BOOK REVIEWS

PRECEDENT IN ENGLISH LAW. By Rupert Cross. [Oxford: The Clarendon Press, Clarendon Law Series. 1961. viii + 268 pp. 21s.]

Case law is often regarded as the most distinctive feature of the English legal system. Precedent is an attendant, though, in my view, logically independent doctrine. Consequently the absence of any major study of the character of case law and of the doctrine of precedent is surprising, even if one accepts the thesis, for which case law may be adduced as evidence, that the pragmatism of Englishmen makes them averse from consideration of fundamental principles in their various tasks of industry commerce and government. Such studies as have been made are mainly to be found within books on 'jurisprudence'. Thus monographs and articles on the subjects are generally classified under that heading. Moreover, in British universities, the subjects usually follow the books, and are included in courses on jurisprudence. True they are subjects which are in great need of terminological clarification, conceptual analysis, and synthesis of principles, to name but tasks of analytical jurisprudence. But they are branches of English law, and other branches, which also need jurisprudential treatment, are expounded in separate treatises. It is true that case law and precedent are topics which pervade all other branches of law, and so have a degree of generality not possessed by subjects like contract, still less by such narrower topics as compulsory acquisition of land. Nevertheless, such pervasiveness has not inhibited the publication of works on statute law and its 'interpretation'.

We now have an important book on precedent: its sole predecessor has been out of print for a century. It is one of the Clarendon Law Series, and, though it will add to the high reputation of the Oxford law school, it is, accordingly, a general introduction to the subject, rather than a 'text-book'. Its author presents it as "an essay in analytical jurisprudence", though he does not rigidly confine himself to 'analysis': his description of judicial practice and his evaluation of legal rules are no insignificant part of the work. However, he does not attempt a comprehensive survey of judicial practices as does Karl Llewellyn in his book on the work of the U.S. appellate courts: he is mainly concerned with matters previously discussed in the jurisprudence books and articles. But though the author calls the book a work on "particular jurisprudence" dealing with "fundamental assumptions", its appearance is a major event in the history of English law. It brings together a number of basic problems which have hitherto been separately considered, and in his lucid exposition the author presents his own stimulating views. His solutions of some problems are contributions both to jurisprudence and to general theory of English law. For example, he answers the riddle set by Glanville Williams, and echoed by Lord Reid in *Scruttons v. Midland Silicones, Ltd.* [1962] A.C. 446 as to the possibility under the doctrine of precedent, of making binding changes in the doctrine. He lifts the doctrine, not however by its own bootstraps, on to the level of constitutional law. Nor does he deal merely with problems previously agitated. Thus, he discusses the relationship of precedent to the definition of law, and he considers how far the limitations in *Young* v. *Bristol Aeroplane Company* [1944] K.B. 718 are of general application, and affect decisions of the House of Lords. Above all, he has demonstrated the existence of an independent subject of precedent. It is to be hoped that on this foundation the author in a larger work, or some other scholar, may build that substantial structure which is called for by the importance of the subject.

My admiration for what has been attempted and accomplished by the author is, however, qualified by two sets of doubts. Was it not possible to provide a more adequate exposition of some of the topics covered? Was it not possible to have provided a more rigorous analysis of the language and concepts involved?

Two examples of the attenuated character of the exposition are to be found in the treatment on the one hand of comparative law and on the other of the interpretation of statutes. In the former the author omits consideration of the Justinian text *Non exemplis sed legibus judicandum est,* and of its derivatives in modern legal systems. In the latter he regards what is, in effect, Willis' treatment, afforced by a reference to the problem of vagueness, as a sufficient survey. Of course, this brief treatment can be explained on the ground that the book is on precedent and not on statute law, and the section serves but as an introduction to the interrelation of the doctrine of precedent with that of the interpretation of statutes. Nevertheless, the student needs surely to be brought into touch with the modern attitude of the courts. It is a minor matter that Willis's terminology is not in accordance with judicial practice. The 'golden rule' is not the rule that the gramatical and ordinary sense of words may be modified so as to avoid an absurdity or inconsistency, if, indeed, such a rule is recognized today. The 'golden rule' is that words be given their ordinary and grammatical meaning. Are we, with some judges, to invoke the Rule in *Heydon's Case* only after consideraton of the statutory words has disclosed an ambiguity, or may we, with other judges, first look at the social reasons for a statute, and then read the text in the light of that history?

The absence of uniformity of practice in connection with the interpretation of statutes, and the related variety of rules and doctrines, is paralleled in the field of precedent. Goodhart tells us that "there is no actual *uniform* operation of English courts concerning the operation of precedents" and Lord Reid finds "no invariable practice with regard to rationes decidendi". But the impression I received from this book, which a more careful reading may correct, is of some "brooding omnipresence in the sky" of a coherent body of principles forming *the* doctrine of precedent, and needing but the illustration of a few cases. Certainly we are referred to but few cases. It may. well be that the principles expounded are derived from a survey of many cases: the author from time to time speaks of the practice of the courts. Once again, the needs of an introduction for students may call for a telescope and not a microscope. Or is it that a 'jurisprudential' approach blurs the distinction between an ideal of consistency and a reality which depicts our lady the common law warts and all? I see the cases as revealing various patterns of doctrine, some maintained by one group of judges, some by another; some belong to a past era, some to the present, and perhaps some to the future; some declining, some rising. Some doctrines exist concurrently, without conscious recognition of their diversity by counsel or judges: and it is not easy to predict which will be submitted or applied in a particular case, though it is plausible to suppose some relation between submission and application. Judges will sometimes speak in terms of the ratio decidendi of a precedent, sometimes in terms of distinguishing cases, sometimes in terms of an 'explanation' of the precedent. Karl Llewellyn sees the conflict of doctrines as providing a rich choice of weapons in the armoury of justice, and discerns the existence of patterns of decision based on factors other than doctrines of precedent. I find the conflict disturbing, and am soothed by belief in the existence of dominating patterns of doctrines. But the discovery of such patterns requires a patient survey of the corpus of cases, not a recital of a selection of dicta.

Let me turn now to consideration of the book as a contribution to analytical jurisprudence. Despite the conventional name, the major tasks of this jurisprudence appear to be those of analysis of the language and concepts of legal discourse, and synthesis of the concepts and doctrines of legal systems. If the analysis discloses ambiguity of language or inadequacy of concepts, then the jurist may recommend a different terminology or a new conceptual framework. In the course of attempted synthesis the jurist may discover inconsistencies of practices and rules, but he cannot in this event make suggestions without becoming a sociologist and stating trends towards the rise of one or the decline of another doctrine, or becoming a politician and evaluating the opposed doctrines. My uneasiness is concerned more with the preliminary examination of words and processes, rather than with statements the author makes about trends and values. May I become less abstract by abstracting for consideration two pairs of related topics, (1a) The analysis of the phrase "applying a decision", and (1b) the related problem of the distinction between the the creative power of case law and the restrictive effect of precedent. (2a) The analysis of the phrase "ratio decidendi" and (2b) the related problem of the comparison of the examination of a precedent to see whether or not it contains a ratio decidendi applicable to the instant case, with the process of examining a precedent to see whether or no its facts are such that it can be distinguished from the instant case.

Both pairs are of course interrelated. Thus (1a) and (2b) are connected when the author links the phrase "applying a decision" with the existence of "a reasonable distinction between [a previous decision] and the instant case [which nevertheless] is not regarded as one which should be acted on". He finds in Lord Halsbury's dictum in *Quinn* v. *Leathem,* [1901] A.C. 495 about the 'logic' of precedent both a procedure for distinguishing cases on the ground of the 'objective' materiality of their facts and a procedure for deriving a ratio decidendi from "all the material facts before the court".

Both terms of the phrase "applying a decision" call for consideration. It is well to remember, as our author tells us, that "the words 'decision' and 'precedent' are often used synonymously", but we need also to be reminded that the word 'decision' may refer to a number of distinct matters, (i) 'Decision' is sometimes used as synonymous with 'precedent' or, indeed, 'case' (precedent or subsequent): (ii) 'decision' is sometimes used as referring to the final order of the court: e.g., that an appeal be dismissed. It is to such an ultimate decision that the verb refers in the phrase ratio decidendi. In this sense it may sometimes be synonymous with judgment, another ambiguous word: (iii) 'decision' is sometimes used as referring to the terms in which an issue between the parties is resolved. In this sense it is synonymous with 'holding'. The ambiguity of 'decision' obscures the distinction, made by Viscount Dunedin in *The Mostyn* [1928] A.C. 57, between being bound by a precedent in the sense that one must apply to the instant case the decision of an issue in the precedent case (the rule of law adopted in the precedent), and being bound by a precedent in the sense that one must not apply in the instant case a rule, which if applied in the precedent, would have led to a different (final) decision in that precedent case. When we speak of a past decision applying to the instant case analysis will often disclose that we refer to the application of the decision in the precedent of an issue of law in the precedent case: i.e. to the application of a rule of law propounded in the precedent case.

If the facts in the instant case do not fall under the rule adopted in the precedent case, its 'decision', then we could well say the 'decision' does not apply. But there is sanction in judicial usage, for saying that a decision 'applies', even though the rule propounded in it was stated in such a manner as to exclude the facts of the instant case. Cross refers the reader to the following *dictum* of Roxburgh J. in his brief discussion of the distinction between 'applying' and 'following' in *Re House Property and Investment Ltd.* [1954] Ch. 576. "It has often become material to consider whether a decision of the House of Lords should be applied in a case which can be distinguished but is analogous". There is a need for further analysis. It is provided by considering some *dicta* of Devlin L.J. in *Berry* v. *British Transport Commission* [1962] 1 Q.B. 306. There he examines various precedents from which he concludes that there is a rule that a party who had been awarded costs in civil cases can not allege that he has suffered damage by reason of the fact that the costs he recovered were less than he actually incurred. Devlin L.J. then speaks of seeing "whether [the rule] is equally applicable to criminal costs": He also phrases that notion in the words "The question is whether [the rule] should be extended to costs in criminal cases". Analysis discloses that in judicial language the word 'apply' is ambiguous: sometimes it refers to the process of stating that particular facts are comprehended in the general words of a rule: sometime it applies to the process of constructing a rule wider than the one given in the precedent case, so that the new rule may comprehend both the facts of the precedent case and the facts of the instant case.

Is it not desirable that there should be appropriate terminological distinctions to mark such very different concepts as that of law making — the extension of a rule, and law applying — the subsumption of facts under a rule? It seems to me plausible that if such a terminology existed we should see more clearly that Lord Halsbury's dictum in *Quinn* v. *Leathem (supra)* is 'really' a plea against extending rules merely by analogy. The ambiguity of 'applies' may induce the error that the new law made by extension is identical with the old law. If we eliminate that error, may we not see more clearly that the declaratory theory of precedent reflects a practice of judges to make new law on the analogy of old law? This practice, however, may diminish as judges become more conscious of the dangers of arguing by analogy.

The distinction between case law in general and a doctrine of precedent in particular is indeed made by the author. But, in my view, it could have been made more

sharply. The discussion of law making is to be found in a chapter entitled "Precedent and Judicial Reasoning". In the middle of a discussion about reasoning by analogy we find important additions to the earlier examination of the character of ratio decidendi. Of course, the sharpness of the conceptual distinction does not mean that in practice law making and law applying are not intertwined, that it may not be difficult to disentangle arguments for 'following' precedents from arguments in favour of principles and policies. Is not 'following' an old rule in new circumstances the making of a new rule? Perhaps my general doubts derive from my particular doubt about the assertion made by the author in his introduction that "in a system based on case-law, judges in subsequent cases *must* have regard to . . . the rules laid down by judges in giving decisions". A system of case-law appears to me to be a system of rules for which there is no legislative authority. I cannot see why such a system necessarily involves later judges in consideration of the rules propounded by earlier judges. And, even within a system incorporating a doctrine of precedent, the problem of deciding cases, in the absence of binding judicial authority, is different from that of determining whether a precedent is binding. But this is to take sides on the problem of the existence of "gaps in the law", a problem doubtless wisely omitted from the book.

An analysis of the use of the words 'ratio decidendi' is to me subordinate to an examination of the manner in which, in fact, judges treat precedent cases and of the evaluation of that judicial process. Nevertheless, its importance is considerable. Cross quotes statements of mine to the effect that the expression *'ratio decidendi'* is used in two senses. I have indicated a third sense other than the two cited, *viz*., any reason, including a finding of fact, stated by the judge as being a ground of his final decision: and I can give instances of *such* usage. Cross however tells us that "by common consent the *ratio decidendi* is a proposition of law". It is either "(i) The rule of law for which a case is of binding authority, (ii) The rule of law to be found in actual opinion of the judge forming the basis of his decision." He appears to me, particularly in his 'description' of the ratio decidendi, to use the phrase in the second sense. He says "The *ratio decidendi* is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him." If this sentence be considered in isolation, it may be regarded not as providing a nominal definition of *"ratio decidendi",* but as asserting that the rule for which a case is of binding authority is any rule of law expressly or impliedly treated by a judge as a necessary step, and thus as providing an illustration of the use of ratio decidendi in the first sense. But later we are told "The *ratio decidendi* of a case is generally the proposition of law for which that case may be cited as authority . . ." Here it would be self-contradictory to substitute for 'ratio decidendi' the rule of law for which a case is of binding authority. Though the author refers to Llewellyn's statement in his *Bramble Bush* of two meanings of the phrase 'ratio decidendi', which, in substance, are my two senses, he does not, however, cite Goodhart's characterisation of my second sense as "a novel sense which I find it difficult to understand, singularly unhelpful and unnecessary", or Goodhart's assertion that 'other writers' never use the phrase in that sense. Nor does he quote Simpson's epithet 'very eccentric', and his assertion that the two senses are 'not separable'. It does not appear that his use of the phrase 'ratio decidendi' is always consistent. In his exegesis of Lord Halsbury's dictum in *Quinn* v. *Leathern, (supra),* he surely uses the phrase in the sense of the rule of law for which a case is of binding authority. In his elaborate analysis of Goodhart's essay he nowhere suggests that Goodhart's use of the phrase *'ratio decidendi'* is in any way different from his own, though he does not accept Goodhart's method of determining the principle for which a case is 'authoritative'. However, if his terminological analysis, as opposed to his substantial description, of ratio decidendi is correct, then there is no need to bother about two different senses. That analysis is found in his comment on my two senses: "If our description of the *ratio decidendi* is correct, there is no distinction between these two senses of the phrase until a decision has been interpreted in subsequent cases. Up to that moment the rule of law for which the decision is of binding authority is to be found in the actual opinion of the judge, forming the basis of his decision". But this statement fails to distinguish adequately between the meanings of words and empirical description, between "what the description means" and "the thing which a description describes", between meaning and 'referring'. It happens to be empirically true that Sir Walter Scott was the author of "Waverley", but it is not true that the meaning of 'Sir Walter Scott' is the meaning of 'the author of Waverley. The meaning of 'the evening star' is not identical with meaning of 'the morning star', though both phrases refer to the same planet There is a distinction between the sense of 'the victor of Austerlitz' and the sense of 'the prisoner on St. Helena', though it was the victor of Austerlitz who

became the prisoner of St. Helena. There is a distinction between the sense of 'ratio decidendi' as a rule for which a decision is of binding authority and its sense as the rule found in the opinion of the judge, even though it be always true that the rule for which a decision is of binding authority is that found in the opinion. Moreover, if Simpson were correct, so that as a matter of empirical usage the element of binding authority always appears as part of the usage of the phrase 'ratio decidendi', then not only would it be odd, because self-contradictory, to say that a ratio decidendi is not binding, it would also be odd, because tautologous, to say that a ratio decidendi is binding. However, such, or similar, phrases are by no means uncommon.

It would be well, in view of the sterile character of merely terminological disputes, if one could turn to the examination of the substance of the doctrine of precedent unencumbered by the phrase 'ratio decidendi'. One can certainly ask how far it is true to say with Goodhart that the underlying principle which forms a precedent's authority is not found in the rule of law set forth in the opinion. In my opinion, such a proposition can be supported by reference to cases in which the technique has been adopted of asking whether or not a precedent can be distinguished 'on the facts'. On the other hand, it is opposed to cases in which the technique has been adopted of asking whether the ratio decidendi of a precedent falls to be 'applied' in the instant case. There is no uniform and coherent doctrine at present of handling precedents, but, broadly speaking, two procedures involving opposed doctrine, though I perceive a trend in favour of seeking for the ratio decidendi. (The technique of 'explaining' cases, castigated by Hamson as "making nonsense of case law", is perhaps best 'explained' as a variant of distinguishing cases.) Moreover, just as Lord Reid has said that "there is no invariable practice with regard to *rationes decidendi"* so I find no invariable practice with regard to distinguishing cases on the facts. Some of the practices can be reconciled with the technique of seeking for the binding principle in the rule of law set forth in the opinion: but some cannot. The examination of the judicial procedures of distinguishing, however, leads us back to the language of ratio decidendi, for some of the judgments use both terms and sometimes both procedures. Thus Lord Reid has said we may "limit" a "ratio decidendi" if "it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision". We need to compare the technique of examining a precedent to see whether it contains a ratio decidendi that must be applied to the instant case with the technique of examining a precedent to see whether or not its facts are such that it can be distinguished from the instant case.

In the passage dealing with Lord Halsbury's dictum in *Quinn* v. *Leathem, (supra),* Cross does indeed discuss the distinguishing of case in relation to *'ratio decidendi'.* He appears to regard the process of distinguishing, indicated by Lord Halsbury, as leading to the view that "the *ratio decidendi* is derived from the material facts of the case". This is not Goodhart's doctrine, though in this sentence 'ratio decidendi' is used as Goodhart uses it. The 'material facts' are not those "treated by the judge as material". "The basis of Lord Halsbury's pronouncement", says the author, "seems to have been that every case has certain facts which every lawyer would regard to be material, quite apart from what the judge says about them. In order to determine the *ratio decidendi* of a case it is, on the view under consideration, only necessary to eliminate objectively immaterial facts i.e. those facts which all lawyers would agree could not reasonably be made a ground for distinguishing the case in subsequent litigation". This legal mystique of the agreement of lawyers is surely the author's conception rather than Lord Halsbury's. It shouts for analysis. The author only spends a few more sentences, later in the book, on the process of distinguishing. On the whole, his treatment of the topic suggests that the process is not reconcilable with that of considering the rule set forth in the precedent as binding.

On the other hand, Glanville Williams does reconcile the process of distinguishing with that of applying a judge's ratio decidendi. We should note first that he employs the terminology of "expressed ratio decidendi" as meaning "the rule that the judge who decided the case intended to lay down and apply to the facts". Thus "expressed ratio decidendi" is synonymous with "ratio decidendi" in my second sense. I shall employ the phrase 'ratio decidendi' henceforth in this second sense. Glanville Williams tells us that "Genuine . . . distinguishing occurs where a court accepts the expressed *ratio decidendi* of the earlier case . . . but finds that the case before it does not fall within the *ratio decidendi* because of some material differences of fact".

It is but a short step from this to saying that an instant case is distinguished from the precedent case if the ratio decidendi of the precedent case does not apply to the facts of the instant case. Such a proposition would eliminate all antithesis between the procedures of applying rationes decidendi and of distinguishing cases.

But what about the 'authorities'? Lord Halsbury's dictum is a weak peg on which to hang a thesis of opposing 'distinguishing' to 'ratio decidendi'. Glanville Williams supplies none for his view. What is required is a comprehensive survey of cases. The impression I have is that neither Cross nor Glanville Williams has given an adequate account of the actual procedures used in distinguishing, and that some cases support one account and some the other. It is not possible here to justify that impression. It is, however, instructive both in relation to the comparison of the two procedures of 'distinguishing' and 'ratio decidendi', and to their relation with the problem of analogical extension, to look at a case previously cited, which was referred to by Cross in his account of applying cases.

In *Re House Property and Investment, Ltd.* [1954] Ch. 576 the two techniques of distinguishing and determining the ratio decidendi are pursued by the same judge in one judgment. A landlord leased shops to L, who assigned the lease to H, who went into voluntary liquidation. In the course of the winding up H assigned the lease to B. An assignor remains liable in English law on the convenant to pay rent. The landlord claimed that the liquidator should set aside funds to meet H's liability as assignor (sufficient, indeed, to pay every instalment of rent as it fell due). The authority on which he relied was *Elphinstone* v. *Monkland Iron and Coal Co.* (1886) 11 App.Cas. 332. Roxburgh J. said "If it decides the point before me — in other words if I cannot distinguish that case from the present case — I conceive myself to be bound by it". In it a lessee, who had purported to assign, went into voluntary liquidation and the landlord, in effect, succeeded in having a sum set aside to meet the rent. In Scots law an assignor ceases after assignment to be liable to pay rent. The difference in law was for Roxburgh J. "a fundamental difference". The purported assignment was invalid, and, consequently, the assignor remained liable, but his liability, unlike the liability of the assignor in the *House Property* case, was a sole liability: there could not in Scots law be liability of both assignor and assignee. Accordingly, Roxburgh J. said of the Elphinstone case "I regard the case as of no authority whatever on what the position would have been if the decision had been that the old company [the purported assignors] and the new company [the purported assignees] were both liable". The case was distinguished from the instant case.

Roxburgh J. then proceeded to consider whether, even though *Elphinstone's* case could be distinguished, he should extend it on the ground that the instant case was analogous. But this question was soon transformed into asking "ought I to follow some of the things that were said in the course of the speeches": and this question became one of considering whether the dicta were obiter. If they were obiter Roxburgh J. "was not willing to adopt" them. Apparently, therefore, if ratio he thought himself bound. The question arose thus: there being no valid assignment the lessee was liable to pay rent, but that was only a future liability, since it was to pay the future instalments, and it was a contingent liability since it would cease on assignment. The Court of Session had said that the landlord's claim to have funds set aside could not be made as of right because there was no present liability. This view was rejected in the House of Lords. Lord Herschell said "If any liability existed ... he was entitled to have provision made for it by the liquidators," and Lord Watson made it clear that "any liability" included "future or contingent liabilities". The contention was that these dicta involved the generalization that any landlord is entitled to have funds set aside in a liquidation to meet any future or contingent liabilities. This would cover the position in England of an assignor of a lease, and it was maintained that Roxburgh J. should apply that principle. But he rejected the contention. In the first place he resolved, what our author calls the "psychological problem" of what the dicta meant, by saying that they were not intended to apply "without any regard to the circumstances", to cover cases other than those of "sole liability". And, secondly, if they said anything more then they were 'obiter'. No ratio decidendi in *Elphinstone's* case applied to the instant case.

The consideration given in the past few pages to the analysis of aspects of the doctrine of precedent is evidence of the stimulating power of the author, which extends over a far wider range of topics than those selected by me. Nor as I have already said are those topics confined to analytical jurisprudence. Even this 'review'

must have an end, and I would, in conclusion, support the proposal suggested by the author in his conclusions, that statutory power should be given to the House of Lords to overrule its past decisions. The value of this book can indeed be assessed by the impressive manner in which the author marshalls arguments and authorities in support of his proposal. His empirical realism is shown by his recognition of the fact that the adoption of the practice might not make much difference in practice, and his sense of values by his appreciation of the greater need for a partnership between courts and legislature with regard to statute law than for changes in the doctrine of precedent. Throughout, the book is informed by a spirit of reasoned discussion and broad perspectives. The future or our legal system will perhaps be most influenced by the education of lawyers and citizens. The author has made a notable contribution to law as a medium of liberal education, which is one of the aims of the Clarendon Law Series.

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