JURISPRUDENCE

TOPIC

The Concept of Precedent:

Rupert Cross's Opinion

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The Concept of Precedent

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Introduction

It is a basic principle of the administration of justice that like cases should be decided alike. This is enough to account for the fact that, in almost every jurisdiction, a judge tends to decide a case in the same way as that in which a similar case has been decided by another judge. The strength of this tendency varies greatly. It may be little more than an inclination to do as others have done before, or it may be the outcome of a positive obligation to follow a previous decision in the absence of justification for departing from it. Judicial precedent has some persuasive effect almost everywhere because *share decisis* (keep to what has been decided previously) is a maximum of practically universal application. The peculiar feature of the English doctrine of precedent is its strongly coercive nature. English judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so.

Case –law

The strongly coercive nature of the English doctrine of precedent is due to rules of practice, called 'rule of precedent', which are designed to give effect to the far more fundamental rule that English law is to a large extent based on case-law. 'Case-law' consists of the rules and principles stated and acted upon by judges in giving decisions. In a system based on case-law, a judge in a subsequent case must have regard to these matters; they are not, as in some other legal systems, merely material which he may take into consideration in coming to his decision. The fact that English law is largely a system of case-law means that the judge's

decision in a particular case constitutes a 'precedent'. If we place ourselves in the position of a judge in a later case, there may be said to be many different kinds of precedent. The judge may simply be obliged to consider the former decision as part of the material in which his present decision could be based, or he may be obliged to decide the case before him in the same way as that in which the previous case was decided unless he can give a good reason for not doing so. Finally, the judge in the instant case may be obliged to decide it in the same way as that in which the previous case was decided, even if he can give a good reason for not doing so. In the last-mentioned situation the precedent is said to be 'binding' or of 'coercive effect' as contrasted with its merely 'persuasive' effect in the other situations in which the degree of persuasiveness may vary considerably.

Some branches of our law are almost entirely the product of the decisions of the judges whose reasoned judgments have been reported in various types of law report. Other branches of our law are based on statutes, but in many instances, case-law has played an important part in the interpretation of those statutes. As the sovereignty of Parliament is more complete in England than practically anywhere else in the world, it might be thought that the rigidify of the doctrine of precedent in this country is of no particular importance because any unsatisfactory results of case-law can be swept away but legislation, but the promotion of a statute on matters of this nature is often slow and difficult.

Rules of precedent

It is said that the rules of precedent are dependent on the practice of the courts, which has varied considerably. In 1948 it was possible for Dr. Goodhart, one of the leading

contemporary writers on precedent, to say: The English doctrine of precedent is more rigid today than it ever was in the past[1].

At present the English doctrine of precedent is to some extent in a state of flux, but there appear to be three constant features. These are the respect paid to a single decision in a superior court, the fact that a decision of such a court is a persuasive precedent even so far as courts above that from which it emanates are concerned, and the fact that a single decision is always a binding precedent as regards courts below that from which it emanated. These can be better understood in the light of a brief account of the hierarchy of the English Courts.

The hierarchy of the courts

Beginning with the civil courts. At the bottom of the hierarchy there are the Country and Magistrates Courts with a limited jurisdiction over cases if first instance. Next comes the High Court whose judges exercise an unlimited jurisdiction over such cases. The Divisional Courts, which are part of the High Court, enjoy a limited appellate jurisdiction in addition to hearing certain special applications in the first instances. Next in the hierarchy of civil courts comes the Court of Appeal (Civil Division) which hears appeals from the Country Courts and the High Court. Finally, there is the House of Lords which hears appeals from the English Court of Appeal, the Court of Sessions in Scotland, and the Court of Appeal in Northern Ireland.

Where the criminal courts are concerned, the Magistrates Courts exercise an important summary jurisdiction over cases of first instance. A convicted person has a right to appeal to

[1] 64 LQR 40

the Crown Court in a summary case, but the most important appellate and supervisory work in relation to summary jurisdiction is done by the Divisional Courts of the Queen's Bench Division of the High Court. Trials on indictment take place in the Crown Court a person convicted on indictment may appeal to the Court of Appeal (Criminal Division) whence an appeal lies to the House of Lords.

Preliminary statement of the English doctrine of precedent

The Practice in the House of Lords shows how easily the rules of precedent can be changed. Every court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts (other than the House of Lords) are bound by their previous decisions.

The inaccuracy concerns the effect of a decision of the Crown Court on an appeal from a Magistrates Court. Such a decision is probably not binding for the future on a Magistrates Court or the Crown Court itself. The inaccuracy is trivial because the doctrine of precedent is primarily of importance in relation to courts whose decisions of the Crown Court in the exercise of its appellate jurisdiction are not included in any series of law reports in daily use, and, in the absence of reports, the doctrine of *stare decisis* is liable to be ineffective.

There are, however some serious reasons why the above preliminary formulation of the English doctrine of precedent is too concise and dogmatic. It does not indicate that only certain aspects of a previous case, called the ratio decidendi, are binding, and it does not refer to the existence of important exceptions to the rule of *stare decisis* but it must not be forgotten that the rules of precedent are subsidiary to, and far less important than, the obligation of judges to consider case-law.

I L L U S T R A T I O N S

The first of the features of the English doctrine of precedent mentioned above, the respect paid to a single decision of a superior court, may be illustrated by the treatment of ***R. v. Millis*** in ***Beamish v. Beamish***. In *R. v. Millis*[2], for doubtful historical reasons, and without much previous authority, the House of Lords adopted the rule that the presence of an episcopally ordained priest is essential, at common law, to a valid marriage in England or Ireland with the result that an Irish Presbyterian marriage was held void, Though greatly modified by statute and, to some extent, by later decisions, the case has caused much trouble. The decision of the Irish Appellate Court, which was against the validity of the marriage, was accordingly only affirmed on the principle *praesumiturpro negante*. A motion had been proposed, and as it had not been carried, it was deemed to have been defeated.

In Beamish v. Beamish the House of Lords decided that the fact that the bridegroom was in Holy Orders did not prevent the rule in R. v. Millis from applying. In order that the marriage should be valid, the priest had to be present as a celebrant not as a party to the ceremony. Lord Campbelll had disapproved of the view which prevailed in the previous case; but, in *Beamish v. Beamish*[3], he said.

If it were competent to me, I would now ask your Lordships to reconsider the doctrine laid down in R. v. Millis, particularly as the judges who were then consulted complained of being hurried into giving an opinion without due time for deliberation, and the members of this

[2] (1844) 10 Cl & F. 534
[3] (1861) 9 HLC 274

House who heard the argument, and voted on the question , that the judgment appealed against be reversed, were equally divided; so that the judgment which decided the marriage by a Presbyterian clergyman of a man and woman, who both belonged to his religious persuasion, who both believed that they were contracting lawful matrimony, who had lived together as husband and wife, and who had procreated children while so living together as husband and wife, to be nullity, was only pronounced on the technical rule of your Lordships House, that where, upon a division, the number are equal, simper *praesunitur pro negante*. But it is my duty to say that your Lordships are bound by this decisions as much as if it had been pronounced *nemine dissentiente*, and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and Supreme Court of Appeal for the Empire, must be taken for law till altered by an act of Parliament, agreed to by the Commons and the Crown, as well as by your Lordships. The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right to altering the law, and legislating by its own separate authority.

The second feature of the English doctrine of precedent, the fact that a decision of s superior court is treated as persuasive by courts above that court in the hierarchy, may be illustrated by the treatment of *Simonin v. Mallac* by the House of Lords in *Ross-Smith v. Ross-smith.*

Simonin v. Mallac was a decision of the full court of Divorce and Matrimonial Causes which slightly antedated the modern hierarchy; its decisions were and are in no way binding on the

House of Lords. It was held that the English courts had jurisdiction to hear a petition for nullity of marriage on the ground that the marriage was void *ab initio* because of a defect in the ceremony if it was celebrated in England although the parties were domiciled in France (i.e. had their permanent home there), and the husband was temporarily resident in Naples. The ground of the decision was that, The parties by professing to enter into a contract in England mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal.

Ross-Smith v. Ross Smith was considered by seven members of the House of Lords, one of whom died before he could deliver his speech, although he had prepared it. The speech was read, but the case must presumably be regarded as having been decided by six members of the House. None of them accepted the *ratio decidendi* of *Simonin v. Mallac* which has just been quoted; but a precedent may be persuasive authority although it does not persuade especially if it had been followed, as *Simonin v. Mallac* had been followed, on a number of occasions. Lord Reid said:

Before holding that the decision should be overruled I must be convinced not only that the *ratio decidendi* is wrong but there is no other possible ground on which the decision can be supported[4].

Being unable to find any such ground, Lord Reid and two of his colleagues were prepared to overrule *Simonin v. Mallac*[5], but as the House was evenly divided on this point, they

[4] [1963] AC at 294
[5] (1860) 2 Sw. & Tr. 67

ultimately based their collusion, as did two other members of the House, on the ground that the decision in *Simonin v. Mallac,* must be confined to marriages alleged to be void; the sixth member of the House dissented, and would have extended *Simonin v. Mallac,* to the case before him.

The issue in Ross –Smith v. Ross-Smith was whether the English courts had jurisdiction to annul a marriage on the ground that it was voidable on account of willful refusal or incapacity to consummate, if the marriage was celebrated in England, though the parties were domiciled elsewhere and the husband resided abroad. By a majority of five to one, the House of Lords gave a negative answer.

Whether a decision of the full court of Divorce and Matrimonial Causes is binding on a judge of first instance is perhaps a somewhat knotty point, but the fact that *Simonin v. Mallac* had been impliedly treated as good law by the court of Appeal and the treatment accorded to it in the House of Lords in *Ross-Smith v. Ross- Smith* were enough to induce Sir Jocelyn Simon P to treat himself as bound by it in *Padolecchia v. Padolecchia*[6]. We thus have an illustration of the third feature of the English doctrine of precedent. However anomalous a decision of a superior court may be (and the treatment accorded to *Simonin v. Mallac* was judicially described as ' the perpetuation of error), once it has received the blessings of an appellate court, it binds all courts below that court ion the hierarchy.

Until recently it was widely supposed that the mere refusal by an appeal committee of the House of Lords of leave to appeal rendered a decision mere authoritative. The House

[6] (1967) 3 All ER 863

emphatically corrected this erroneous impression in *Wilson v. Colchester Justices*. There were many reasons why leave might be refusal other than approval of the decision. Grant or refusal of leave is in no way to be taken as implying disapproval or approval of the decision and judgments of the court below.

PRECEDENT AS A SOURCE OF LAW

The rules of precedent generate what may not ineptly be described as 'jurisprudential' problems of their own. This part is primarily concerned with problems posed by case-law generally. They would braise even if the English rules of precedent were very different from what they are. They stem from the older and more important rule that judges must have regard to case-law.

THE DIFFERENT SOURCES OF LAW

The phrase source of law is used in several different senses, First, there is the literary source, the original documentary source of our information concerning the existence of a rule of law, In this sense the law reports are a source of law, whereas a textbook on tort or contract, or a digest of cases falls into the category of legal literature.

Next three are the historical sources of law, the sources- original, mediate, or immediate- from which rules of law derive their content as a matter of legal history. In this sense the writings if Bracton and Coke and the works of other great exponents of English law are

sources of law, for they enunciate rules which are now embodied in judicial decisions and Acts of Parliament. In this sense, too, Roman law and medieval custom are sources of English law, for parts of our law which are now immediately attributable to decisions in particular cases or specific statutory provisions can be traced to a rule of Roman law.

This sense of the phrase source of law can be extended to anything which accounts for the existence of a legal rule from the casual point of view.

Although the historical sources of law are of the greatest importance and interest, they are not considered at length in books of analytical jurisprudence. These works contains elaborate discussions of legislation, precedent, and juristic writings, but they are mainly concerned with sources of law in a third and entirely different sense of the word from that denoted by literary and historical sources. In this sense source means not a casual origin, direct or remote, but that from which a rule derives its validity as a rule of law. The enquiry is not How do you account for the content of a particular legal rule? but Why do you sat that certain rules are rules of law? This approach colours the discussion of sources and gives a meaning to such question as “Are there more sources of law than one? Is custom a source of law? and Is European Community legislation and ultimate or derivative source of law?

The criteria of validity vary. Every legal system is based in fundamental rules or ultimate principles by means of which it is possible to ascertain whether a particular rule is a rule of law. There is, of course, plenty of scope for controversy concerning the best way of formulating these basic rules., In the case of the English system it is at least generally

agreed that legislation (direct or subordinate) and the ration decidendi of cases coming before the superior courts have the force of law. Other legal systems are based on different ultimate principles. Whatever may be the truth with regard to the French system, that system is based on the rule that decided cases make law for the future.

Sir John Salmond referred to source from which legal rules derive their validity as legal source as distinct from historical sources, since the former are those which are recognized as such by the law itself. Precedent, legislation, and custom are legal sources of English law because:

It is itself a principle of English law that any principle involved in a judicial decision has the force of law, Similar legal recognition is extended to the law producing effect of statutes and immemorial custom, Rules such as these establish the source of law.

PRECEDENT AND CUSTOM

The following extract from Blackstone epitomizes the approach of English law to customary practices:

The municipal law of England, or the civil conduct prescribed for the inhabitants of this Kingdom, may with sufficient propriety be divided into two kinds: the lex non scripta, the unwritten or common law; and the lex scripta, the written or statute law. The lex non scripta or unwritten law, includes not only general customs, or the common law properly so called,

but also the particular customs of certain parts of the Kingdom; and like wise those particular laws that are by custom observed only in certain courts and jurisdictions[7].

The particular customs of certain parts of the kingdom are occasionally considered by contemporary courts. An example of such a custom is the practice of the fisherman in a certain locality to spread their nets on a particular stretch of sand. Customs of this nature usually, if not invariably, operate in derogation of the common law. They generally permit what the common law prohibits. The spreading of the nets would be a trespass to the foreshore were if not for the local practice. The courts allow a local custom to be effective provided it complies with certain tests which have been laid down in four or five centuries of case-law.

The tests are variously stated. For present purposes it is sufficient to say that the custom must be reasonable, it must not contradict a statute, it must have been observed as of right (i.e. not by force or permission), and it must have existed since time immemorial[8].

The requirement that the custom must be reasonable is of some interest in the present context. In some legal contexts, reasonableness is a question of fact to be determined by a jury when there is one. For example, civil negligence is by definition a failure to comply with the standard of a reasonable man, and the question whether this standard was reached by the defendant in a particular case must be left to the jury.

[7] Commentaries (1813 edn.) 81
[8] These are the tests enumerated in Salmonds Jurisprudence (12th edn.) 199

Decisions on questions of fact do not constitute a precedent, for every case is considered to be unique. In order to constitute a precedent, a decision must concern a point of law. The question whether a local custom is reasonable is a question of law in this sense. Previous cases are cited and analyzed when an issue is raised concerning the reasonableness of a custom. The test was once formulated in very broad terms by Parker J who said the custom must be such that, in the opinion of a trained lawyer, it is consistent, or at any rate not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the very root of our legal system[9].

Obviously there is plenty of scope for controversy here, and the matter is one on which guidance from precedent may sometimes be most welcome.

The following brief discussion of the relation between precedent and custom as sources of law is confined to local custom. Two questions must be distinguished. First, the question whether a local custom is to be regarded as law before it is enforced by the courts, and second the sense in which custom can be said to be subordinate to precedent as a source of law.

When does a custom become law?

To revert to an example which has already been mentioned, it was held in 1905 that the fisherman of Walmer were entitled by a local custom to dry their nets on a particular stretch of sand[10]. Would it have been correct for someone speaking in 1900 to say that the fisherman of Walmer were legally entitled to act in that way although such conduct would elsewhere

[9] Johnson v. Clark [1908] 1 Ch. 303 at 311
[10] Mercer v. Denne [1905] 2 Ch. 538

amount to trespass? John Austin's answer to this question would have been an emphatic negative because a custom is a moral rule before it has been made the ground of a judicial decision after which it is law established by judicial decision[11].

The opposite view is taken by a number of other writers, notably Sir Carleton Allen. According to this view, the correct description of the position of the fisherman of Walmer in 1900 would be the same as that applicable to a situation mentioned in a statute which had not been construed by the courts. If a statute of 1890 had empowered the fisherman to dry their nets on the foreshore, only someone who was guilty of an error similar to Gray's would have said, in 1900, that it was not the law that they might do so, although, under the common law, such conduct was trespass.

John Chipman Gray was a distinguished American jurist of the early twentieth century, but his suggestion that a statute is not law until it has been interpreted by the courts is commonly regarded as eccentric. It was the outcome of his view that the judges are the creators of all law, but an English judge invariably acts and talks as though a statute had been law from the moment when it came into effect. Statutes are always held to have governed the rights of citizens long before those rights are questioned in a court. The vast majority of statues never come before the courts, but no one denies that their contents constitute the greater part of English law.

Which of the above views about custom is correct so far as English law is concerned? The answer depends on the manner in which the tests by which the validity of a local custom is

[11] Jurisprudence (5th edn.) ii. 523

determined are applied by the courts. Those requiring immemorial antiquity and observance as of right are questions of fact. If disputed, they must, like any other factual dispute, be decided by the courts, but this does not mean that a custom is not law before it is upheld by a judicial decision. The requirement of consistency with statute need not trouble us, because it simply means that a statute can abrogate any custom, just as a statute can abrogate a judicial decision or an earlier statutory provision. The crucial point concerns the approach of our courts to the test if reasonableness. If the courts took the view that this gives them a complete discretion to reject or uphold a custom according to their opinion of what was reasonable, there would be something to be said for the view that a custom is not law before its enforcement, but this is not the approach of our courts. Reasonableness is treated by them as a question of law, and, to a certain extent, what is reasonable is something which can be ascertained by reference to past cases.

So far as reported decisions go, it is believed that it has not yet been held that the manufacturer of ginger ale, as opposed to ginger beer, owes a duty of care to the ultimate consumer if he supplies it in opaque bottles, but no English lawyer would hesitate to say that this is the case, having regard to Donoghue v. Stevenson. Of course, there can be but few local customs concerning which it is possible to speak with such certainty, but the principle remains the same. Accordingly it seems that, in contemporary England, a local custom is law before it is upheld by the courts.

The subordination of custom to precedent as a source of law.

Although it may be correct to speak of custom as a distinct source of law because local customs can truly be said to be law before they are enforced, custom must be regarded as subordinate to precedent.

Suppose a lawyer advises a client that a particular custom is valid before it has been judicially enforced. If he were asked for the grounds of his opinion, he would say that the custom appeared to him to comply with the tests of validity laid down by the cases. This is type of derivation or subordination in a different sense from that in which precedent of subordinate to legislation. It is a type of derivation because the courts exercise certain control over customary rules as the question whether those rules are reasonable is dependent on case-law. If our hypothetical lawyer were asked why he based his opinion that a particular custom is law on the tests laid down in the cases, he would say that was because the principles on which cases have been decided represent English law. He could not justify his respect for the cases by derivation from the sovereignty of Parliament in the same way as that in which he could justify his regard for the tests if validity of a local custom by direct derivation from the cases. If he did refer to the sovereignty of Parliament at all, it would only be to say that the principles on which cases are decided represent English law, subject to legislation to the contrary. The subordination of precedent to legislation is based on the fact that a statute can also subordinate to legislation in this sense.

The distinction between subordination by derivation and sub-ordination due to the power of Abrogation has an important bearing in the formulation of the ultimate principles of a legal system. So far as the English system is concerned, as precedent is subordinate to legislation by reason only of the fact that the effect of a judicial decision can be abrogated by legislation, the rule concerning the efficacy of precedent must be treated as ultimate. It is not necessary to treat the rules concerning the validity of a local custom in the same way, because these rules are derived from precedent although they probably cannot be abrogated by judicial decision.

THE RELATION OF PRECEDENT TO LEGISLATION

Precedent is, as we have seen, subordinate to legislation as a source of law in the sense that a statute can always abrogate the effect of a judicial decision, and the courts regard themselves as bound to give effect to legislation once they are satisfied that it was duly enacted. The subordination was not always as complete as it is today, but it was clearly recognized by the beginning of the nineteenth century at the latest.

All that a court of justice can do is to look to the Parliamentary roll, if from that it should appear that a bill has passed both houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament or into was done previous to its introduction, or what passed in Parliament during its progress in its various states through both Houses[12].

[12] Edinburgh Railway Co. v. Wauchope (1842) 8 Cl

Joint operation of legislation and case-law

English precedent rules are derived from judicial practice not from statute. No doubt Parliament could enact legislation abrogating or altering any of them, but it has not done so. Consequently, precedent and legislation are ultimate as distinct from, derivative sources of law, neither owes its validity to the other or to any other legal source, but precedent is of course subordinate to legislation in the sense that legislation can abrogate it. The relationship is of interest from the point of view of the joint operation of case-law and statute law.

Dean Roscoe Pound said in a famous article[13] that four ways may be conceived of in which courts in such a legal system as ours might deal with a legislative innovation.

1. They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will; as superior authority to judge-made rules on the same general subject; and so reason from it any analogy in preference to them.

2. They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or coordinate authority in this respect with judge-made rules upon the same subject.

3. They might refuse to receive in into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover.

[13] Common Law and Legislation, HLR 21 (1907), 383

4. They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.

Pound said that the fourth hypothesis represents the orthodox common-law attitude towards legislative innovation although he thought we were tending towards the third. Of the second and first hypothesis he said that he thought they would doubtless appear to the common lawyer as absurd. He can hardly conceive that a rule of statutory origin mat be treated as a permanent part of the general body of the law.

But Pound submitted that the course of legal development upon which he had already entered must lead us to adopt the method of the second, and eventually the method of the first, hypothesis.

Pound's article was written as long ago as 1907 and it was primarily concerned with the United States. So far as the English legal system is concerned, it is open to question whether the second, or even perhaps the first hypothesis, has not been accepted for a considerable time.

The common-law presumption that a person is dead if he has been absent from and unheard of by those likely to have heard of him for a continuous period of seven years or more as established early in the nineteenth century and is generally supposed to have been evolved by analogy with statutes of the seventeenth century.

Courts of equity applied the Statute of Limitations analogically, laying down a time-limit within which actions must be begun. More recently, statutory provisions to the effect that, when corroborative evidence is required in a criminal case, it should implicate the accused in a material particular, have been applied by analogy to the evidence of accomplices with regard to which the jury must be warned of danger of convicting without corroboration.

Analogical application of statutes

The terms of one statutory provision may be used as the ground of a conclusion concerning the construction of another statutory provision. In *R.v. Bourne*[14], for instance, a doctor was charged with abortion, He had operated on a young girl who was the victim of a rape with a view to procuring her miscarriage. He had come to the conclusion, after consulting another doctor, that the operation was necessary for the preservation of the girl's health. The offence of abortion is defined by s. 58 of the Offences against the Person Act 1861 in the following terms:

Any person who, with the intent to procure the miscarriage of any woman… unlawfully administers to her or causes to be taken by her any poison or noxious thing or unlawfully uses any instrument or other means is guilty of abortion.

Macnaghten J treated the case as one which turned on the effect to be given to the word unlawfully and he found guidance in the Infant Life Preservation Act 1929, which created the offence of child destruction. This crime is committed by someone who, with intent to

[14] [1939] 1 KB 687

destroy the life of a child capable of being born alive, by any willful act, causes it to die before it has an existence independent of its mother. Under a proviso in the Infant Life Preservation Act, no one is guilty of child destruction unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother. Macnaghten J directed the jury in Bourne's case that he accused was not guilty if they thought that he might have been acting to preserve the life of the mother, and that the term life could be broadly construed so as to include a healthy existence. The doctor was acquitted; such conduct would now be protected by the express working of the Abortion Act 1967.

The forgoing examples show that legislative innovations are sometimes received fully into the body of the law to be reasoned from by analogy. It is, however, possible to point to many instances in which this has not been done. There is no convincing reason why superiority in analogical force should always be attributed to legislation. Pound spoke of it as a later and more direct expression of the general will, and hence as something to be reasoned from by analogy in preference to judge-made rules on the same subject. But this fails to take account of the fact that the force of analogy is something which varies very greatly.

So far as the law presently in force is concerned, if some propositions of the common law is in direct conflict with a proposition emanating from Parliament, it is no longer valid. Broader statements of principle contained within the historic common law- whether conceptual definitions or wide formulations of individual responsibilities or rights – have a more timeless quality. They grow, flourish, and sometimes wither away. Legislation may play a

role in this evolutionary process, to the extent that it is clearly premised on normative assumptions inconsistent with those embodied in particular principle But the mere fact the ruling in a certain case has been abrogated does not necessarily rob general principles enunciated in that decision of continuing doctrinal force.

Statute law and case-law are directly integrated in our system so far as the legal meaning of certain words is concerned. Most words have not got a specifically legal meaning. In the absence of good reason to the contrary, the courts fine effect to the ordinary meaning whether the words are used in a statute, a private document, or an oral transaction. In any event, the courts are more often than not concerned with the effect of whole phrases and sentences on particular context rather than with that of a single word. There are, however, certain instances in which a word has acquired a legal meaning.

When this is the case, the influence of the doctrine of precedent on the construction of a statute must be as great as its influence in the construction of private documents. There are, however, some special problems concerning precedent and the interpretation of statutes which must be considered.

PRECEDENT AND THE INTERPRETATION OF STATUTES.

The two points calling for discussion are the question whether it is necessary to make any modification in the usual method of determining the ratio decidendi when the case under consideration turns on the interpretation of a statute , and the suggestion derived from *Ex*

parte Campbell[15], that once statutory words have been interpreted by a superior court, the re-enactment of those words in substantially the same statute invests that interpretation with parliamentary authority.

The ration decidendi of a case interpreting a statute

The ratio decidendi is, generally speaking, any rule of law expressly, or impliedly treated by the judge as a necessary step in reaching his conclusion. It was recognized that due regard must be had to the facts of the particular case and the rationes decidendi of other cases. Reference is made to the opinion of Lord Halsbury in *Quinn v. Leathem*[16] according to which a case is only authority for what is actually decides. On this view, every case has certain facts which all lawyers would recognize to be material, and the ratio decidendi is all the material facts plus the conclusion, i.e. the major would warrant the order of the court if the material facts were made to constitute the minor premises of a syllogism. There are certain circumstances in which it becomes necessary to take this view of the proposition of law for which a case is authority. Examples are decisions for which no reason is given, and decisions which have been distinguished in subsequent cases, Must such a view be taken of all decisions concerning the interpretation of statute? Two dissenting judgments of Lord Denning appear to give an affirmative answer to this question. As Denning LJ he said, in *Paisner v. Goodrich*[17].

When the judges of this court (the Court of Appeal) give a decision on the interpretation of an act of Parliament that decision itself is binding on them and their successors, But the

[15] (1869) LR 5 Ch. 773
[16] [1901] AC 495 at 506, p. 57
[17] [1955] 2 QB 343 at 358

words which the judges used in giving a decisions are not binding, This is often a very fine distinction, because the decision can only be expressed in words. Nevertheless, it is a real distinction which will best be appreciated by remembering that, when interpreting a statute , the sole function of the court is to apply the words of the statute to give situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation; but not in a different situation. Whenever a new situation emerges, not covered by previous decisions, the court must be governed by the statute and not by the words of the judges.

Denning LJ was clearly of the opinion that the question whether the situation before the court differs in a material respect from that covered by the previous decision must be decided by the court dealing with the new case, and that court is no way bound by the principle which the judge in the previous case appeared to consider necessary for his decision.

Lord Denning repeated this view concerning the authority of past decisions on the interpretation of a statute in *London Transport Executive v. Betts*[18]. In that case the House of Lords was concerned with the question whether a depot in which vehicles might be reconditioned was used for their maintenance so as to take it outside the statutory provisions concerning the rating of industrial hereditaments. A previous decision of the House[19] had treated a paint shop as used for the maintenance of vehicles within the meaning of the

[18] [1959] AC 211 at 246
[19] Potteries Electric Traction Co. Ltd v. Bailey [1931] AC 151

relevant legislation, and, in Bett's case, the majority concluded that this previous decision applied to the depot. In the course of his dissenting speech Lord Denning said:

That is, to my mind, a decision on the particular facts of the paint shop and nothing else, The decision may be binding on your Lordships if there is another such paint shop anywhere, but it is not, in my opinion, binding for anything else. If your Lordships were to elevate that particular precedent into a binding decision on the meaning of maintenance, you would, I believe, carry the doctrine of precedent farther than it has been carried before.

The ratio decidendi of any case is only a guide in substantially different circumstances, but Lord Reid, unlike Lord Denning, would evidently consider that the judge in a subsequent case should have regard to the words used by the previous judge in order to determine whether there are relevant differences between the facts of the two cases. This conclusion is borne out by the facts that in *London Transport Executive v. Betts*. Lord Reid asserted in effect that there is no difference, so far as the binding force of the ratio decidedi is concerned, between a decision on the construction of a statute and a decision on any other point of law.

While it would plainly be going too far to say that there is anything in the nature of a fixed practice according to which decisions on the interpretation of a statute are only authoritative in subsequent cases in which all the material facts are the same, without regard to the rule of law which the judge considered necessary for those decisions, there is at least one reasoning why the ratio decidendi of cases concerned with statutory interpretation may have to be given a restricted effect. It is generally recognized that differing decisions on

the meaning of the same words need never be treated as conflicting if the words are used in different statutes.

It is possible to point to several cases in which, when a court has been called on to construe certain words in a statute, a decision on the me meaning of the same words in a different statute has been disregarded for no other reason than that the case was concerned with a different statute.[20] When this practice is followed, the ratio decidendi of the previous case may be restrictively interpreted because the court responsible of it may have thought it was acting on a moral general principle of construction.

Ex-parte Campbell

If the doctrine of precedent has something less than its usual force when the same words are used in different statutes, it may be more rigid than ever when applied to the re-enactment of a statute which has already been construed by the courts. In *Ex-parte Campbell*[21] James LJ said:

Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without alteration in a subsequent statute I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them.

Taken literally this rule if statutory construction would mean that, if a first instance judge construed a statute in a particular way and that statute were re0enacted in the same form, it

[20] R. v. Evan-Jones and Jenkins (1923) 17 Cr. App. Rep. 121
[21] [1869] LR 5 Ch 703 at 706

would not be open to he Court of Appeal or the House of Lords to give it a different interpretation.

That this was the interference to be drawn was asserted by Lord Buckmaster in *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.*[22] This view has however been decisively rejected by two decisions of the House of Lords, in each of which their Lordships refused to give to a re-enacting statute the meaning attributed to its terms by decisions of the Court of Appeal prior to the re-enactment. In Farrell v. Alexander, Lord Wilberforce expressed skepticism about the parliamentary endorsement of decided cases, on the ground that it might often be fictional to suppose that the draftsman had them in mind.

In the same case, Lord Simon rejected the doctrine on a different ground: the draftsman could indeed be presumed to know the relevant case-law, but he must also be presumed to know the relevant case-law, but he must also be presumed to known that any decision interpreting he words he uses carries only as much authority as it bears under the general doctrine of precedent.

Farrell v. Alexander was not cited in *R. v. Chard*[23], but in the latter case the House again repudiated Lord Buckmaster's view. They preferred the opinion expresses by Lord Macmillan in the Barras case, that the presumption in favour of parliamentary endorsement applied only where judicial interpretation was well settled and well recognized, and even then it must yield to the rule that statutory language is to be given its plain meaning where

[22] (1933) AC 402, 412
[23] (1984) AC 279

that can be clearly ascertained. It may be concluded that the doctrine derived from James LJ's principle now retains very little force.

PRECEDENT AND EUROPEAN COMMUNITY LAW

English courts loyally accept as conclusive the pronouncements of the European Court of Justice on European Community Law. They also accept the jurisprudence of the Court which has established that in the event of conflict between a rule of European law and a rule of domestic law, the former must prevail.[24] No such conflict has yet emerged so far as English rules of precedent are concerned. The Court of Appeal in *Duke v. Reliance* Systems Ltd. refused to regard an earlier decision of its own as per incuriam merely because an EEC directive, which might have influenced its construction of statute had not been cited to it. In that case, Sir Donaldson MR said that he did not believe that section 2(4) of the 1972 Act has the effect of abrogating the doctrine of stare decisis in this court, even when European law is involved. However the case did not concern directly enforceable rights but merely a directive binding national governments, and in any event the directive had not been issued until after the passing of the statute whose constriction was in question. No doubt, if an earlier Court of Appeal decision overlooked some directly enforceable provision of Community law the per incuriam exception would apply.

To conceive of a direct conflict between the provisions community law and the English rules of precedent is to imagine a situation in which something has gone awry with the procedure laid down by Art. 177 of the Treaty of Rome. That article provides that were a question of community law is raised before any court or tribunal considers that decision on the question

[24] Costa v. Enel (1964)

is necessary to enable it to give a judgment, it may request the European Court of Justice to give a preliminary ruling, The article further provides that where any such question is raised in a case pending before a court or tribunal against whose decisions there is not judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice. Thus a discretion to refer question is conferred on all courts and tribunals, and an obligation to refer is imposed on final appellate courts.

Where a reference is made, the ruling obtained is clearly binding on the referring court. For a direct clash with English precedent rules to occur, something like the following sequence of events would have to come about.

In case A, a superior English court rules in a question of Community law which, by virtue of direct applicability, is also a question of English law.) In case B, an inferior court or tribunal has the following alternatives: (1) to follow he ratio decidendi of case A; (ii) in the exercise of its discretion under Art. 177, to refer the satisfied, in the light perhaps Is a subsequent judgment I of the European Court, that the decision in case A was mistaken, itself to make a ruling in a country sense. Alternatives (ii) and (iii) would represent a departure from English rules of precedent. It seems clear that the jurisprudence of the European court itself supports at least the second alternative.[25] It was held in Rheinmuhlen cases[26] that no hierarchical rule of bindingness within a national court structure could exclude the discretion of an inferior court to refer a question under Art. 177 for a preliminary ruling.

[25] Brown and Jacobs, Court of Justice, 318-22
[26] Rheinmuhlen v. Einfuhr (1974) ECR 33 and 139

For the foregoing situation to have come about , the superior English court in case A would have had to have given a ruling either without making a reference or one which went beyond the terms of a ruling made pursuant to a reference. That might occur if, say, the Court of Appeal took the view that European law on a rule on a point was so clear that it need not exercise its discretion to refer the matter – always assuming that it also decided that, as to the issue before it, was not the final court of appeal so that it had a discretion not to refer. Or it might arise where the House of Lords took the view that the duty of the final appellate court to refer questions did not apply because some ruling of the European Court already covered the issue , or where the house simply overlooked the fact that decision on a question Community law was a necessary step in reaching its judgment. In the latter context, it may be surmised that the view that the per incuriam doctrine does not apply, as between rationes of the House and the decisions of inferior courts, would not be decisive. Should any of these scenarios arise, an English court or tribunal might be forced to choose between English rules of precedent and the jurisprudence of the European Court of Justice, an current trends suggest that it would prefer the latter. Indeed, an argument might be advanced that it was statutorily bound to do so by the terms of Section 3 (1) of the European Communities Act. That subsequent provides that any question as to the meaning or effect of any of the treaties shall be for determination in accordance with the principles laid down by the European Court, It might be contented that the issue whether English precedent rules have been partially abrogated is a question as to the effect of the Treaty of Rome.

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