CURRENT LEGAL PERIODICALS

Precedent in Past and Present Legal Systems. C. Sumner Lobingier. 44 Michigan Law Review: 955-996.

The stare decisis principle is not peculiar to the Common Law but "is inherent in every legal system". It is found in the law of ancient China, Babylon, Assyria, Greece and Rome, and Bracton in England, 1250 A.D., cited about 500 cases. In Civil Law jurisdictions today it "seems to be gaining ground". In the United States soon after the revolution, statutes were passed in some states forbidding the citation of English authorities in the courts but long before 1900 the authority of precedents was as strong as in England. Recently the eclipse of the doctrine has been predicted. In this article it is analyzed and defined. Precedents are said to be imperative or persuasive, declaratory or creative. Precedent-making is compared with statute-making.

The application of the principle is limited in various ways; decisions are reluctantly adhered to, distinguished or overruled directly or by implication. The decision overruling a precedent may or may not be considered to have retroactive operation. The author suggests that the remedy for the "perversions and abuses" with which the precedent method has been applied, would be to have a continuing advisory committee "to report periodically on needed changes in case law".

Objections to the use of the principle are said to be, multiplicity of decisions, irregularity of its operation and its lack of certainty. However, text-books and digests help the practitioner to find his way through the "flood of decisions"; the proposed committee could recommend the overruling of law decisions which might otherwise remain precedents for long periods; to the objection that stare decises does not attain certainty the author quotes Franklin's remark about religion: "If men are so bad with it, what would they be without it?" The conclusion reached is that all objections could be removed or materially lessened by "careful, intelligent, and fearless application by. . . . the courts, aided by a committee of experts".

Over 200 footnotes referring to cases and legal-periodical articles constitute a most complete bibliography of this subject.

The Interpretation of Statutes Subject to Case Law. W. H. D. Winder, 58 Juridical Review: 93-106.

Where in a statute a word appears which has been previously considered in decided cases, "to what extent must the statute be construed as having adopted the existing judicial interpretation of the word?" Different answers to this question are to be found in the authorities.

In *Ex p. Campbell, In re Cathcart* (1870), 5 Ch. App. 703, the rule was laid down that Parliament would be presumed to have given statutory effect to the judicial interpretation. Lord Macmillan in a recent case would confine the rule to cases in which "the judicial interpretation is well settled and well recognized". Lord Blanesburgh, in the same case, would seem to favour a third opinion, namely that decisions made prior to the passing of a statute should have no more binding effect than have other decisions. They would then not be binding on a higher court.

Mr. Winder cites other cases, some supporting the rule as laid down by Lord Blanesburgh and others failing to apply or even to refer to it. He concludes that "the true principle is that judicial decisions on words which are incorporated in a later enactment have no more than the accustomed binding authority of decided cases".

The Ancient Grudge: A Study in the Public Relations of the Legal Profession. Max Radin. 32 Virginia Law Review: 734-752.

Professor Radin begins by quoting a statement by Boniface VIII in 1296, "that laymen are extremely hostile to the clergy" and says that where there is a group of men set apart, with special privileges, the mass of the people is suspicious and resentful.

Among the ancestors of the lawyer were the sophist, the rhetor who could express the complaints of the unlearned, the witch-doctor, the Athenian sycophant, the Roman delator and the generations of men who disputed as to the nature of law. The legal profession appeared in the Mediterranean world in Graeco-Roman times and after the Renaissance it became in most countries a quasi-corporation and became secularized. In France its members filled the administrative offices and both there and in England the practice of law brought great rewards.

Even in Greece and Rome before they constituted a closed corporation, the lawyers, or those who pleaded for litigants were censured for hypocrisy and for charging high fees, but this criticism was not ill-humoured and had not the bitterness seen

"in later diatribes against lawyers". Indeed, even in modern times there has been something like a "sneaking admiration" for the lawyer who could plead for either side of a question. The ancient grudge has been deepened and intensified, emphasis being laid on the particular vice of rapacity, but the grievance seems rather that anything has been charged at all. Others can rightly claim remuneration for their services but why should one have to pay for justice?

While there is a body of law there will be lawyers and while there is a monopoly of public functions in a group set apart by examination or apprenticeship there will be "both envy and rancor". Professor Radin doubts whether many lawyers have justified Gulliver's "bitter arraignment" but suggests that, if lawyers would do a little soul-searching, they would not thereby become popular but would be able "a little more easily to smile at their unpopularity".

Law and Science in Collision: Use of blood tests in Paternity Suits. Sidney B. Schatkin. 32 Virginia Law Review: 886-901.

Affiliation suits give rise to almost insoluble problems and receive little publicity. It is submitted, however, that the need for justice in such suits is as great as in other cases and that courts should not, as so many do, in the opinion of the author of this article, "deliberately reject the aid of science" which would make for a more accurate determination of facts in paternity actions.

In these cases intimacy between claimant and defendant is proved by witnesses, hotel registers and the like corroborative evidence, but the actual issue is whether or not the defendant is the father. This "is peculiarly within the realm of science" but the defendant is ordered to pay maintenance for sixteen years although evidence similar to that on which the decision has been made "would not be sufficient to secure a conviction for a breach of parking regulations".

The Chaplin verdict and others referred to are said to have been contrary to science, nature and truth. The courts have held that a blood test exclusion is a mere item of evidence to be weighed with other evidence and that it is merely an expert's opinion, whereas they should have held, if proper inquiry had been made, that such evidence reported by qualified pathologists was final and conclusive proof of non-paternity. In continental European courts such tests have been used since 1920 and the thousands of exclusions indicated have almost invariably been followed by confessions of intimacy with other men.

Today five distinct tests are made, which "can exclude slightly more than fifty per cent of men incorrectly accused". Can we afford to ignore this scientific achievement?

The Art of the Jury Trial. Lewis Nizer. 32 Cornell Law Quarterly: 59-72 (a lecture delivered to the N.Y.County Lawyers' Association).

There is not a right way to try a case but a right way for each individual lawyer. The one who boils over with indignation should not attempt to be suave and the quiet, kindly lawyer should not try to be loud and sarcastic. Each should express his talents in his own way. However there is one inflexible rule for all, which is that they must prepare their cases thoroughly.

It is important that all documents, relevant and irrelevant, concerning a case be listed and studied. A trial lawyer should expect to lose at least six pounds during the course of a trial since he must work day and night. He should use finesse in questioning prospective jurors. He should open with a "carefully selected statement of what he hopes to prove. Mr. Nizer tells of a junior who made a very eloquent opening, which, according to his senior, "opened the case so wide I don't know how in hell I will ever be able to close it". He has laboured for five or six hours to organize a twenty-minute statement. The jury should be prepared for the statement.

Witnesses should be told what they are to expect and lawyers should encourage them and become thoroughly acquainted with them before trial. They should be drilled in cross-examination and certain rules of evidence should be explained to them. Cross-examination need not be cross and should not be aimless or a fishing expedition. "A fisherman pulled into the water by his catch is an ungainly sight." Counsel should not rush in with a document which contradicts a witness but should carefully build up his triumph so that there can be no orderly retreat. "Innocuous" admissions may, when joined up with later evidence, be of great importance, The jury's reactions to a witness should be considered in deciding how to cross-examine him. In summation, quotations from testimony of opposing witnesses are very effective and should be used where possible.

It is said that juries give the right verdicts ninety-nine per cent of the time but do not always select the right reason. That they occasionally go wrong is often the fault of counsel. A skilful trial lawyer may make it appear that the facts and law are on his side, so that on the evidence adduced the right decision is made.

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