STARE DECISIS AND LEGAL EDUCATION

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When a lawyer is asked by a client as to what his rights and/or duties are, the first inquiry is, "What are the facts"? Except to philosophers law means little, if anything, if not related to a factual situation. The client's version of the facts may have to be supplemented, and the lawyer not infrequently is disconcerted to find, perhaps in an ensuing law suit, that his understanding of the facts was faulty or incomplete.[1]

At any rate, after he has gotten what he considers an accurate and provable version, in the next step, often particularly with an experienced lawyer subconsciously, he asks himself what the judicial conclusion probably would be if the dispute, actual or potential, were effectively presented to a court. In that conclusion, on which he bases his advice to the client, he is in a sense indulging in prophecy.[2]

In almost any situation, with the possible exception of the simplest ones, he wants to investigate, perhaps merely refresh his recollection, the law he deems applicable to his facts. He feels entitled to assume that if there is a statute covering the problem, a court, if

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* See Contributors' Section, p. 65, for biographical data.

[1] The law schools should not be criticized for graduating students who have developed virtually no skills in discovering facts. The recipient of a law degree ought to be fully aware of the importance of facts, their provability, etc., and to recognize what facts are relevant to his current problem; but *how* to uncover facts is another matter.

The young doctor in a way is better prepared for dealing with his problems than is his contemporary lawyer. The former in his training, particularly when one includes his internship, has had at least some opportunity to see and deal with actual patients. The young lawyer, on the other hand, has gotten almost all his training from books and verbal tilts with his professors.

[2] As he gathers the facts and reflects upon them almost certainly he is going through a sorting or pigeon-holing process: in what area of the law does this question lie — contracts, torts, property, etc., and, more specifically in what particular corner thereof? Very rarely will a client, unless he is another lawyer, open the conversation by saying, for example, "I have a nice question in contracts for you — a third party beneficiary problem." This suggests that in bar examinations the sensible thing to do is to present the question unlabeled.

Unless a lawyer can do a good job in this pigeon-holing process, law books, even thousands of them, will be of little use to him. Only once perhaps in a lifetime will he be helped by such an aid as was said to have been furnished by the Index of a massive work on Corporations. The entry was, "Spitoon, one director hits another with." Even in that situation the lawyer would have to realize that he ought to look under "corporations."

the potential litigation develops, will apply it, so he searches the statutes. He likewise feels at least a considerable measure of certainty that if there has been an authoritative ruling by a reviewing court in his state on the problem about which he has been consulted, the decision when reached will be in line with such ruling. So he makes a study of the reported cases, hoping that he may find a path marked out by them which presumably will be followed in later cases.

Unfortunately, it seems almost impossible to choose words for a statute that leave no room for differences of opinion as to what is meant. Our hypothetical lawyer, however, does the best he can in interpreting the language, and relieved he is if he can find that his supreme court has declared the meaning. He is warranted in the assumption that the meaning thus once declared will be adhered to. Not only that, but if the statute, as is often the case, was borrowed from the legislation of another state where a construction thereof had been announced by the court there before the enactment in his state took place, he has strong reason to conclude that such construction will be respected by his court.

So far as decided cases are concerned, he again has a problem of construction and appraisal. It would be almost a miracle if he were to find a decision involving precisely the facts on which he is to advise his client. At least the names and chronological factors will be different! Certainly, though, one of the earmarks of the well trained lawyer is his ability to determine what legal rule or principle a decided case or cases establish. This includes, and, at least in part, depends upon his ability to conclude what differences in facts differentiate the reported cases one from another and from his own problem. His training along that line presumably began in his law school days.[3]

In determining the nature of his reply to the client's question, the lawyer may find no seemingly controlling decision in his own state; he does, however, find that his problem has been decided in other states. Perhaps he finds that in all those states the same conclusion has been reached, or perhaps, he finds that while not every court has reached the same result, there is distinctly what might be called the general, or usual, view. In such situation, even though his advice was based on such "general" rule, obviously in a reviewing court, or

[3] The day after day drill under the case system of law study, drudgery though it may sometimes seem to be, is, it is submitted, the effective way of developing skills along this line. Whatever may be thought to be the shortcomings of present day law school training, here is something that law schools are presumably equipped to do well. Granting that almost anything, however good, may be overdone, it must be recognized that the lawyer must early develop the ability to find, understand and use decided cases. Rather than watering down the training in this respect, is it not more sensible to lengthen the standard period of law study?

in the court of first instance, he cannot rely on stare decisis. A fortiori, if he relied on the decisions not in line with the generally prevailing view, he cannot rely on that principle. In either one of those situations he may turn out, to put it boldly, to have been a faulty prophet! No lawyer, however high his standing at the bar may be, ever rated 100% in this prophecy function!

As a result of his search for and analysis of the reported cases, particularly those in the reviewing courts of the state in which his hypothetical litigation will be settled, he arrives at his conclusion as to how his case probably would be decided, and his advice to his client is based on that.

Now let us assume that the client relies on that advice. Yet the possible litigation develops into an actual lawsuit. Let us also assume that in handling the suit the trial judge is satisfied, as was the attorney, that the decisions relied on are applicable, thus marking out the path of the controlling law, and the result is in favor of our hypothetical client.

The losing side then carries the case to the reviewing court, the one that decided the cases which were relied on by the trial judge and the prevailing attorney. Of course there will be arguments that the authorities relied on below are not in point. But assuming that all the members of the court, or a majority of them, are satisfied that those authorities are in point and would seem to control the answer to be given, to what extent should the court feel itself free to ignore them on the ground that they establish a legal doctrine that ought to be abandoned or changed?

Another way of stating the question is: When should a court respect or, on the other hand, ignore stare decisis?

It must be recognized that more often than not, it is reasonably debatable whether a decided case or cases do give a clear cut answer to the question that has bothered the client, his lawyer, the trial judge and then the reviewing court. The turn then naturally is to analogies. Arguments and reasoning on that basis may or may not be persuasive; opinions of reasonable men may well differ as to whether this or that analogy, each represented by authoritative pronouncements, should be applied, and the doctrine of stare decisis has little, if any, force. Drawing a bit on one's imagination, a colloquy between the attorney whose advice was acted upon and as a result of which the litigation has now reached the reviewing court, on the one side, and, one of the judges, on the other, might take the following course: The judge says that it is his understanding that the attorney relies on "this line of cases." To that the attorney replies that while he concedes that the question now before the court is not precisely the same as that

settled by the cases he has cited, he maintains that the two questions are so similar that the decisions should be the same. The spokesman for the court then states that "we consider those cited cases well decided, but this case is a quite different one."

At that point one might agree or disagree with the court, but it can hardly be said that it was ignoring the force of stare decisis. If, on the other hand the observation by the court had been to the effect that the pending case falls within the principle for which those decided cases stand, but we think that the courts erred in those decisions, a problem of stare decisis was presented.

This principle or doctrine of stare decisis is neither subtle nor esoteric. It has been developed out of the fact that when a court decides a case, it not only settles that dispute but it establishes a guide for future decisions on facts that present essentially the same problem. In their reliance upon this high probability that the court will respect its own pronouncements, people and their lawyers and the judges of inferior courts shape their plans, give their advice and render their decisions.

Games played without pre-determined rules are unthinkable if chaotic results and strife are to be avoided. It is a common observation that even children of very tender age recognize that in their childish games rules have to be settled in advance. What would happen if in a late inning of a closely contested baseball game the plate umpire were to rule that a batter was "out" on the call of a second strike and then when a batter or his team manager questions the ruling, the umpire were to reply: "My associates and I agreed before this inning started that the sun was getting so hot that the game must be expedited — we have changed the rule of three strikes and out by substituting two for the three"!

It may not be impertinent to refer at this point to another possible baseball incident. Even non-experts are aware of the baseball rule that if a man on base attempts to steal one farther on he must touch the latter one before its guardian touches him with the ball, thrown probably by the catcher. Let us suppose that the base runner twists his ankle as he starts his run and as a result he has obviously been slowed down. He thus, because of his infirmity, is an easy out if the rule is applied. Let us suppose, though, that the umpire, feeling that under the circumstances it is unjust to hold to the rule, calls the runner safe. What would happen? The newspapers would call it a "rhubarb"!

How often one hears substantially this: "It may be the law, but it is not justice"! The relationship of law and justice is beyond the scope of this paper, but it may readily be conceded, as it is here,

that if a law — a rule — commonly results in unfair or unjust results, the inference may become overwhelming that the law in that respect should be changed, perhaps by legislation, possibly by court decision.

With outstanding exceptions, most people, it is submitted, really want to conduct their affairs and make their plans in accordance with the rules — the law. They often consult lawyers as to what those rules are, and in giving advice or taking action the lawyer is largely governed by what he figures the decision would be in a properly presented litigation. He rightly proceeds on the assumption that a court in the potential litigation would decide according to the rules established by legislative bodies and by the decisions of his court. If he cannot count on that, he is driven to resort to what would be largely guesses. The rules deducible from decisions and sometimes even from legislation are not of the precise nature of the baseball rule referred to above, so at best there is still room for some guessing!

Since the degree of respect to be paid to stare decisis depends upon weighing two competing appeals and desires — stability and dependability in the law, and, on the other hand, the felt need for change in its content — judicial opinion and action are bound to vary from judge to judge and from period to period. The figure of the swinging pendulum is applicable here, as it is in many other situations. No laboratory scales being available for weighing the conflicting elements, the philosophy, even the personal idiosyncrasies, of the judge or judges are obviously significant.

One cannot long study English cases without being impressed with the respect for previously decided cases manifested by the English judges. Their primary effort, generally speaking, seems to be to find whether the authorities, most of which no doubt were brought to their attention by the skilled advocates who practice before them, determine the path which should be followed in reaching their conclusion. Even English courts have on occasion rejected an earlier decision as having been erroneous, but such instances are so unusual as to be noteworthy.[4] Is it not true that changes in the law deemed necessary or desirable because of developments in social or economic thinking are normally over there left to Parliament to work out in comprehensive legislation?

It is not only English judges that have felt the force of decided

[4] One interesting instance from the field of Property law will suffice. In Wheeldon v. Burrows, L.R. Ch. D. 31, in deciding that a grantor had not impliedly reserved an easement over land he had conveyed, the court repudiated the earlier case of Pyer v. Carter, 1 H & N 916, where it was declared that an easement could be as readily created by implied reservation as by implied grant. It is, however, noteworthy that the court in the Wheeldon case thought, as they pointed out, that in the earlier case the judgment was correct but on grounds quite different from that relied on.

cases. Many American cases may be cited as striking instances of conclusions reached with obvious reluctance because earlier decisions had pointed the way.

In *Armroyd v. Williams* in 1811,[5] the Circuit Court of the United States had to decide whether respect should be given to a French Prize Court's judgment of condemnation of a ship and cargo seized by a French privateer because the condemned ship had been trading with an enemy of France in violation of the Milan decree issued during the then bitter struggle between France and England. It was pointed out that according to "the doctrine of the British courts, acknowledged and adopted by the Courts of the United States," the action of the French Prize Court was to be given effect. Mr. Justice Washington, speaking for the court had the following to say:

> The rule of law which governs the court in deciding this case, is, in our opinion, a wise one; and it has appeared otherwise only during a few years past, because the regular order of things has been disturbed and disfigured by the violence and rapine of the belligerents. We confess that we sicken with disgust, in giving to the appellees the benefit of a general principle of law, which compels submission to so daring an outrage upon our neutral rights. But we must obey the law and leave to our government the task of protecting its citizens.

On appeal to the supreme court the conclusion was affirmed in an opinion by Chief Justice Marshall.[6]

In litigation between husband and wife,[7] the Michigan court had to rule upon the effect of a deed of land by the former to the latter which had been delivered to her. The husband, just before leaving on a trip which he deemed dangerous, had handed the deed to her with instructions that if anything of a fatal nature should befall him, to record it. He did return, but was unaware, until some years later when the marriage broke up and a divorce proceeding was pending, that she had recorded the deed on his departure. He then petitioned the court to declare the deed ineffective and to clear his title.

In opposition to this petition it was argued that under the Michigan law, as declared in earlier decisions, a delivery of a deed to the grantee could not be shown dehors the deed that it was to be effective as a transfer of ownership only upon the happening of a certain event, here the failure of the grantor to survive the intended trip. The court pointed out that, "The case of *Dyer v. Skadan* reviews the authorities and follows the rule laid down by this court in *Dawson v. Hall*, 2 Mich. 390, that a delivery of a deed by a grantor to a grantee

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[5] 1 Fed. Cas. 1132 (No. 538) (C.C. Wash. 1811).
[6] Cranch (11 U.S.) 423 (1813).
[7] Wipfler v. Wipfler, 153 Mich. 18, 116 N.W. 544 (1908), 16 L.R.A.N.S. 941 (1908).

in escrow or upon condition is effectual to pass title presently."

It is interesting to note that this court felt impelled to say:

> Upon the question of the right to set aside the deed executed by complainant and placed in defendant's hands, we encounter what we deem a legal obstacle to granting the relief prayed. The equities of the case are undoubtedly very strongly with complainant, and if the rules of law would permit, we should unhesitatingly grant the relief prayed. The property involved represents substantially all the earnings of the complainant for a lifetime, and the insistence by the defendant upon her legal rights which will result in turning complainant out almost penniless, is most unconscionable and inequitable. We have struggled to find authority for relieving complainant in the case, but upon a full consideration and a re-examination of the question determined by this court, *Dyer v. Skadan*, 128 Mich. 348, 87 N.W. 277, 92 Am. St. Rep. 461, we are unable to find such authority.

In a recent case[8] on strikingly similar facts, the Maryland Court of Appeals was faced with precisely the same question. The defendant grantee-wife there relied upon an earlier Maryland decision[9] which was in line with the view of the Michigan court. In this late case the court said: "Thus this Court, recognizing the rule that a deed cannot be delivered in escrow to the grantee said [in the Buchwald case], that if a deed absolute on its face is deposited by the grantor with the grantee, to be held by the grantee in escrow, such a deposit becomes a delivery which operates to vest the title in the grantee immediately."

The court, however, continued:

> But there is actually no logical reason why a deed should not be held in escrow by the grantee as well as by any other person. The ancient rule is not adapted to present-day conditions and is entirely unnecessary for the protection of rights of litigants. After all, conditional delivery is purely a question of intention, and it is immaterial whether the instrument pending satisfaction of the condition, is in the hands of the grantor, the grantee, or a third person.

Viewing the matter as one of intention, the court considered the proofs and concluded that the trial court had been warranted in decreeing an annulment of the deed. Thus the Maryland court in re-examining what had seemed settled law of the state considers that there was more merit in giving effect to intention of the parties than in closing the door to parol evidence with all its uncertainties and the resulting instability in land titles.

No doubt it would be generally agreed that as a question of

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[8] Chillemi v. Chillemi, 197 Md. 257, 78 A.2d 750 (1951).
[9] Buchwald v. Buchwald, 175 Md. 115, 199 Atl. 800 (1938).

first impression, uncontrolled or affected by decisions, reasonable minds might differ as to whether the difficulties and uncertainties inherent in parol evidence warranted the law being so shaped that the intentions of parties in such situations as those before the Michigan and Maryland courts in the cases referred to above, might not be given effect. So far as this paper is concerned, the question, however, is which court, Michigan or Maryland, was the wiser in its respect, or lack of it, for what seemed to have been the established law on the subject in that very state.[10]

Situations arise not infrequently in which there is no earlier decision in the court of last resort of the state, but there is a considerable body of pertinent decisions elsewhere, perhaps in England and/or other states, indicating a path generally, if not universally, followed. Of course a strong argument may be made in the court considering the basic problem presented by the facts that it should apply the law thus indicated by such outside decisions. In a sense this is an appeal to stare decisis, but here the court in concluding otherwise would not be disregarding established law of its own state; yet the court may feel a considerable degree of compulsion to go along with the generally accepted view. An interesting example of this is found in a recent case in Minnesota.[11]

The decision in that case turned on whether a possibility of reverter which arose out of a conveyance of a determinable fee, was alienable. A statute enacted after the date of the attempted alienation definitely made such interests conveyable. The court, however, was satisfied that the common law, though not infrequently criticized, clearly indicated the opposite conclusion. The point had not been passed upon by earlier Minnesota decisions, but, referring to a view expressed by Dean Fraser,[12] the court declared that this common law doctrine had "apparently been assumed to be the law in Minnesota" before the statute. The defendants in the case contended that because the rule against alienability was a bad one, the court should not now apply it, particularly in view of the provisions of the statute to the contrary. As to this the court observed: "Our function is to ascertain and apply the law as it exists, however undesirable it may sometimes appear to be. It is for the legislature and not for us to modify the common law rules."

Here was an instance of respect for the basic philosophy of stare

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[10] The attorney who on the basis of the Buchwald decision had advised his client that the deed was effective probably was more than a little embarrassed in explaining the result to the client.

[11] Consolidated School Dist. v. Walter, 243 Minn. 159, 66 N.W.2d 881 (1954), Annot. 53 A.L.R.2d 218 (1957).

[12] See 22 MINN. L. REV. 243 (1937-1938).

decisis, though the principle applied had never been authoritatively announced by an earlier decision in the state. A contrary decision in that case could have been a repudiation of Minnesota law at the time of the transaction that gave rise to the litigation only in the sense that the "common law" on the subject was a part of the body of the law of the state.

The phrase, "common law," has more than one meaning. It may have a chronological connotation — the law as of a certain time; it may refer, on the other hand, to the source of the law — the result of decisions by courts rather than legislation.

Not at all infrequently courts have been moved to depart from what admittedly was once the law of England or even what had earlier become established law in the state, the reason for the departure being a conviction that conditions that had made the rule or doctrine under examination understandable and reasonable had undergone a change to such an extent that the established law was no longer reasonable or wise. The doctrine of stare decisis should not, it has been felt, demand a perpetuation of a thus outmoded legal doctrine.

An interesting example of such a departure from the common law is *Melms v. Pabst Brewing Co.*,[13] also involving a question in the property field. The question there, to put it briefly, was whether an owner of a life estate had incurred liability for waste by destroying a rather pretentious house on the premises. The court pointed out that as the law had developed in earlier days in England such destruction clearly amounted to waste. Earlier announcements by the Wisconsin court had seemingly adopted for the state the English concept of waste. The court then went on to show that the concept had grown out of conditions that did not exist in Wisconsin at the time the house was destroyed and it observed that the seeming adoption of the English view in the opinions of their predecessors were not really necessary to their decisions. So it was concluded that defendant's act did not amount to waste. The court said:

> The familiar examples of departure from ancient rules will serve to show that, while definitions have remained much the same, the law upon the subject of waste is not an unchanging and unchangeable code which was crystallized for all time in the days of feudal tenures but that it is subject to such reasonable modification as may be demanded by the growth of civilization and varying conditions.

Many other instances of change in the law by court decision be-

[13] 104 Wis. 7, 79 N.W. 738 (1899), 46 L.R.A. 478 (1904).

cause conditions that made the earlier law what it was had changed materially might be cited. It will suffice here merely to point out that a decent respect for stare decisis does not mean that courts should *never* discard existing law.

The writer of this paper should not want any reader to think that in the former's judgment all decisions, or rather the rules derived from them, are sacrosanct. Even the most enthusiastic champion of stare decisis recognizes that the legal doctrine or principle derived from a case or cases commonly undergoes remolding by the process of limitation and exception. He also concedes that general conditions which made the earlier decision a reasonable, if not a necessary, one may in time change so radically that good sense indicates that it ought to be repudiated. He would, however, maintain that repudiation should be used sparingly and only after a calm appraisal of the need for such step in comparison with its effect upon the stability of the law.

Ignoring stare decisis can have far reaching effects in such areas as Property. In others, such as Procedure, the direct effects are apt to be significant only to one litigant. Thus, it is that the argument for respect for stare decisis can be very strong or very weak, with many gradations in between those extremes.

Constitutional provisions obviously have to be expressed by words, and they rarely state specific rules of conduct. On the contrary they are generally statements of basic policy and are expected to be applicable over periods that may, and do, run into many years. It should, then, cause no surprise that courts not infrequently feel a considerable degree of freedom to re-examine earlier decisions in the constitutional field and even to repudiate them.[14]

In the field of public law, putting aside those questions of broad constitutional policy, one finds the usual variance in judicial attitude as to the weight to be given to earlier adjudicatitons. A group of decisions by the Arizona Court are more than usually interesting in this connection.

In *Phoenix v. Michael*[15] in 1944, it was held in a suit by a taxpayer that the city should be enjoined from expending the city's public funds in "payment of its dues and assessments as a member of the Arizona Municipal League," it being the view of the court that

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[14] The freedom with which some of the members of the U.S. Supreme Court bowl over its earlier decisions must be discouraging to lawyers and law professors who think of themselves as specialists in that area of law. There is also some opinion to the effect that appreciation is lacking as to the difference between construction and amendment.

[15] 61 Ariz. 238, 148 P.2d 353 (1944).

such payments would not be for a "public purpose." To the argument that the disputed expenditures were for a public purpose since (a) membership entitled the city officers to "educational training by the public for their duties" and (b) influence for desirable legislation would be beneficial to the members of the League, Ross, J., speaking for the court, replied that, "No greater affront can be offered an aspirant to public office than that he is not qualified." "It seems to be the rule," he continued, "that qualification to get in office is a guarantee of qualification to fill it competently"![16]

Four years later, another taxpayers' suit was before the court.[17] This time the defendant was the neighboring City of Glendale but the question was precisely the same — the power of the City to expend money in connection with its membership in the Arizona Municipal League. Stanford, J., was still on the court, but Udall and LaPrade, J.J., had succeeded the two judges whose views prevailed in the Phoenix case. In the court's opinion by Udall, J., it is said that, "If we are to blindly adhere to the rule of stare decisis, the judgment of the lower court [in favor of the taxpayer] in the instant case should be affirmed."

After quoting from Cardozo's "The Nature of the Judicial Process"[18] the court went on to say:

> However where, as here, no property rights have become vested in reliance upon the old rule, there is much less hesitancy upon the part of an appellate court to reconsider the correctness of its former decision particularly when it was decided by a divided court.

Following a consideration of a number of decisions in Arizona and other states, the court said:

> We have reached the conclusion that the majority opinion in the *Michael* case forbidding municipalities in all events from availing themselves of the services of the Arizona Municipal League is wrong as it represents an ultra conservative view of the actualities confronting municipalities in these modern times. . . . Nor can we subscribe to the naive view, expressed in the majority

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[16] It is more than a little surprising that a truly able judge could entertain, to say nothing of writing, such naive ideas. Stanford, J., dissented.

[17] City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435 (1948).

[18] On page 23 the author states: "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the Courts of Justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered." The learned author in using the words "is felt to be unjust" obviously is not referring to the losing litigant or even to his attorney!

See also Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948), Annot. 17 A.L.R.2d 1 (1951).

opinion in the *Michael* case, that every public official and employee assumes his office completely equipped with adequate knowledge of the manner in which his duties may best be performed. This is an unwarranted assumption based upon a false premise and is contrary to a realistic view of public administration.

That the Arizona court is not lacking in respect for the doctrine of stare decisis but on the contrary, is quite ready to apply it in what it deems to be appropriate occasions, is demonstrated by *White v. Bateman.*[19]

The question before the court was whether a party whose name was on the ballot as a candidate for sheriff and who, on the vote count, was elected was entitled to be certified as the elected candidate, the claim being that since he had failed to secure the party nomination at the primary his name was not properly before the voters at the election. In short, the question was whether a party who is defeated in the primary may thereafter be on the election ballot. Precisely the same problem had been decided by the court three years earlier,[20] the conclusion being then that the name of the defeated primary candidate could still be lawfully on the election ballot. Perhaps because there had been some changes in the personnel of the court, counsel for the unsuccessful candidate thought it worthwhile again to test the courts' reaction.

The observations of the court (by Bernstein, J.) leading to the conclusion that the decision should be in favor of the party certified as elected are introduced by this: "Is *Cavender v. Board of Supervisors* sufficiently determinative of the question before us that we may rest it upon the rule of stare decisis?" The answer is found in the following language:

> The fact that the construction of the statute in question rests on a single case does not render it any less the duty of this court to utilize the doctrine of stare decisis, and neither does the fact that the prior case was by a divided court. The primary duty of this court is to interpret the laws of this state so that the people may know their rights. The people have a right to rely upon our decisions in conducting their affairs and we are hesitant to take away the rights obtained through such reliance unless we find manifest error in our prior holding or that more harm than good would come by adhering to it. The stability of the law is a prime aim of this court and consistency of judicial approach is essential to this end.

An even more striking case involving a matter of public office is

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[19] 89 Ariz. 110, 358 P.2d 712 (1961). *Cf.* Hernandez v. County of Yuma, 369 P.2d 271 (Ariz. 1962).

[20] Cavender v. Board of Supervisors, 85 Ariz. 156, 333 P.2d 967 (1958).

one in Ohio.[21] The Charter of the City of Columbus declared that "vacancies in council shall be filled by the council for the remainder of the unexpired term." Another provision in the charter stated in effect that "all general laws of the state not in conflict with the charter or with ordinances or resolutions shall be applicable to the city." A state statute provided that:

> When the office of a member of the legislative authority of a municipal corporation becomes vacant, the vacancy shall be filled by election by the legislative authority for the unexpired term. If the legislative authority fails within 30 days to fill such vacancy, the mayor shall fill it by appointment.

A vacancy arose in the Columbus council and there having been an attempt and failure by the council to fill the vacancy, the mayor, after thirty days had gone by, appointed Jones to fill the place. Proceedings in quo warranto were then instituted by the Prosecuting Attorney for the ouster of Jones. In a per curiam opinion signed by four of the seven members of the court it was said:

> With the exception of the identities of the relator and appointee-respondent, the facts and questions of law in this case are identically the same as those in the case of *State ex rel. Devine v. Hoermle.*[22] Therefore, under the doctrine of stare decisis, the demurrer to the answer is sustained and the judgment of ouster prayed for is rendered upon authority of that case.

Three members of the court dissented "for the reasons stated in the dissenting opinions" in the *Hoermle* case. Judge Stewart, one of the four who constituted the majority in the *Hoermle* case, died not long after that decision and Judge Peck was appointed to fill the Stewart place.

It is not improbable that the second case was set up and litigated as a test whether the change in the courts' personnel might not lead to an overturn of the earlier case. Judge Peck, whose determination to vote as his predecessor had was decisive, wrote a remarkably interesting concurring opinion. Since the majority in the later case rested their conclusions on the doctrine of stare decisis, it was quite unnecessary for Judge Peck to state how his vote would have been in the earlier case, had he then been a member of the court. A careful reading of his opinion, however, may warrant the guess that his vote then would not have been the same as that of Judge Stewart. His opinion shows clearly his awareness that his vote was the critical one — he was the "swing" man. He said:

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[21] State *ex. rel.* Allison v. Jones, 170 Ohio St. 323, 164 N.E.2d 417 (1960).
[22] 168 Ohio St. 461, 156 N.E.2d 131 (1959).

> Alone of the seven members of the court, I have not had the opportunity of passing upon the issue, created by the appointment of a member of the Columbus City Council by the city's mayor, without the restriction of a controlling decision of this court directly in point. Exercising judgment in the enviable aura of unrestricted choice, three of my colleagues chose each of the two divergent courses [citing the *Hoermle* case], and each now adheres to his position so adopted. I enjoy no such freedom of choice and consider myself bound to follow what has now been established as the law of this state. Whether I find the result to be palatable is of concern only to myself.[23]

Reference might be made to a multitude of cases in which conclusions have been based on stare decisis or in the face of it. Enough has been pointed out to demonstrate that the concept is given various weights depending upon the nature of the case in which the problem arises and, perhaps even more so, upon the nature and background of the judge or judges. With some, the factor of stability and certainty in the law is controlling or nearly so. With others, the zeal for reform is almost overpowering. Prominent among these are those with pronounced social and economic views at variance with their predecessors and an impatience with the slowness of legislative processes.

Few, if any, including the writer of this paper, are against reform. Questions, however, remain: what steps truly are reforms? and, secondly, when and how should the reform be accomplished? There are those, at one extreme, who look upon all change as progress and those, at the other extreme, who are satisfied that whatever is should be retained. The latter refuse to recognize that conditions could be bettered and that improvement necessitates change; the former seem to reject the possibility that a proposed change may result, in the long range view, in even a worse condition, even though the new order may seem temporarily an improvement.

An example from the prosaic field of negotiable instrument law,

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[23] After pointing out that under the former decision, announced exactly a year earlier, "the clear law of this state [has been] that the mayor has no power of appointment" and that even counsel for the respondent concedes that he was asking that the law be *changed*, the judge went on to say: "Such a change in the pronounced law can only result from an abandonment of a doctrine which may well be considered the heart and core of Anglo-Saxon Jurisprudence. That doctrine is referred to as *stare decisis*, a phrase which is an abbreviation of a maxim adjuring the courts 'to stand by precedent, and not to disturb settled points'. . . . From this it follows that we cannot find the doctrine of *stare decisis* to be without application merely because the submission of the present case followed the decision of the *Hoermle* case by only a year to the day. On the contrary, to so promptly disavow a conclusion thoughtfully arrived at by this court would for all time to come cause its decisions to be suspect as fragile ephemeral things."

Judge Peck would seem to be an asset to any bench, but he failed of approval by the voters when they had a chance to vote for or against him.

is interesting in this respect. In *Gill v. Cubit*[24] the English court announced that one who took a negotiable instrument under circumstances that should have aroused the suspicions of a reasonably prudent person could not be a holder in due course. Not many years later, the English courts[25] repudiated that doctrine and went back to what they said had been English law before that case. It has been pointed out, as a result of research,[26] that prior to the *Gill* case there had been a rash of mail robberies and that the robbers had profited by passing negotiable instruments thus stolen to tradesmen who then claimed to be holders in due course with all that that implied. *Gill v. Cubit* thus appeared to have been the result of what may have been a public clamor that "something be done" to take the profit out of crime.

Some time ago, it was reported that an acquaintance of a prominent member of the U.S. Supreme Court said in substance to the latter: "I understand, of course that the Executive is a check on the Legislature and vice versa and that the Court is a check upon both of those departments of our Government. But where is the check on the Judicial Branch?" After a moment's reflection the justice replied, it is said: "It is our consciences." This prompts the observation that there must be wide differences in the justices' consciences! Again, it is perhaps pertinent to say that among judges generally there are marked differences in the degree of their urges and zeal for what they think may be reform and also as to their notions as to how reform in the law should be effected.

Now what bearing does this doctrine have upon legal education?

That law schools exist for the purpose of legal education will no doubt be generally agreed. While some enjoy, or endure, the school's operations with a view to more productive business lines, or as a preparation for public careers, or even merely with the intention of teaching, the chief motivation is the expectation of a life as a practicing lawyer.

It is unlikely that any member of the staff of a law school, however brilliant its faculty and however complete its equipment, would assert that his school's graduates, though admitted to the bar, are wholly ready for handling the affairs of clients. The novice who prepared for the bar in the office of a wise and skilled lawyer no doubt, in some respects, was more nearly ready for such handling than his contemporary who had just finished a law school course. Of course, the latter had gotten something that the former lacked, something

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[24] 3 Barn. and Cress. 466, 107 Eng. Rep. 806 (1824).
[25] In Goodman v. Harvey, 4 Adol. and El. 870, 111 Eng. Rep. 1011 (1836).
[26] See Rightmire in 18 MICH. L. REV. 355, 357 (1920).

which in the long run might much more than offset the advantages the other way.

While law schools are equipped to do some things well, even superbly, it must be recognized that they cannot turn out polished and completely effective lawyers; there are so many things that the graduates must learn after they get out.[27]

It may be that not a few enter upon their law school work making the same mistake made by the writer of this paper, that in the law school one learns "the law." The professors would be distressed if their students failed to learn some of it. The writer may have been subnormal, but it took at least a few weeks in school for him to come to the conclusion that learning the law was not the chief return from law courses.

Perhaps one who has been a law teacher for many years may be forgiven for even thinking a suggestion as fantastic as this: restrict admission to a law school to those who have had x years of experience as practicing lawyers!

In the early part of this paper, reference was made to at least one respect in which law schools do not, indeed cannot, fully equip their graduates for the effective practice of the profession. Of course there are other respects in which the school may seem to some to be disappointing. It will suffice to mention one or two of these.

One often hears of an urge that "legal writing" be taught. Just what is that type of writing? Presumably it is writing regarding legal matters in an understandable, perhaps attractive, manner. With college degrees, or at least a considerable measure of college credit, required for admission to a law school, it should be a reasonable assumption that law students come with an ability to express themselves in meaningful English.[28] The remaining requirement is a capability to

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[27] Professor B., a favorite of mine, liked to tell the following incident: "After my graduation from law school and admission to the bar, I was fortunate to get a clerkship in a busy Chicago firm. One day, early in my service there, I was summoned to the office of Mr. W., the head of the firm. He handed me a folder saying, 'this is the file in Jones v. Smith; go over to the courthouse and have a default judgment entered against the defendant.' Noticing the obviously puzzled look on my face, he pressed a button on his desk. Immediately Johnny, the office boy, came into the room. Mr. W. then said: 'Johnny, take Mr. B. over to the courthouse and show him how to enter up a default judgment!'"

Even those who conduct in our law schools the most efficient practice, or moot, courts will probably agree that the participants have much to learn about the art of practice after they leave school.

[28] If that assumption is too violent, then surely the remedy is not in the law school but in the college and below. Since not a few lawyers (and law students) have difficulties with comparatively simple mathematical problems, perhaps law schools should consider the giving of a course in elementary mathematics!

formulate worthwhile and reasonably accurate ideas as to what the law is or ought to be and how a particular case ought to be decided. Those ideas they should get from effective study and instruction in typical law school courses.[29]

Then it is said that our law schools are delinquent in developing in those future lawyers proper standards of morality. Clearly the young lawyer should come from his school with an acquaintance with the established standards of lawyerlike conduct — his relations with the court, the bar generally and the public. But as to morality in general the law student has been shaped before he ever gets into the professional school. His moral make-up, as someone once said, was probably determined at his mother's knee.

In the preparation of future lawyers the schools contribute most in one general area — an understanding of the nature and sources of our law, its development and function in society, and the use of legal materials, particularly legislation and decisions. The student, if he is worthy of being in the school, should, and can, be trained to recognize legal materials, to understand the judicial process, to analyze cases and determine what factors led to the decisions and what is supremely important, to reach intelligent conclusions as to what path for future decisions is indicated by what has been decided.

The marked increase of complexity in life generally during the last several decades with its inevitable increase in the complexity of our law has posed problems for law school faculties. Not a few, persuaded perhaps by the notion that a law graduate is competent to handle a problem only if he has had a course in the subject, have added course after course to an already crowded three year curriculum. As a result there has been, it is submitted, a weakening in the very thing, as just pointed out, law schools are best fitted to do for the prospective lawyer.[30]

No law professor worthy of the title would let his students go out into the "world" with the idea that courts will never depart from, or refuse to use, the path marked out by the decisions, even though

[29] Fortunate indeed are those students whose capabilities are so pronounced that they are made members of a law review staff. Conscientious work in that capacity can do a lot in developing skill in "legal writing." Perhaps professors in grading exam papers should give more weight to clarity and orderliness in expression. That "legal writing" may be taught in law schools is seemingly the conviction of many law school faculties — so many have introduced such courses into their curriculums.

It seems that occasionally the phrase "legal writing" is used in such a broad sense as to include the drafting of effective documents such as wills, contracts, instruments of conveyance, corporate charters, etc. These do call for ability to use understandable English and adequate knowledge of the applicable law as well as a degree of imagination and foresight on the part of the drafter.

[30] Three years have been the standard law course for over fifty years. Perhaps the time has come to recognize that what was an adequate period for law study in 1900 will no longer suffice.

they have come from the highest courts in their states. But he would impress upon them that in the steps they take and the advice they give their clients they should expect to be guided by such paths and that only in exceptional instances will the court not respect the earlier decisions that have shaped the "law."

Despite the thousands of pages of statutes, a large part of the law of any state is deduced from the court decisions. Whatever may be its weaknesses, the commonly used case system of instruction in the law schools is still the best device for training prospective lawyers how to analyze decisions and draw at least tentative conclusions as to what they mean in determining the shape and content of the law.

So not only trial judges, practicing lawyers and the public generally, but also, in a pronounced degree, the law teachers are left up in the air if stare decisis is viewed too lightly by the courts of last resort.

Certainly there is no impropriety in pointing out to law students that there may be a possibility that what is quite clearly established law may be rejected by a court of last resort, that it it not always necessary to go to the legislature to get a change in the law. No doubt, however, such remark should be qualified by something like this: "But you must expect your effort to be an uphill battle, for courts do have a tendency to give unpredictable weight to stare decisis."