan, 263 U.S. at 451 (1924); and the articles by Kocourek and Koven, Renovation of the Common Law Through Stare Decisis, 29 Ill. L. Rev. at pp. 937-990 (1935); Spruill, The Effect of an Overruling Decision, 18 N. Car. L. Rev. pp. 209-220 (1940); and Stimson, Retroactive Application of Law—A Problem in Constitutional Law, 32 Mich. L. Rev. 30 (1939).

Is attacked and repudiated as being a fallacious and unwarranted appendage to the declaratory theory. Kocourek and Koven (supra, n. 8 at p. 985) say "that the retrospective feature of the declaratory theory is an importation which is antithetical to the very purposes of stare decisis."

Briefly, that a judge does not make law but only declares the law as he finds it.

BLACKSTONE, COMMENTARIES §§ 68-71 (Cooley's ed., 1879).
overruled and overruling decision unless retroactive effect were given the overruling decision.\footnote{In so doing the courts ignored the patent “operative fact” of the appearance of law which the overruled decision had. Retroaction very often instead of bridging the void has opened the floodgates of confusion and hardship to fill it.}

It will be seen on slight reflection that the matter of the effect to be given an overruling decision is at the pinnacle of the judicial process. Before the peak is reached much has already transpired. The ladder of decision is anchored in the nature of law; the rungs are the various theories and mechanics of the judicial process, none of which can be minimized or ignored without injuring and distorting the whole.\footnote{Green, The Duty Problem in Negligence Cases, 23 Col. L. Rev. at p. 1015 (1928) suggests that law is a power which operates through rules; that law is something different from the machinery through which it operates; that the machinery is not to be minimized but that it is to be recognized as being only machinery. He further suggests that a “decision of a case is no more law than the light from last night’s lamp is electricity”; that we make use of decisions, statutes and constitutions for the purpose of passing desirable judgments and use these and other devices in order to make the judgments effectual.} It is, moreover, at this pinnacle of decision where it appears most readily whether justice or injustice has been done. If one keeps in mind the difference between cause and effect, it becomes clear why the dissatisfaction with the doctrine of stare decisis has centered around the application which is to be given the overruling decision. For here is the immediate effect of the judicial process; the cause is often obscured in the intricacies of the process and the base on which it rests. The continuing failure to solve this problem of application will result in having fashioned an elaborate institution which dispenses injustice. It may be likened to the chain of activities of a fireman mounting an ice-covered ladder, climbing high into the air, entering a burning building and making his way through billowing smoke and intense heat to rescue a life-size doll and inadvertently leaving the child behind. Both the law and the fireman come away from such an event with a poignant sense of futility and self-defeat.

It was precisely on this point of the effect to be given an overruling decision that the Montana Supreme Court addressed itself in 1932 in deciding the case of Montana Horse Products Co. v. Great Northern Railway Co.\footnote{91 Mont. 194, 7 P. (2d) 919 (1932).} This decision propounded an ameliorating view of the doctrine of stare decisis. The action of the Montana court has drawn high praise from virtually every
writer on the subject, and a growing number of state courts are adopting this solution. The one dissenting voice among the

More than twenty-five writers in various law reviews have discussed the Montana approach to this aspect of stare decisis. The following appeared as case comments shortly after the Sunburst case was reported:

28 I.L.R. 277, 17 Minn. L. Rev. 811, 10 N. Y. U. L. Q. Rev. 528, 11 N. Car. L. Rev. 323, 42 Yale L. J. 779; and two later ones: 25 Va. L. Rev. 210 (1939), and 27 Iowa L. Rev. 516 (1942). Of the later, more extensive articles the most important are: Aumann, Judicial Law Making and Stare Decisis, 21 Ky. L. J. 156 (1933); Catlett, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 21 Wash. L. Rev. 158 (1946); Covington, The American Doctrine of Stare Decisis, 24 Tex. L. Rev. 160 (1946); Douglas, Stare Decisis, 49 Col. L. Rev. 735 (1949); Green, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 40 Ill. L. Rev. 303 (1946); Griffith, Judicial Regulation of Stare Decisis, 24 J. Am. Jud. Soc. 150 (1940); Kocurek and Koven, supra n. 8; Lobinger, Precedent in Past and Present Legal Systems, 44 Mich. L. Rev. 955 (1946); Moore and Oglebay, The Supreme Court, Stare Decisis and Law of the Case, 21 Tex. L. Rev. 514 (1943); Shartel, Stare Decisis—A Practical View, 17 J. Am. Jud. Soc. 6 (1933); Snyder, supra, n. 8; Sprecher, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 40 Ill. L. Rev. 303 (1946); Grinnell, Judicial Regulation of Stare Decisis, 24 J. Am. Jud. Soc. 150 (1940); Kocurek and Koven, supra n. 8; Lobinger, Precedent in Past and Present Legal Systems, 44 Mich. L. Rev. 955 (1946); Moore and Oglebay, The Supreme Court, Stare Decisis and Law of the Case, 21 Tex. L. Rev. 514 (1943); Shartel, Stare Decisis—A Practical View, 17 J. Am. Jud. Soc. 6 (1933); Snyder, supra, n. 8; Sprecher, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 40 Ill. L. Rev. 303 (1946).

No effort has been made to trace the extent to which the doctrine has been accepted by each state, but each of the following cases has cited the Sunburst case and the courts have expressed their accord with the idea that the power to decide the effect of an overruling decision lies within their discretion. Kentucky has many more decisions along this line than any other state and has, in fact, preceded Montana in stating the doctrine. But as noted before, it was not until the Sunburst case that the "very point" was brought to the U.S. Supreme Court. The states are listed alphabetically: Duhame v. State Tax Commission, 65 Ariz. 268, 179 P. (2d) 252 at 260 (1947); Kern v. City of Long Beach, 29 Cal. (2d) 850, 179 P. (2d) 799 at 800 (1947); World Fire and Marine Ins. Co. v. Tapp, 279 Ky. 423, 130 S.W. (2d) 848 at 852 (1939); Norton v. Crescent City Ice Mfg. Co., (La. App.) 146 So. at 756 (1933); State v. Jones, 44 N. Mex. 623, 107 P. (2d) at 329 (1940); Oklahoma County v. Queen City Lodge No. 197 I.O.O.F., 195 Okla. 131, 156 P. (2d) 340 at 354 (1945). Cited as dicta in City Affairs Committee of Jersey City v. Board of Commissioners, 134 N.J. Law 180, 46 A. (2d) 425 at 430 (1946). Two cases which are in accord but do not cite Sunburst are Cooper v. Hawkins, 234 Ala. 630, 176 So. 329 (1937); Culpepper v. Culpepper, 147 Fla. 632, 3 So. (2d) 330 (1941); Federal case which treats of the subject in some detail is Warring v. Colpoys, 74 App. D.C. 303, 136 A.L.R. 1025 (1941). Sunburst case is discussed in footnotes on p. 645.

Comment in 47 Harv. L. Rev. 1403 (1935). The writer reiterates the objections made by Von Moschzisker in Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409 (1924) at 426, that this is (1) outright legislation by the courts, (2) dicta, (3) ineffective as a practical remedy since no one would sue because the overruling would provide no relief for his dispute. Most of the articles referred to in n. 15, supra, deal with these objections. Briefly, (1) there is no usurpation of legislative function because declaring law for the future is no more judicial legislation than is declaring law for the past, both are merely the
writers repeats objections uttered eight years prior to the decision, and adds a new one, but on the whole does not seem entirely out of sympathy with this method of solving the problem.

On appeal from the district court the Horse Products case was consolidated with the Sunburst Oil & Refining Co. v. Great Northern Railway Co. case, since each involved the same primary situation, and the cases were argued and presented to the Montana Supreme Court together. Most of the court’s opinion is given within the pages of the Horse Products case whereas the Sunburst case was the one taken to the United States Supreme Court. In discussing the cases, a reference to either is to be regarded as including the other.

In these cases an action was brought by a shipper to recover from the carrier on freight rates paid as set forth in a schedule approved by the Board of Railroad Commissioners. The shipper was allowed to recover despite the fact that the grounds on which it rested its case were expressly overruled. This seeming anomaly is explained by the fact that in 1921 the court in decid-

exercise of a legitimate judicial power in the making of law which in no way encroaches on the traditional legislative function. For an early and standard treatment of this see Thayer, Judicial Legislation: Its Legitimate Function in the Development of the Common Law, 5 Harv. L. Rev. 172 (1891). (2) If dicta, it is judicial not obiter and is entitled to weight on its merits. It is also said that this is only the application of the theory of the declaratory judgment to a larger field: the announcement of a rule for the future guidance of the community and the court. (3) Parties, such as railroads and insurance companies, who have continuing interests along certain lines will bring actions to get a favorable rule for the future; cases will reach the supreme court on other grounds and will have erroneous or outmoded precedents which do not apply to the case at hand, and alert judges can take the opportunity of purging the law of its “congealing humors.” Furthermore, the force of this third objection very largely disappears if the view be taken that either retrospective or prospective application be given the overruling decision as circumstances indicate. In this way, other items being equal, the one bringing the suit could be “rewarded” by having the overruling decision apply to his dispute.

47 Harv. L. Rev. at 1412 to the effect that “retroaction, as an automatic check upon overruling, serves to regulate the strength of stare decisis, which is a product of the evolution of a workable balance between certainty in law and its adaptability to new demands . . . .” But this begs the question. The determination to overrule is independent of and precedes the determination of the effect of the overruling. Further, stare decisis is not designed to perpetuate error nor to allow more harm than good to come from it. Stability of law is enhanced instead of weakened when “the law” from whatever source is held to rule for the period when it was promulgated as law, rather than one day be obliterated and a different guide for that period be substituted.


R.C.M. 1921, §§ 3779 to 3817, especially § 3810.
ing the case of Doney v. Northern Pacific Railway Co., which dealt with a similar transaction and similar code sections, had ambiguously indicated that the shipper might recover under these circumstances. In 1932 both the shipper and carrier maintained that the Doney case controlled. The court agreed saying "that decision properly understood and interpreted, is conclusive in this case," and that "the language employed in the Doney Case above noted [supra, n. 23] is not merely to be considered as obiter dictum." Mr. Justice Galen speaking for the court in the Horse Products case of the controverted paragraphs in the Doney case went on to say:

"In view of the conclusions theretofore reached in that opinion these paragraphs of the decision are not supported by the language employed, by the plain language of our statutes, or by the primary holding in that decision. . . . They are hereby expressly overruled, as is also any other language in that opinion at variance with this decision. Having written that opinion for the court, the author hereof expresses apology for having misled the profession, and welcomes this opportunity to correct the error made in interpreting our statutes."

Since the shipper relied solely on this interpretation of the statute as previously rendered, its case fell; nevertheless the court allowed it to recover, and this was on the basis of reliance as appears from its statement on page 211 of the Horse Products opinion:

"We were then apparently satisfied with the cor-

\[2^{15}\text{Mont. 209, 199 P. 432 (1921).}\]
\[2^{16}\text{R.C.M. 1907, §§ 4363 to 4399, especially § 4391.}\]
\[2^{17}\text{Supra, n. 21 at p. 236:} \]
\[2^{18}\text{"The reasoning in the above cases applies with equal force to our statute and to the lack of jurisdiction of the courts to pass upon the reasonableness of the rates and discriminations before the commission has taken action thereon. In other words, before any shipper can recover in the courts damages for excess rates or discriminations, the discrimination or unreasonableness of the rate must first be passed upon by the special tribunal expressly created and authorized by law to handle such matters—the Railroad Commission.} \]
\[2^{19}\text{"The fact that the Railroad Commission is not authorized, upon determining that a rate is unreasonable or discriminatory, to order reparation, does not prevent a shipper, after the rate has been so determined by the special tribunal created for that express purpose, from maintaining an action in court to recover damages sustained by him as a result of such unreasonable or discriminatory rate. His action is based upon the fact that such rate has been so declared by the proper tribunal, and the court merely determines the amount of damages, if any, sustained."}\]
\[2^{20}\text{Supra, n. 14 at p. 203.}\]
\[2^{21}\text{Id., at p. 210.}\]
\[2^{22}\text{Id., at pp. 205-206.}\]
rectness of the holding, and thenceforth the profession and others were entitled to place reliance thereon. The construction of the statutes made by this court in that case had been acted upon by the shipper, the carrier, and the Railroad Commission, and undoubtedly gave rise to the procedure adopted by the shipper in this instance and to the present cause of action. It would be manifestly unjust and improper to deprive the shipper of its legal right to recover . . . as pronounced by this court simply because of the later opinion expressed by this court repudiating its former decision." (Italics supplied).

As to the carrier, the court said no injustice will be done, nor will it be injured by now allowing the shipper to recover for this reason:

". . . it must have appreciated its liability under the holding of this court in the Doney case. Furthermore, it appears that in reliance upon the holding . . . in that case negotiations were under way by which the carrier proposed to make settlement with the shipper. . . ."

Though the Montana court felt itself bound in the Horse Products case by the Doney case, it was nevertheless convinced that its ruling in the Doney case was wrong and should be overruled otherwise error would be perpetuated. Yet to overrule with retroactive effect would be unjust to the shipper since he meticulously and deliberately followed the procedure set forth by the court in the earlier case. In denying a rehearing the court quotes from 26 Am. & Eng. Ency. Law, 2d ed., p. 184:

"Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty, as well as the right of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of stare decisis was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good from it."

(Italics supplied).

"Id., p. 211.

But clearer cases of reliance have been overruled with retroactive effect. See the Michigan trilogy: Kavanough v. Rabior, 222 Mich. 68, 192 N.W. 623 (1923); Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930); Donohue v. Russell, 264 Mich. 217, 249 N.W. 830 (1933); and the Washington trilogy of Richey v. Smith, 42 Wash. 237, 84 P. 851 (1906); City of Tacoma v. Fox, 158 Wash. 325, 290 P. 1010 (1930); Lund v. Bruflat, 159 Wash. 89, 292 P. 112 (1930).

"Supra, n. 14 at p. 216.
The *Sunburst* case reached the United States Supreme Court on *certiorari,* was heard and on December 5, 1932, was decided and opinion rendered. The carrier attacked on the ground that the Montana court's refusal to allow retroactive effect to the overruling decision deprived it of equal privileges and immunities. In dismissing this argument, Justice Cardozo speaking for the Court said:

"... there had been written into the statute a notice to all concerned that payments exacted by a carrier in conformity with a published tariff were subject to be refunded if found thereafter ... to be excessive and unreasonable ... Carrier and shipper would be presumed to bargain with each other on the basis of existing law .... The validity of the notice is no less because it was written into the act by a process of construction."

And as to the contention of lack of due process:

"The petitioner is thus driven to the position that the Constitution of the United States has been infringed because the *Doney* case was disapproved, and yet, while disapproved, was followed ... This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal ... We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions."

Cardozo called this a "novel stand" because the general mode of operation heretofore had been to plead lack of due process when retroactive effect had been given, and not, as here, denied. The significance of this decision is that there is no constitutional mandate or prohibition in regard to the effect given an overruling decision. There is, instead, a clear affirmation that the common law doctrine of adherence to precedent is a matter lying solely within the discretion of each state court:

"The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana ... in making this

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80287 U.S. 580.
81287 U.S. at 362.
82Id., at pp. 363-4.
choice ... is declaring common law for those within her borders ... If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process. ¹³⁹

Up to this point the main concern has been with the theoretical inquiry whether the courts had the power to determine the effect to be given an overruling decision or whether they were inexorably bound to give retroactive effect to the overruling decision. We have come to see that there is no inherent necessity upon a court from a common law or constitutional standpoint to decide this in only one way. Moreover, to require prospective application for every overruling decision would be merely the substitution of one inflexible procedure for another with no assurance that the old problems would not be replaced by new ones equally as serious. Prospective application, while a laudable advance in the common law technique of precedent, is no panacea. There are instances when equity demands retroactive application as well. Attention, therefore, is now directed to the practical matter of determining under what circumstances the principle as announced in the overruling decision should be made to serve in the future only and when it should also be made to serve for the past.

Two general principles which bind every common law judge are those obliging him to turn away from error and to follow precedent. The power to overrule enables the judge to turn away from error. He announces the correct principle by the overruling, and this principle will serve for the future. The duty to follow precedent is in force only before the conclusion to overrule is reached, but there does remain the "operative fact" of the overruled decision. As to this "operative fact" the duty to follow precedent is silent. It is precisely at this point that the art of judging calls into use the utmost in talent and knowledge of the judge. The effect to be given an overruling decision lies not with the legislature but in the exercise of "a wider and wiser judicial discretion." ¹⁴⁰ It is essential not to confuse the act of overruling with the effect of overruling.

In far the greater number of instances, only prospective effect will be given the overruling decision. This is so because in

¹³⁹Id., at pp. 365-6.
¹⁴⁰Spruill, supra, n. 8 at p. 223.
harmonizing the two duties of a judge in accord with the fundamental conception of law as a rule of conduct it is plain that a party is entitled to be judged by the state of the law, actual or apparent, as it existed at the time he acted since that is the only rule which he could reasonably be expected to know or discover. If the one acting did so in justifiable reliance on the law as promulgated by the official agencies of government, then the only fair or reasonable effect to be given the overruling decision is prospective. When both parties have acted in justifiable reliance on the existing law at the time of their transaction, and all other things are equal, the application given the overruling decision should be that which allows the one bringing the action to prevail. This on the theory that the one who supplied the occasion for the correction of the law ought to be rewarded.

Whether prospective or retrospective effect shall be given an overruling decision appears to be primarily a study in reliance. Though there is much more to the doctrine of precedent than "estoppel applied to court decisions," the theory of estoppel can very validly be applied to the effect to be given an overruling decision. In applying the doctrine of stare decisis, the parties are often overlooked by the courts because the courts have been prone to regard themselves as being "bound" to follow a previous decision. Very little examination has been made of the fact whether the parties now before the court knew or could have known of these decisions. The law has generally been taken to be the rule governing the conduct of the judge at the time he makes the decision. But law, existing no more exclusively for courts and lawyers than medicine does for hospitals and doctors, is perverted by such application. The person whose conduct is primarily sought to be regulated must be given the chief consideration in law. Thus, the importance of the principle of reliance becomes manifest.

In general, the type of case in which the principle of reliance

\[\text{Snyder, supra n. 8 at p. 150.}\]
\[\text{With due allowance being given to the principles that neither ignorance nor mistake of law excuses.}\]
\[\text{Covington, supra n. 15 at p. 204.}\]
\[\text{"I have often felt . . . that in the central hall of the Royal Courts of Justice . . . there might well be erected a monument to the many thousands of litigants, whose names have been appended to 'leading' cases, and whose pockets have been searched for the privileges of securing the definitions of our law."}\]
\[\text{Courts, 15 C.J. pp. 919 and 959; Courts, 21 C.J.S. p. 326.}\]
is asserted is not too important. It is a valid principle and cuts across all fields of law because it deals with those who act under the law. But reliance is not always nor necessarily a controlling principle. It yields to superior principles, e.g., those dealing with public health, safety, and welfare, among others. Reliance is seldom valid in the tort or criminal field, and there are instances of unsocial though not illegal acts to which the principle does not lend itself. Some examples follow.

Where a conveyance of land is made upon an oral trust in favor of the transferor or upon an oral contract to reconvey to the transferor and the transferee relying on the Statute of Frauds refuses to perform the trust or contract, American courts have adopted conflicting views. The majority allow the transferee to keep the land free from any trust; the minority declare the transferee a constructive trustee. Now suppose an American court holding the majority view becomes convinced of the unsoundness of its position and wishes to abandon it. Giving prospective application will free the court from the bugaboo of interfering with vested property rights. But suppose the court gives its overruling decision retroactive effect thus allowing the return of the property to the grantor. Can it be urged that the grantee (defendant) has justifiably relied on precedent and so prevent this? Even if the grantee were fully aware of this aspect of the law of trusts, his profiting by his own wrong is sufficiently unsocial (or immoral) to vindicate a court in finding that this reliance is not justifiable. In any event, inquiry by the court is pertinent on the matter of reliance. In cases like this, retroactive effect could be given in most instances without harming the defendant, for it is quite unlikely he can show justifiable reliance on the precedents. And if the "reward" feature is recognized, then the plaintiff's case is weighted that much more in his favor.

In regard to a defectively organized corporation lacking even the elements of a de facto corporation, the rule is that under some circumstances the one contracting with this organization can hold the stockholders liable as partners. Suppose a jurisdiction providing for such liability determines to abolish that rule. Obviously, prospective application provides a means of considering the rule on its merits and allowing for a change without interfering with vested rights. But again the inquiry into reliance

401 Scott, Trusts (1st ed. 1939) § 44, p. 246.
41 Reliance is a mixed question of law and fact.
42 That is, the one who brings the action, other things being equal, ought to be "rewarded" by getting retroactive effect so that he prevails.
is pertinent. Clearly, unless the contracting party knew of this phase of corporation law, he can hardly claim to have entered into the transaction in reliance on it. The granting of retroactive application would not in reality be taking anything away from him which he himself ever expected to have. The mere fact such a precedent existed is no reason why he should be allowed to avail himself of it as a legal windfall. Further, if retroactive application is denied, stockholders find themselves burdened with an obligation they never intended and in many instances were never aware existed. Instances like these present a clear case for the court to exercise a "wise judicial discretion" as the equities appear.

_Erie Railroad Co. v. Tompkins_ illustrates a situation where the reliance of those other than the litigants might properly have been considered. And this on the basis, although the action itself was one in tort for personal injury, that there was a much broader interest involved. The Court itself posed the interest as being: "The question for decision is whether the oft-challenged doctrine of _Swift v. Tyson_ shall now be disapproved." Here Tompkins was walking on a longitudinal pathway which ran close to the tracks at the point where he was injured by something projecting from one of the moving cars. According to the common law of Pennsylvania (where the injury occurred) Tompkins was a trespasser rather than a licensee and as to him the railroad was liable only for injuries resulting from wanton or wilful negligence, which admittedly this was not. In the New York Federal District Court the verdict was for Tompkins. The United States Supreme Court reversed thereby overruling the almost century-old doctrine of _Swift v. Tyson_ which was to the effect that the federal courts were free to exercise an "independent judgment" as to what the common law of any state was. In speaking of this case Mr. Frank W. Grinnel said:

"Of course, an injured trespasser could hardly be considered as having 'equitable' claim based on 'reliance' on _Swift v. Tyson_ when he trespassed; but the inhabitants of the forty-eight states whose actions for many years had involved actual 'reliance' on the doctrine of _Swift v. Tyson_ might well have been protected,

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4This and the previous example were suggested by Carpenter in _Stare Decisis and Law Reform_, 1 So. Calif. L. Rev. 53 (1927). Several other situations are also discussed there.
4316 Pet. 1, 10 L.Ed. 865 (1842).
4358 U.S. at p. 69,
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as to the past, by an equitable clause in the overruling opinion as to its general application.'

The same writer in calling attention to the fact that Justice Cardozo took no part in the consideration or decision of the *Erie* case says:

"This is unfortunate for his appreciation of the equitable trend in the development of the doctrine of precedent might have resulted either in a separate suggestive opinion, or a modification of the retrospective application of the majority opinion.'

The "reliance" element in this case is entirely separate from the tort which happened to be the vehicle used to bring the action before the court. The significance attributed in the case to the roles of the state and federal courts is what makes reliance important.

Let us now consider the case of *Continental Supply Co. v. Abell* in which the matter of reliance on previous decisions was made a virtually conclusive presumption. Here a statute imposing personal liability on directors of corporations for failure to file an annual report within a certain time was amended and there was no saving clause in the amending statute. The amendment was to take effect on July 1 whereas liability under the old statute would attach if no report were filed by March 1. In

"Supra, n. 15 at p. 156.

"Kocourek and Koven, *supra*, n. 8 at p. 993, quote the following from Cardozo reported in 55 Rep. of N.Y. State Bar Assn. at p. 293 (1932):

"The objection will be made that courts are without power to tie the hands of their successors by a declaration of purpose not wrought into a judgment. If I conceive the situation justly they are untying and releasing. A fair paraphrase of what they say is this: 'The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice, however, that anyone trusting to it hereafter will do so at his peril. Much of the evasion, the pretense, the shallow, and disingenuous distinctions too often manifest in opinions—distinctions made in the laudable endeavor to attain a just result while preserving a semblance of consistency—would disappear from our law forever if there were such a statute on the books [suggested in 17 A. B. A. Joua. 180 but made unnecessary by the Sunburst decision.] Thus would *stare decisis* retain what it has of value, retain its stabilizing virtue and be purged of its congealing humors."

"Grinnel, *supra*, n. 15 at p. 156.

"95 Mont. 148, 24 P. (2d) 133 (1933).

"Id., p. 171, the court saying:

"It is unnecessary that it be shown that reliance was actually placed by defendants upon the former decisions. Reliance thereon will be presumed."
previous decisions\textsuperscript{a} the court had decided that where there was an amendment of a statute fixing the liability and the amending statute had a general repealing clause with no saving clause as to a right of action previously accrued, it must be considered as if the liability had never existed if no action were brought before the amendment became effective. Plaintiff contended that the strict construction placed on the statutes in the previous decisions was wrong and that the statutes if liberally construed would give a different result. The court in the \textit{Abell} case agreed, expressly overruled the previous cases, and decided in favor of the plaintiff. On defendants' motion for rehearing the rule was changed to accord with the \textit{Horse Products}\textsuperscript{a} case of applying prospectively only so that the defendants prevailed. This case appears to have been one where an inquiry into the matter of reliance might profitably have been made. The decision to overrule was unanimous; on the rehearing which granted prospective application only, it was three to two.\textsuperscript{a} The dissent in full was: "Being convinced of the correctness of the original opinion, we dissent from any modification thereof."

Looking more closely into the facts we find that the defendants' liability arose upon their default March 1, 1927, and continued, if no action were brought, only to July first of the same year according to three previous decisions on the point. Not until some two years later did plaintiff bring the action. Even if retroactive effect were granted in this case, the court could possibly have denied plaintiff relief on the basis of laches.\textsuperscript{a} However, it appears more likely that it was the defendants who knew of and relied on their escape from liability because plain-

\textsuperscript{a}Continental Oil Co. v. Montana Concrete Co., 63 Mont. 223, 207 P. 116 (1922); First National Bank of Brockton v. Cosier, 66 Mont. 352, 213 P. 442 (1923); and First National Bank of Plains v. Barto, 72 Mont. 437, 233 P. 963 (1925).

\textsuperscript{a}Supra, n. 14.

\textsuperscript{a}The explanation of this being that the court was fully convinced of the unsoundness of the precedent and there was unanimity on the matter of overruling. But on being urged to give prospective application only to the overruling decision, a difference arose. Since the dissenting judges failed to state their position on the effect to be given an overruling decision, and since the majority had not changed its mind on the desirability of overruling but only on the effect to be given, this seems to have supplied a situation where inquiry into the matter of reliance would have been worthwhile.

\textsuperscript{a}Supra, n. 50.

\textsuperscript{a}Admittedly not under the usual view of the doctrine of laches, for as the state of the law stood, the plaintiff for two years had no rights, \textit{i.e.}, plaintiff acquired no rights until the overruling decision was announced, and could not be held to be sleeping upon rights which did not exist.
tiff's failure to sue them by July first. The degree of that reliance could have been the controlling feature. It is quite possible that had plaintiff sued shortly after July first the defendants' reliance would have been inconsequential; that "expectations" would be the most they could be said to have had. This also seems to have been a situation where, if the "reward" principle were recognized, retroactive effect could well have been given the overruling decision.

While every man is presumed to know the law, no man is expected to be clairvoyant; reliance, therefore, is something which must be left to the courts to work out as a practical matter. Tedium and protracted inquiries could easily bog down the whole judicial process in side issues. The feasibility of the inquiry and the fruits to be obtained therefrom should be the guiding factors. A presumption of reliance ought to be rebuttable rather than conclusive lest the effect to be given an overruling decision again become crystallized. The important thing is that the door be not closed to granting retroactive effect to an overruling decision under the proper circumstances and that courts be alert to discover when such circumstances exist.

Even at this early stage of the development of the Montana Doctrine courts are not without some guides. By whatever theory the particular case was justified, the municipal bond and legal tender cases with their multitudinous progeny have firmly established the fact that where statutory or constitutional provisions are construed, any change in construction is to be given prospective effect only. Equally as well settled, and by many of the same cases since the two very frequently intertwine, is the proposition that where property or contract rights have vested, any change affecting them will be given prospective effect only. Subject to the rule that no criminal has a vested right in rules which have been erroneously sanctioned, prospective application only is given to changes in procedure both civil and criminal.

See cases listed, supra, n. 7. And the Duhaney, Kern and Oklahoma County cases, supra n. 16.

See the Farrior, Muhlker and Hill cases, supra, n. 7; and World Fire & Marine Insurance case, supra, n. 16. For an astounding departure on this proposition see Carter Oil Co. v. Well, 209 Ark. 633, 192 S.W. (2d) 315, citing Sunburst case in dissent at p. 222 (1946).

Norton v. Crescent City Ice, supra, n. 16. Indeed, in Barker v. St. Louis County, 340 Mo. 986, 104 S.W. (2d) 371 (1937), it is held that only where adjective law is involved can prospective effect be given. But this distinction between adjective and substantive law is not valid where prospective application is the point under consideration. This case cites Sunburst on p. 378.

It is also quite apparent that in regard to some torts retroactive application is to be given. It is fanciful to think of a person acting negligently in reliance on precedent; accidents occur so quickly that there is no time to consider a course of action. Changing of a rule of liability to extend its scope is generally productive of no injustice to the defendant since he already knows he is responsible for negligent acts, and if he deliberately or knowingly is crowding the line separating permissive from responsible action, a court which has decided to enlarge the scope of liability may find such acts of the defendant to be so unsocial as to preclude any possibility of reliance. But in cases of libel or slander, where advice of counsel is sought as to what can safely be published and the advice accords with the law as announced by the decisions, a change in decision could well be limited to prospective effect only. Since criminal law deals almost exclusively with constitutions and statutes any changes in decisions are limited to prospective application. Thus, though the courts are faced with a difficult task, they are not entirely without aid. They are not in an uncharted wilderness; there are some pathways even if but faintly blazed.

To view the doctrine of stare decisis in proper perspective, it is helpful to realize some of the things it is as well as some of the things it is not. As to the doctrine of precedents, Dean Pound says:

"... [It] is a part of the technique which has developed in the courts in the English speaking world. It represents experience developed by reason and reason tried and tested by experience. Now a great deal of the trouble that the layman finds with the doctrine of precedent grows out of, as I see it, an entire misunderstanding of what we are doing. The layman seems to think a certain number of cases were decided back in the time of the Plantagenets and were laid down in a fossilized state in the Middle Ages and from time to time are dug up and are used as the measure of decision in controversies of Twentieth Century America."

"Nor does the doctrine require or demand continued and servile adherence to any and all precedents. It permits growth ordered and planned. But the doctrine of stare decisis refuses to concede that change necessarily connotes progress."

Further, this doctrine is intended to keep us under "a gov-

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\(^{a1}\) 14 CINN. L. REV. at p. 329 (see supra, n. 15).
\(^{a2}\) Kennedy, Portrait of the New Supreme Court, 14 FORD. L. REV. 8 (1945).
ernment of laws and not of men," as well expressed by these words:

"In aeronautics, stability means the maintenance of flight on an even keel without pitching or rolling. The American theory of precedents seeks to achieve stability in that sense—that is, in the sense of regulated progress rather than immobility or movement without direction . . . . At the same time the boundaries of flexibility should be delimited for litigants, lawyers and law courts, by the overruling of precedents only in instances where the change fits into the overall pattern of progress, so that the law is in the spirit of the times rather than in the spirit of the judge who happens to decide or whose vote happens to be decisive."

The prospective overruling of decisions allows stare decisis to serve future needs as well as to furnish a current stabilizing link with the past. The importance of the Montana Court's decision in the Sunburst case defies valuation. It has been said that the case "seems likely to become a landmark in legal history." Another writer has called the Sunburst decision "a commendable determination . . . that a court never acts so much like a court as when it combines the duty of setting forth correct doctrines with the protection of litigants who have reasonably come to rely on doctrines not quite so good."

The Montana court in a sharp, decisive stroke cut the fetters of retroactive necessity which had been restricting the common law. That action gives promise of achieving "not only a renovation of the common law but possibly a renaissance of the common law that will carry us forward to a level higher than ever reached by any system of law." With constitutional and theoretical difficulties swept out of the way, the energy and "attention of courts and lawyers should be directed to working out definitive applications of the principle of reliance in connection with overruled and overruling decisions." It attaches a challenge and a duty which cannot be passed on to the legislature.

Marbury v. Madison, 1 Cranch at 163 (1803).
Sprecher, supra, n. 15 at p. 509.
Grinnell, supra, n. 15 at p. 150.
Kocourek and Koven, supra, n. 8 at p. 396.
Snyder, supra, n. 8 at p. 153.
"''"No legislature, no matter how wise or expert, nor court either, for that matter, can make rules of law so adequate that they will not work harsh injustice in some instances when applied to particular cases. . . . Judge-made law has the decided advantage in this respect for it is possible to modify the rule so as not to make an improper sacrifice of justice for the sake of maintaining the rule. . . . The whole body of the
By way of summation, the general rule is that an overruling decision is to be given retroactive effect; that exceptions to this rule exist where contract or property rights have vested, where a statutory or constitutional provision is being construed, where personal rights in criminal cases are involved. The *Sunburst* decision is the leading case in the growing equitable tendency toward granting prospective effect only. The chief obstacle to general acceptance of the Montana Doctrine still seems to be the declaratory theory that a judge declares not makes law. This the courts still feel themselves bound to follow despite the harsh results often engendered and despite the fact that the *Sunburst* case indicates that there is no constitutional objection nor common law limitation on the power of courts to grant either retroactive or prospective application. Since there are instances when retroactive effect is called for, the determination of which is to be based on the "principle of reliance," it would seem that in the interest of doing effective justice the general rule ought to be prospective overruling, with retroactive overruling the exception.

Existing in four broad categories of (1) constitutional and statutory construction, (2) vested contract and property rights, (3) procedure, and (4) torts, is a guide by which courts can be aided in developing this new judicial technique. Eventually in each category, situations of justifiable reliance will be indicated and ultimately can be listed in an ascending-descending degree of importance. But this determination of the effect to be given an overruling decision, lying so peculiarly within the power and abilities of the courts, is a task and a duty which ought not to be shunted to the legislature.

LAWRENCE G. STIMATZ

TRUST OR DEBT?

A REVIEW OF MONTANA DECISIONS

Courts have not consistently answered the question of whether a given transaction creates a trust or a debt. A trust and a debt are fundamentally different, and it is important to distinguish between them where the claimant is seeking a preference.

In some cases courts have disregarded the distinctions be-

common law having been evolved in a process of application of rules to particular cases, has a . . . fitness to the actualities of life that no body of legislative rules made in a priori fashion can have."—Carpenter, *supra*, n. 43 at p. 63.