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of judicial decisions. Such a result would seem to be dictated by the clear language of Section 1053 of the Revised Statutes of 1870, and by the jurisprudence in other jurisdictions to the effect that an attempt is generic and a lesser-included degree of the basic crime. GEORGE D. ERNEST, JR.

RETROSPECTIVE EFFECT OF AN OVERRULING DECISION

In *Succession of Lambert*,[1] the most recent Louisiana case on the vexing problem of conjoint legacy, the Supreme Court of Louisiana overruled certain of its prior cases on the subject.[2] The argument that a changed interpretation of the pertinent code provisions would prejudice the property rights of those who had relied on the overruled decisions was answered by the court with a reiteration of the doctrine of *Norton v. Crescent City Ice Manufacturing Company*.[3] The latter, while recognizing that the rule of a case generally would be applied both retrospectively and prospectively, announced that where vested rights had been acquired in reliance upon prior decisions any case overruling the latter would be given prospective effect only.

All systems of law recognize the necessity for some adherence to judicial precedent. A clash occurs only with respect to the weight to be accorded the authority of the decided case. The force of judicial precedent depends upon the extent to which each judicial system is willing to subordinate the necessity of modification of legal rules in accordance with social and economic changes to the desiderata of certainty and predictability in the law.[4]

In the main, three distinct theories obtain as to the force of judicial precedent.[5] Under the English rule of stare decisis, a prior case directly in point has the same force and effect upon the court which decided it and on all inferior tribunals as a statute, unless and until overruled by a higher court. If the prior case was decided by the House of Lords, the point decided becomes the law of England, which can only be overturned legislatively by an act of Parliament. Judicial precedent, even of the single case, is law de jure which all inferior courts are obliged

1. La. Sup. Ct. Docket No. 37,997 (June 14, 1946).
2. For a treatment of the substantive law presented in the *Lambert* case, see Case Note, infra p. 138.
3. 178 La. 135, 150 So. 855 (1933).
4. For an excellent discussion of the various aspects of this problem, see Goodhart, Case Law in England and America (1930) 15 Corn. L. Q. 173.
5. Goodhart, Precedent in English and Continental Law (1934).

to follow, and which cannot be overruled even by the court which originally announced the rule.[6]

The continental concept of judicial precedent presents the other extreme. Case precedent was given little weight in France following the great codifications. Under the then accepted theory, cases were to be decided only under the code provisions and analogical extensions thereof. It was then felt that there was little need of case law. While in more recent years judicial precedent has played an increasingly important role, it is still regarded as possessing persuasive rather than authoritative force. Under the doctrine of *jurisprudence constante,* where a line of decisions are all to the same effect, the jurisprudence will be followed, not because of any compelling or binding force, but under the theory that the jurisprudence thus established and applied is usually accepted as correct.[7]

The doctrine of stare decisis as applied generally by American courts occupies a mean position between these two extremes.[8] While the great majority of the United States formally adopted the common law, yet in America the institution of unwritten law did not gain such rigid adherence as in England. The English theory of judicial precedent, workable in a single jurisdiction with a highly centralized system of courts, presented difficulties when applied in the various common law jurisdictions of America. The continental concept of judicial precedent, with its allowance for flexibility in legal thought and possibilities for a more rapid evolution of the law, is thought by one student of the subject to be slowly penetrating American common law jurisdictions.[9] According to this author, the English and American doctrines of judicial precedent are at the parting of the ways.[10] In contrast with the English rule, under the American doctrine of stare decisis, it is the line of cases all to the same effect, rather than the single case, which affords the authority of judicial precedent. And even then, American courts have never considered that they were without the power to overrule their own prior decisions; and they have not been too hesitant

6. Id. at 10.
7. Id. at 11; Daggett, Dainow, Hebert and McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana (1937) 12 Tulane L. Rev. 12, 15-17.
8. Goodhart, supra note 4, at 193.
9. Ibid.
10. Ibid.

to overturn a long line of cases to reject an outmoded theory deemed inimical to the public interests.[11]

It has been asserted that Louisiana is closer to the continental doctrine of *jurisprudence constante* than to either the English or the American doctrines of stare decisis.[12] Similar to the American concept of judicial precedent, in Louisiana "more than one decision of the supreme judicial tribunal is required to settle the jurisprudence on any given point or question of law."[13] Judicial precedent in this civilian jurisdiction has never been anything more than law de facto.[14]

While the lesser weight previously accorded judicial precedent in Louisiana offered greater opportunities for necessary modification of jurisprudential rules, it achieved this only by sacrificing to some extent relative legal certainty and predictability. In the *Norton* and *Lambert* cases, the court appeared to be groping for a workable compromise between the competing objectives of opportunity for jurisprudential development and the need for stability in the law.

Simultaneously, other American jurisdictions have been striving to achieve similarly a solution of the problem. In 1932, on the authority of a prior case, the Supreme Court of Montana sustained a recovery by a shipper for an overcharge by a carrier, but at the same time expressly overruled the prior case and announced that it would not be followed in the future.[15] The overruling decision was given the same prospective effect only as that ordinarily resulting from a legislative change in the law. The same court affirmed its new rule of judicial precedent a few months later,[16] the second case being affirmed by the United States Supreme Court under certiorari.[17] In upholding the constitutionality of Montana's new rule of judicial precedent, Mr. Justice Cardozo as the organ of the court said:

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to prece-

11. Perhaps the most striking illustration is the overruling of Swift v. Tyson, 41 U. S. 1, 10 L.Ed. 865 (1842), and the long line of cases bottomed thereon by the Supreme Court of the United States in Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S.Ct. 817, 82 L.Ed. 787, 114 A.L.R. 1487 (1938).

12. Daggett, Dainow, Hebert and McMahon, supra note 7, at 23.

13. Smith v. Smith, 13 La. 441, 445 (1839).

14. Daggett, Dainow, Hebert and McMahon, supra note 7, at 23.

15. Montana Horse Products Co. v. Great Northern Ry., 91 Mont. 194, 7 P.(2d) 919 (1932).

16. Sunburst Oil & Refg. Co. v. Great Northern Ry., 91 Mont. 216, 7 P. (2d) 927 (1932).

17. Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S.Ct. 145, 148 (1932).

dent 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."

The Montana rule of the prospective effect of an overruling decision has been heralded by many advocates of law reform in America as a panacea for all ills resulting from adherence to judicial precedent.[18] In the relatively short time since the first of the Montana cases was decided, the new rule of judicial precedent has gained a surprising acceptance in American jurisdictions.[19] Skeptics, however, have not been backward in challenging the validity of any assumption that the doctrine of prospective effect of an overruling decision is a nostrum for all the ills of the judicial system.[20] Four specific objections to the workability of the new rule have been advanced,[21] one of which is so serious as to require consideration despite the limited scope of this comment.

One of the advantages claimed for the Montana doctrine is that it "gives no advantage to the party who succeeds in having an earlier case overruled."[22] Precisely because of this it is argued that a prospective effect only of an overruling decision removes all incentive to seek the overruling of the prior erroneous case.[23] If this argument possesses complete validity, of course, as a practical matter the new rule of judicial precedent ultimately may crystallize into the most rigid type of stare decisis. But at least one counterargument appears. Ordinarily, the appealed case is

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18. Kocourek and Koven, Renovation of the Common Law Through Stare Decisis (1935) 19 Ill. L. Rev. 971; Shartel, Stare Decisis—A Practical View (1933) 17 J. Am. Jud. Soc. 6; Stare Decisis Freed from Baneful Effect (1935) 19 J. Am. Jud. Soc. 37.

19. Payne v. City of Covington, 276 Ky. 380, 123 S.W.(2d) 1045 (1938); Hoven v. McCarthy Bros., 163 Minn. 339, 204 N.W. 29 (1925); State v. Haid, 327 Mo. 567, 38 S.W.(2d) 44 (1931); Bagby v. Martin, 118 Okla. 244, 247 Pac. 404 (1926); Kelley v. Rhoads, 7 Wyo. 237, 51 Pac. 593, 39 L.R.A. 594, 75 Am. St. Rep. 904 (1898).

20. Von Moschzisker, Stare Decisis in Courts of Last Resort (1923) 37 Harv. L. Rev. 409, 410; Comment (1934) 47 Harv. L. Rev. 1403.

21. Three of these objections are set forth in Von Moschzisker, supra note 20, at 410: (1) the rule constitutes pure legislation; (2) it removes all incentive to seek the overruling of an erroneous precedent; and (3) declarations made by the courts as to what the law would be thereafter are sheer dicta, not binding upon the courts. A fourth objection is advanced in Comment (1934) 47 Harv. L. Rev. 1403 on the ground that retroaction serves to regulate the strength of stare decisis, which is a product of the evolution of a workable balance between certainty in the law and its adaptability to new demands.

22. Shartel, supra note 18, at 7.

23. Von Moschzisker, supra note 20, at 410.

seldom limited to a single issue or point of law; and the incentive of reversal on other points not only would give counsel an opportunity to challenge the prior case without cost, but would give an alert court the opportunity to overrule outmoded decisions even though the matter be labored feebly by counsel. The Louisiana rule, being limited to the impairment of vested property rights acquired under a reliance on the prior decisions, presents less of a limitation on the incentive to overturn the prior cases. Further, under the review of the facts by the appellate courts in Louisiana, a greater opportunity is presented for overruling outmoded principles not vigorously challenged by counsel.

Clarification and delineation of the doctrine of the *Norton* and *Lambert* cases appear necessary. In view of the Louisiana concept of judicial precedent heretofore, it seems somewhat doubtful whether the rule of the prospective effect of an overruling decision will be applied when only a single case is overruled, as well as when a line of prior cases is overturned. Further, the precise limits of the nebulous language "vested property rights" remain to be fixed. Despite this, however, it is probable that Louisiana, like a few of its sister states, has taken a long step forward toward a more workable solution of the eternal dilemma which confronts all courts—the difficulty of adapting the law to new demands and yet maintaining a relative legal certainty.

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