

Ratio Decidendi and Rules of Law

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It is proposed in this article to join issue with Dr. A. L. Goodhart on his view that the *ratio decidendi* of a case is to be found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.¹ The circumstance that Dr. Goodhart addresses himself to "the student faced with his first case book"² should not lead to the supposition that behind this modest facade there are no deep jurisprudential truths, for at least two other great writers have made considerable contributions in this sphere in works addressed to beginners.³

There is no doubt that Dr. Goodhart's essay has proved of great value in providing the newcomer with an introduction to the study of case-law, and Professor Glanville Williams has adopted his approach to the subject in a book which has a very wide circulation among beginners in the study of law.⁴ It will however be submitted in this article that although Dr. Goodhart has done service to law students, whether beginners or lawyers of standing, by drawing attention to an aspect of case-law hitherto neglected, his attack upon the orthodox theory of the *ratio decidendi* leaves that theory very much where it stood before.

What is the orthodox theory of the *ratio decidendi*? In the words of Professor Morgan, "the rules of law applied by the court, the application of which was required for the determination of the issues presented, are to be considered as decision",⁵ that is, *ratio decidendi*. It is then a proposition of law, and one necessary for the decision of the case. If not necessary for the decision, it is an *obiter dictum*. Dr. Goodhart adopts the position that the rule

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¹ Essays in Jurisprudence and the Common Law (1931) p. 1; (1930), 40 Yale L.J. 161.

² *Op. cit.*, p. 11.

³ Professor Karl Llewellyn, *The Bramble Bush* (1930); Professor Wambaugh, *The Study of Cases* (1894).

⁴ *Learning the Law* (2nd ed.) p. 50.

⁵ *The Study of Law* (1st ed.) p. 109.

of law set forth by the judge is not necessarily the *ratio decidendi* of the case. It will be convenient to split Dr. Goodhart's observations into two parts, firstly his description of the mental process of the judge in deciding a case, and secondly his assertion that a study of this process demonstrates the unsoundness of the orthodox view of *ratio decidendi*. In this paper it is the latter conclusion that will be questioned, while the former will be largely admitted. It may be conceded that it is by his choice of the material facts that a judge arrives at his proposition of law. This is the process of abstraction, which has been described as "the mental operation of picking out certain qualities and relations from the facts of experience".⁶ It has also been said that "all thinking depends upon it".⁷ Even so, it seems at first sight that the proposition of law is the substance, and the process of abstraction the shadow, the mental process in arriving at the goal, but nothing more. This process may be subconscious, as in the case of babies,⁸ and it is unlikely that even judges analyzed what they were doing until Dr. Goodhart had opened their eyes. It seems therefore that a judge will take more care over his enunciation of a proposition of law, than in his attitude towards a particular fact in the case. Dr. Goodhart states, with respect rightly, that the *ratio decidendi* should not be sought in the reasons which a judge gives for his decision.⁹ It is submitted that similarly the possibly subconscious mental process of the judge should not be stressed to the exclusion of his express statement of law. Assuming, however, for the sake of argument, that the mental process is the substance and the statement of law the shadow, it is a startling proposition that they do not necessarily coincide. Wherever the emphasis is placed, the same result should be achieved. If this is not so, the inference seems to be that the judge's mental processes will not bear examination. It is therefore reasonable to expect convincing arguments to establish that lawyers have for centuries been mistaken in treating the proposition of law as the essence of the case. Dr. Goodhart must bring light to those who, with the beginners to

⁶ Glanville Williams, *op. cit.*, p. 53.

⁷ *Ibid.*

⁸ See Glanville Williams' illustration, *op. cit.*, p. 53.

⁹ Goodhart, *op. cit.*, p. 2. There is of course ambiguity in the word "reason", as observed by the Supreme Court of South Africa in *Pretoria City Council v. Levinson*, [1949] 3 S.A.L.R. 305, at p. 316, a case for which I am indebted to Professor D. V. Cowen of Capetown University, where Dr. Goodhart's view that the reason for the decision is not the *ratio decidendi* is criticized. But it is submitted that a judgment must contain a decision, usually a *ratio decidendi*, and sometimes the underlying reasons for the *ratio*. The underlying reasons may be found for example in history, logic or policy. Dr. Goodhart rightly stresses that a case may contain a valid legal principle, although it is based on an erroneous view of history, faulty logic or questionable policy.

whom he refers, have been enthusiastically underlining the propositions of law in their case books.

Before examining the arguments Dr. Goodhart advances, the ambiguity in the term *ratio decidendi* must be remembered. In the words of Professor Glanville Williams, "it may mean either (1) the rule that the judge who decided the case intended to lay down and apply to the facts, or (2) the rule that a later court concedes him to have had the power to lay down. Courts do not accord to their predecessors an unlimited power of laying down wide rules."¹⁰ Again, "there is another kind of *obiter*, which perhaps is not properly speaking an *obiter* at all, namely a *ratio decidendi* that in the view of a subsequent court is unnecessarily wide".¹¹ For the purposes of this article, the latter kind of *ratio decidendi* will be referred to as "*obiter ex post facto*".

Dr. Goodhart submits four reasons for rejecting the proposition of law formulated by the judge as the *ratio decidendi* of the case: "There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow. In appellate courts, the rules of law set forth by the different judges may have no relation to each other."¹² It is proposed to examine each of these arguments in turn.

(1) *There may be no rule of law set forth.*

At the present day this is not a difficulty normally met with, but in many reports of cases of no great antiquity little more than the facts and decision of the court are given. The orthodox theory is of course no help here. According to Dr. Goodhart, all the facts are material, except the facts of person, time, place, kind and amount.¹³ Even if it is admitted that the exclusion of such facts is a clean operation,¹⁴ it is submitted that the inclusion of all other facts as material will leave too narrow a rule of law to be of any great value as a precedent. This will be true of all decisions where loose ends are left in the judgment. By way of illustration the case of *Rex v. Bontien*¹⁵ may be considered. There the court held that signing in an assumed name is not forgery, where the prisoner can prove that he was already known by this assumed name before making the document in question. The judgment of

¹⁰ Glanville Williams, *op. cit.*, p. 55.

¹¹ *Op. cit.*, p. 59.

¹² Goodhart, *op. cit.*, p. 5.

¹³ *Op. cit.*, p. 11.

¹⁴ This is denied by Professor Julius Stone, *The Province and Function of Law*, p. 187.

¹⁵ (1813), Russ. & Ry. 260.

the court is reported in two or three lines, and there is no indication whether the court held that the document in such a case is not a false one, or that there is no forgery because there is no intent to defraud by the falsity of the document. Dr. Goodhart's theory gives no help in such circumstances, and only extrinsic evidence, such as the reporter attempts to provide in the shape of other authorities, can assist in explaining the decision. The only value which can be abstracted from such cases is derived from "our knowledge of the law in general and by our common sense and our feeling for what the law ought to be".¹⁶ In any case it seems unnecessary for Dr. Goodhart to evolve a theory to meet a difficulty that no longer exists. It is true that the courts may still have to discover the *ratio decidendi* of old cases of this sort, but no one can ever have been misled by the orthodox theory which clearly does not apply, and it is no criticism of this theory to admit this, for no doctrine of binding precedent can be effective unless there is efficient law reporting.¹⁷

(2) *The rule of law may be too wide.*

The first case which Dr. Goodhart uses to demonstrate the inadequacy of the orthodox theory is *Rex v. Fenton*. There *F*, in sport, threw large stones down a coalmine, whereby *X* fell from an overturned corf and was killed. *F* was indicted for manslaughter and Tindal C. J. directed the jury: "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter".¹⁸ Dr. Goodhart remarks¹⁹ that this statement of the law was held to be too wide in the subsequent case of *Regina v. Franklin*,²⁰ where *F* threw *A*'s box from Brighton pier into the sea, killing a bather, and Field J. left the case to the jury on the broad ground of negligence.

Dr. Goodhart's illustration makes the reader momentarily wonder which of the two meanings of *ratio decidendi* just mentioned²¹ he has in mind. Is it the rule the judge intended to lay down, or the rule that the subsequent court conceded him to have had the power to lay down? In other words, is he setting out to help the reader to discover what *ratio decidendi* the judge

¹⁶ Glanville Williams, *op. cit.*, p. 54.

¹⁷ The application of Dr. Goodhart's theory equally requires efficient reporting; see especially his conclusion (4) at page 26, also his remarks at page 11 on *Williams v. Carwardine*.

¹⁸ (1830), 1 Lew. 179.

¹⁹ Goodhart, *op. cit.*, p. 6.

²⁰ (1883), 15 Cox 163.

²¹ See footnotes 10 and 11 *supra*.

intended, or to show that the proposition of law is not necessarily the *ratio decidendi* because a subsequent court did not concede to the judge power to lay down so wide a principle? It seems that Dr. Goodhart is here concerned with the first meaning: he is seeking to discover what the judge intended to decide. That this is Dr. Goodhart's viewpoint seems to be established by the following passage: "His conclusion is based on the material facts as he sees them, and we cannot add or subtract from them by proving that other facts existed in the case".²² "We" cannot therefore escape from the full force of the proposition laid down by Tindal C.J. by proving the additional fact, that the wrongful act of the prisoner was to his knowledge dangerous to life, provided that the judge held this fact to be immaterial. Can a subsequent court in Dr. Goodhart's view perform this function? Dr. Goodhart seems to answer this question in the negative in the following passage: "In a certain case the court finds that facts *A*, *B* and *C* exist. It then excludes fact *A* as immaterial, and on facts *B* and *C* it reaches conclusion *X*. . . in any future case in which the facts are *B* and *C*, the court must reach conclusion *X*."²³ On Dr. Goodhart's view therefore a subsequent court cannot rely on the dangerous quality of Fenton's act, provided that the judge held this fact to be immaterial. Applying Dr. Goodhart's test the only facts the judge expressly treated as material are:

Fact I. *F* committed an unlawful act;

Fact II. *F* caused death thereby.

The judge never adverts to the question whether *F*'s act was to his knowledge dangerous to life. Dr. Goodhart's approach to such a situation is as follows: "Under these circumstances there are two possible explanations of the omission: (1) the fact was considered by the court but was found to be immaterial, or (2) the fact in the record was not considered by the court as it was not called to its attention by counsel or was for some other reason overlooked".²⁴ As to the choice between these possibilities, Dr. Goodhart observes that "the burden of showing that a fact has been overlooked is a heavy one".²⁵ The probability is therefore that the omission of the fact by Tindal C.J. was not an oversight, and this probability is increased when it is remembered that in 1830 there was no feeling against the doctrine of constructive malice in murder or manslaughter.²⁶ It seems therefore that on

²² Goodhart, *op cit.*, p. 10.

²³ Goodhart, *op cit.*, p. 22.

²⁴ *Op. cit.*, p. 14.

²⁵ *Ibid.*

²⁶ See Russell on Crime (10th ed.), p. 634, on *Fenton's* case: "Doubtless as the authorities stood at that date this *dictum* could be justified".

Dr. Goodhart's test the proposition of law enunciated by Tindal C.J. is the *ratio decidendi* of the case. The orthodox theorist would adopt the same view, provided the proposition of law was necessary for the decision, a point to be considered later. Since both theories lead to the same result, no flaw in the orthodox theory has been revealed.

It now remains to consider the possible effect of the decision of Field J. in *Regina v. Franklin* on the view here expressed that the principle enunciated by Tindal C.J. in *Rex v. Fenton* is the *ratio decidendi* of that case. The possibilities appear to be threefold. Field J. might have considered (i) that the wide proposition of Tindal C.J. was qualified if his judgment was read as a whole, or (ii) that it was merely an oversight on the part of Tindal C.J. not to refer to the dangerous quality of the act, or (iii) that Tindal C.J. had laid down the rule too widely and his wide proposition was merely *obiter ex post facto*. If possibility (i) could be established, it would lend some support to Dr. Goodhart's theory. Indeed it may be conceded that the judgment must be read as a whole, and that a proposition of law subsequently qualified by the judge is not the *ratio decidendi*. There is however no evidence that Tindal C.J. qualified his proposition or that Field J. believed he had. If possibility (ii) could be established, Dr. Goodhart might argue that his theory will lead to a much needed flexibility in the application of the doctrine of *stare decisis*, if subsequent courts are permitted to restrict the propositions of law laid down by their predecessors by finding that the previous court omitted reference to a material fact *per incuriam*. There is however no hint of such an argument anywhere in Dr. Goodhart's essay: his emphasis is throughout on the power of the judge to exclude facts as material, and in the case of omissions, as I have noted, he places a heavy burden on those who assert that the omission was not deliberate. Possibility (iii) appears to be the likely one. In the fifty-three years since *Fenton's* case, a reaction against the doctrine of constructive malice in homicide had set in, and Field J. was not prepared to concede to Tindal C.J. the power of laying down so wide a principle. He therefore distinguished the case, but by a method permissible under Dr. Goodhart's rules, by treating as material a fact that Tindal C.J. had implicitly treated as immaterial. Dr. Goodhart gives no indication of the importance of this power of converting *ratio decidendi* into *obiter ex post facto*, in fact he seems to deny such a power.²⁷

The second illustration put forward by Dr. Goodhart is the

²⁷ See footnote 23 *supra*.

case of *Riggs v. Palmer*,²⁸ where the court held that a legatee, who had murdered the testator, could not take under the will, because no one is permitted "to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime". Dr. Goodhart observes that this is an overstatement of the principle.²⁹ This is true, but the passage quoted is not a proposition of law, but a statement of the underlying reasons for the legal principle, which Dr. Goodhart has already rightly discarded as a possible interpretation of the meaning of *ratio decidendi*. Moreover, this, as the judge himself states, is "a general, fundamental maxim of the common law". The orthodox view of *ratio decidendi* does not imply that the whole of the law is to be found in a few broad maxims. The difficulty of finding the *ratio decidendi* of the *Riggs* case is that the judge delivers the rule several times, now broader than before, now narrower. Professor Llewellyn has commented on this phenomenon,³⁰ and the *Riggs* case is a good illustration of his point. There are at least four different statements of the rule by Earl J.:

(i) By reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him.

(ii) He caused that death and thus by his crime made it (the will) speak and have operation. Shall it speak and operate in his favour?

(iii) He made himself an heir by the murder and he seeks to take property as the fruit of his crime.

(iv) He cannot vest himself with title by crime.

What are the material facts as seen by the judge on Dr. Goodhart's view? Presumably the legatee need not be a grandson of the testator. Common sense tells us this. Is it material that the crime was murder, and not manslaughter, and that the killer claimed under a will and not an intestacy? It is submitted that neither Dr. Goodhart's theory nor the orthodox one is of great help in such a situation. Whichever approach is adopted it is likely to yield similar results. If a wide view is to be taken, Dr. Goodhart might say that a fact once excluded as immaterial in any proposition is always immaterial, and orthodoxy could reach the same conclusion by an amalgam of all the propositions of law in the widest possible terms. A narrow approach, which Dr. Goodhart seems to favour in this type of situation,³¹ can lead to

²⁸ (1889), 115 N.Y. 506.

²⁹ Goodhart, *op. cit.*, p. 7.

³⁰ Llewellyn, *op. cit.*, p. 41.

³¹ Goodhart, *op. cit.*, p. 21.

an exactly opposite result, orthodoxy selecting the narrowest principle stated, and Dr. Goodhart regarding a fact as material unless consistently rejected as immaterial.

Dr. Goodhart's final illustration is taken from the judgment of Ashhurst J. in *Lickbarrow v. Mason*: "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it".³² Ashhurst J. does not advance this as a proposition of law to decide the case, but, as he himself says, "a broad general principle that will be a strong and leading clue to the decision". Dr. Goodhart observes that it has encouraged much vain litigation.³³ That reliance has been placed on it by counsel in subsequent cases seems to be due not to the false impression that it was anything but *obiter*, but to the "desperate search for quotable language",³⁴ and to the very width of the principle, which thereby brings many a litigant within its ambit. Not even the most rigid exponent of the orthodox theory has ever seriously thought that it was anything but *obiter*. Only one of the three judges refers to it even in the lower court. The *ratio decidendi* is clearly that the endorsement of a bill of lading in blank for value defeats the right of stoppage *in transitu*. It may be conceded that this *ratio decidendi* does not emerge *verbatim* from the judgment. But Dr. Goodhart attacks the orthodox view even where the court does sum up the result in a general statement of the law. The *Lickbarrow* case contains no such summing up, so that it cannot support Dr. Goodhart's thesis in its full amplitude. But to resist Dr. Goodhart's attack in its entirety all the indulgence the exponent of the orthodox need crave is permission to read intelligently. As in *Lickbarrow*, no one sentence may contain the whole *ratio decidendi*, for the judge usually builds up his argument point by point, and does not always express the totality of his conclusions, but if the reader pieces together the fragments the result is clear. This is the function of the headnote, to assist the reader in spelling out the proposition of law. Surely the advocate of the orthodox theory can claim this indulgence, when the rival theory requires an elaboration of so many complicated rules to determine what facts the court considered material.

(3) *The rule of law may be too narrow.*

In one sense the rule of law can never be stated in too narrow a form. It is always open to the judge to confine himself to the

³² (1787), 2 T.R. 63, at p. 70.

³³ Goodhart, *op. cit.*, p. 7.

³⁴ Llewellyn (1938), 47 Yale L.J. 1243, at p. 1246.

particular facts of the case, and, if he does so, that will be the *ratio decidendi*, though of course he can always be criticized for not doing his judicial duty, which is "to decide the particular dispute only according to a general rule which covers a whole class of like disputes",³⁵ or more simply "to decide the case according to a general doctrine".³⁶

Dr. Goodhart is not referring to this difficulty, but seems to mean that if a particular proposition of law is divorced from its context one may mistakenly regard it as the *ratio decidendi*, whereas the judge was really deciding the case on wider grounds. He illustrates his point³⁷ by reference to the cases of *Barwick v. English Joint Stock Bank*³⁸ and *Lloyd v. Grace, Smith*.³⁹ As in his discussion of the cases of *Fenton* and *Franklin*, Dr. Goodhart does not expressly distinguish between the two meanings of *ratio decidendi*, the second of which is referred to in this article as *obiter ex post facto*. In *Franklin* the court treated the proposition of law in the earlier case as unnecessarily wide. In *Lloyd's* case the House of Lords treats the proposition of law in the earlier case of *Barwick* as too narrow. Professor Glanville Williams' remarks, cited already,⁴⁰ may be expanded to include this type of case, and it may be submitted that a proposition of law which a later court sees fit to extend to meet a new situation is still the *ratio decidendi* of the earlier case. Be that as it may, it seems that Dr. Goodhart, as in *Fenton's* case, is concerned with the *ratio decidendi* intended by the court in *Barwick's* case. There an employee of the defendant bank, a branch manager, fraudulently induced the plaintiff to accept a valueless guarantee, and by this fraud the bank benefited. The bank was held liable. Willes J., in delivering the reserved judgment of six judges of the Court of Exchequer Chamber, said: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved".⁴¹ Forty-five years later, in *Lloyd's* case, the House of Lords was considering the position where the managing clerk of the defendant solicitors fraudulently induced a customer to execute deeds of transfer in his own favour for his own benefit. The House of Lords held the defendants liable, but were much

³⁵ Llewellyn, *The Bramble Bush*, p. 35.

³⁶ Wambaugh, *op. cit.*, p. 29.

³⁷ Goodhart, *op. cit.*, p. 8.

³⁸ (1866-7), L.R. 2 Ex. 259.

³⁹ [1912] A.C. 716.

⁴⁰ See footnote 11, *supra*.

⁴¹ At p. 265.

pressed with the quoted remarks of Willes J. There is some slight indication, especially in Lord Loreburn's judgment in *Lloyd's* case, that their Lordships considered it was a misunderstanding of the judgment of Willes J. to regard him as requiring that the fraud must be for the master's benefit, an interpretation put upon his words in some intervening cases and by the Court of Appeal in *Lloyd's* case itself. It will be assumed, for the sake of argument, that Willes J. had been misread in the intervening cases. Would Dr. Goodhart's test have avoided the mistake? Willes J. twice states that the fraud must be for the master's benefit. Surely the same mistake would probably be made, and it would be concluded that Willes J. considered it to be material that the master benefited. This, it is submitted, would always be the case, unless the judge, after stating a proposition of law, performed a "judicial somersault",⁴² and departed from it in his decision.

Dr. Goodhart himself quotes a very similar situation where he agrees that a mistake might well have been made had his doctrine been applied, though here, instead of a fact being erroneously regarded as material, it was erroneously regarded as immaterial.⁴³ In *Simmons v. London Joint Stock Bank*,⁴⁴ the Court of Appeal followed the House of Lords decision in *Sheffield v. London Joint Stock Bank*,⁴⁵ considering themselves bound to do so. The House of Lords⁴⁶ reversed the Court of Appeal, distinguishing *Sheffield's* case on the ground that in it the person who pledged the plaintiff's securities with the defendant bank was a moneylender. Here there was subjective evidence of the misreading since three of their Lordships had sat in both cases.

Finally it may be submitted that there was no evidence of any weight that Willes J. did regard it as immaterial that the master benefited. The passage cited from him does seem to have been the *ratio decidendi*. It is noteworthy that five years before *Barwick's* case, in *Limpus v. L.G.O.C.*,⁴⁷ a master was held liable for an intentional tort committed by his servant, and the court stressed the importance of the servant's belief that it was for his master's benefit. The main concern of the House of Lords in *Lloyd's* case was that Willes J. should not have denied vicarious

⁴² Megarry attributes such a performance to Hall V.-C. in *Re Hensler* (1881), 19 Ch.D. 612; see (1951), 67 L.Q. Rev. 297, at p. 298. It is submitted that such a performance is likely to discomfit all theorists whatever view they propound.

⁴³ Goodhart, *op. cit.*, p. 18.

⁴⁴ [1891] 1 Ch. 270.

⁴⁵ (1888), 13 App. Cas. 333.

⁴⁶ [1892] A.C. 201.

⁴⁷ (1862), 1 H. & C. 526. See also Stolljar in (1949), 12 Mod. L. Rev. 44, at p. 58, attacking *Lloyd's* case.

liability in a case where the servant had not acted for his master's benefit. If Willes J. had said that there was liability even where the intentional tort was not committed for the master's benefit, this would have been *obiter dictum*, according to Wambaugh's test, shortly to be considered, but the House of Lords would have been reluctant to decide contrary to an *obiter dictum* expressed by so great a judge with the backing of a unanimous Court of Exchequer Chamber. The House of Lords, with the exception of Lord Loreburn, did not say that this passage was not the *ratio decidendi* of *Barwick's* case, but merely that Willes J. and his learned brethren had not in *obiter dicta* set their faces against an extension of the rule of vicarious liability for intentional torts to cases where they were not committed for the master's benefit.

(4) *In appellate courts, the rules of law set forth by the different judges may have no relation to each other.*

The situation here considered is where the judges concur in the result, but differ in their statements of the law. Dr. Goodhart limits the *ratio decidendi* of such a case to the sum of all the facts held to be material by the various judges. He gives no concrete illustration, but puts his conclusion in the following form: "A case involves facts A, B and C, and the defendant is held liable. The first judge finds that fact A is the only material fact, the second that B is material, the third that C is material. The principle of the case is, therefore, that on the material facts A, B and C the defendant is liable."⁴⁸

This proposed test may be applied to the case of *Hambrook v. Stokes*,⁴⁹ where, through carelessness, the defendant's lorry careered driverless down a steep and narrow street, and came to rest round a bend near the plaintiff, who had just left her small children on their way to school up that very street. The plaintiff sustained a nervous shock. The question before the Court of Appeal was whether the defendant was liable if the shock was caused to the plaintiff because of her fear for her children's safety. The court had to consider, firstly, whether the defendant owed a duty of care to the plaintiff, and, secondly, whether the damage was too remote. The court by a majority, Sargant L. J. dissenting, held for the plaintiff, ordering a new trial. Atkin L.J. held that the defendant was *prima facie* liable on the ground that a duty of care was admitted in the pleadings, and that, as to remoteness, though the particular injury was not contemplated by the de-

⁴⁸ Goodhart, *op cit.*, p. 21.

⁴⁹ [1925] 1 K.B. 141.

fendant, this was immaterial since the decision in *Re Polemis*,⁵⁰ because the damage was direct. Bankes L.J. held that the defendant ought to have anticipated that some woman might be so terrified for her own safety, or for the safety of her children, that she would suffer a nervous shock, and that therefore there was a duty to take care and the damage was not too remote.⁵¹ The facts regarded as material by Atkin L.J. were therefore:

Fact A. The defendant had admitted the duty to take care.⁵²

Fact B. The consequences of the breach of duty were direct.⁵³ Bankes L.J. regarded as material, as establishing both the duty to take care and liability for the damage, the following fact:

Fact C. The consequences were foreseeable.

The *ratio decidendi* on Dr. Goodhart's test, amalgamating all three facts, seems therefore to be: "Where there is admittedly a duty of care owed by the defendant to the plaintiff, and where the defendant ought to have anticipated some damage to the plaintiff, the defendant is liable to the plaintiff for direct and foreseeable damage (in the shape of nervous shock) caused to the plaintiff in breach of that duty".

It is submitted that this is rather an absurd conclusion, whereas the orthodox way of approaching the problem would be to take the narrower of each of the two propositions of law,⁵⁴ on the two main questions of the duty to take care, and the rules of remoteness of damage, and regard the amalgam as the *ratio decidendi*. On the question of duty to take care, the narrower proposition is that of Atkin L.J., since he relies on the admission in the pleadings. On the question of remoteness, the language of Bankes L.J. is narrower, because everyone agrees that foreseeable damages are recoverable, while *Re Polemis* still awaits the approval of the House of Lords. The *ratio decidendi* will then run: "Where there is admittedly a duty of care owed by the defendant to the plaintiff, the defendant is liable where foreseeable damage (by nervous shock) is caused to the plaintiff in breach of that duty".

⁵⁰ [1921] 3 K.B. 560.

⁵¹ Thus, although Bankes L.J. was a member of the court in *Re Polemis*, and cites it in this case, he seems to treat foreseeability as the test both of culpability and compensation.

⁵² It is arguable that this fact must be considered as immaterial, as Atkin L.J. went on to hold that, even ignoring the pleadings, a duty to take care had been established as some damage to the plaintiff was foreseeable.

⁵³ It might be argued that this is a question of law not of fact, but Lord Wright in *Monarch Steamship Company v. Karlshamns*, [1949] 1 All E.R. 1, at p. 12, treats the question as one of fact. This was a case of contract, but Dr. Goodhart in (1949), 65 L. Q. Rev. 137, regards it as an authority on remoteness of damage in tort as well.

⁵⁴ See the adoption of this test by Lord Greene M.R. in *Gold v. Essex C.C.*, [1942] 2 K.B. 293, at p. 298, in discovering the *ratio decidendi* of *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K.B. 820.

Now that a detailed examination of Dr. Goodhart's arguments has been attempted, the extent to which it is true to say that the proposition of law is not necessarily the *ratio decidendi* of a case can be indicated. Not every proposition of law is the *ratio decidendi*. It has been admitted for nearly three centuries that it must be one necessary for the decision of the case.⁵⁵ It has been conceded in this article that if the judge states his proposition of law several times, now broader, now narrower, only the narrowest is the *ratio decidendi*, and that in courts consisting of several judges who decide the same way on different grounds of law, only the narrowest proposition of law is the *ratio decidendi*. It may further be conceded that, although Dr. Goodhart's illustrations are not particularly convincing, it is at least theoretically possible that a proposition of law taken out of its context may be too wide or too narrow, and that therefore, in finding the *ratio decidendi*, the whole judgment must certainly be read and appraised. But where the court really attempts to sum up the result in a comprehensive rule, it is unlikely that this result will be at variance with other utterances in the judgment, unless there has been a "judicial somersault", or at least a muddled judgment.

It remains to consider whether the orthodox theory has any advantages over that of Dr. Goodhart. The object of this article has been to establish, not that the orthodox way of examining case-law leads to concrete conclusions, but rather that many reported cases are susceptible of a number of different interpretations, and that Dr. Goodhart's theory provides no more concrete rules and has no advantages over the time-honoured theory. A realist observes, with special reference to Dr. Goodhart's theory, that "the search for a logical formula that will determine precisely what rule each decision implies is a wild goose chase starting from a logical confusion".⁵⁶ Despite the air of realism pervading Dr. Goodhart's theory, the call to see what courts do, rather than what they say, it finds no favour with the realists, and may well lead astray the safe-and-sound legal thinker, the enthusiastic underliner of rules of law. His world is turned topsyturvy by Dr. Goodhart, but, it is submitted, to no purpose, for no sort of equilibrium is restored. As has already been suggested, the judge is exerting the utmost of his powers when he states his rule of law, and this is more to be regarded than to play hide and seek among the facts. From the subjective aspect, the *ratio decidendi* the judge intends to lay down, he realises the importance of his statement

⁵⁵ See *Bole v. Horton* (1673) *infra*.

⁵⁶ F. S. Cohen in (1937), 1 Mod. L. Rev. 4, at p. 20.

of law, and he will deliver himself with care. Similarly when in later years the case has to be considered as a precedent the court will examine what rule he has laid down,⁵⁷ rather than what facts he has considered material.

Another criticism of Dr. Goodhart's test is that it is a very wide one, though it is at times applied by its author very narrowly, as in the case of decisions where there is no reported judgment, and where judges in appellate courts adopt different statements of law. There is no hint of any restriction on the power of the judge to exclude facts as immaterial, except that Dr. Goodhart does deal with the case of a judge who bases his decision on non-existent facts.⁵⁸ In practice the power is limited, and if it is not exercised with circumspection the judge will pass into the domain of *obiter*. Dr. Goodhart gives no indication of when this divide is crossed, except to observe that an opinion based on a hypothetical fact is *obiter*.⁵⁹ It is then a feature of Dr. Goodhart's view that he leaves the judge with almost unlimited power to lay down an extremely wide *ratio decidendi*.

Dr. Goodhart also holds the view that a subsequent court has no power to limit the width of a *ratio decidendi* laid down by a previous court, at any rate where the previous court has expressly rejected facts as immaterial.⁶⁰ Coupled with the limitless power he concedes to the court in the original case to exclude facts as immaterial, this leads to a very rigid doctrine of precedent, and it is small wonder, holding the view of *ratio decidendi* he does, that Dr. Goodhart denies the common law doctrine of precedent the virtue of flexibility.⁶¹ But in practice courts do not necessarily concede to their predecessors power to lay down wide rules. One illustration of this has already been given in the case of *Regina v. Franklin*, but Field J. possibly did not regard himself as bound by the decision of another *puisne* judge, so that a better and more recent illustration is the attitude of the House of Lords in the *Fibrosa* case⁶² to their own previous decision in the *French Marine* case.⁶³ Their Lordships did not regard themselves as bound by the affirmation of *Chandler v. Webster* in the latter case, although on a plain reading it seems to have been the *ratio decidendi*. Two

⁵⁷ As did Lord Greene in *Gold v. Essex C.C.* (*supra*). Per Lord Simon in *Mersey Docks v. Coggins*, [1947] A.C. 1, at p. 12: "... The value of an earlier authority lies, not in the view which a particular Court took of particular facts, but in the proposition of law involved in the decision".

⁵⁸ Goodhart, *op. cit.*, p. 25.

⁵⁹ *Op. cit.*, pp. 22, 26.

⁶⁰ See footnote 23 *supra*.

⁶¹ See (1934), 50 L. Q. Rev. 40, at p. 58.

⁶² [1943] A.C. 32.

⁶³ [1921] 2 A.C. 494.

of their Lordships did not even deem it necessary to refer to the *French Marine* case at all.⁶⁴

The disadvantages of Dr. Goodhart's theory may be summed up as follows:

1. A judge is more likely to permit himself a Homeric nod over his attitude towards the materiality of a particular fact than over his proposition of law.

2. A theory which concedes unlimited power to the original court to exclude facts as immaterial, and also makes this exclusion binding on the subsequent court, must lead to extreme rigidity.

The common law seems to require some limitation on the power of excluding facts as immaterial, to ensure more flexibility despite the rule of *stare decisis*. It is submitted that the best hope for the future lies in a return to the idea that the proposition of law, so far as necessary for the decision, constitutes the *ratio decidendi*. The question of the necessity of a particular proposition should be governed by Wambaugh's test of an *obiter dictum*,⁶⁵ which is a restatement in modern language of the view of Vaughan C.J. in *Bole v. Horton*,⁶⁶ decided in 1673, when the doctrine of *stare decisis* was not so rigid. To make the test, the proposition under examination is reversed, and if the reversal would not affect the decision of the case the conclusion is that the proposition is *obiter*. The test has unfortunately come into disrepute because it has been applied to problems it was never intended to solve. Wambaugh confines it to cases which turn on one point only. Professor Paton ignores this limitation,⁶⁷ and explains that it leads to absurd results in a case based on alternate grounds, for on this view neither is the *ratio decidendi*. This criticism was cited to the House of Lords in *Jacobs v. L.C.C.*,⁶⁸ and its soundness apparently recognized by the court. Wambaugh's test has been approved by Dr. Goodhart,⁶⁹ but it is submitted that it can lead to results contrary to his theory. As has been noted earlier, Dr. Goodhart seems to regard the *ratio decidendi* of *Bar-*

⁶⁴ See Professor Glanville Williams in (1942), 6 Mod. L. Rev. 46. This attitude may be compared with Dr. Goodhart's illustration of the strict approach of English courts to *stare decisis*, as illustrated by the fifty page analysis of a previous House of Lords decision in *G.W.R. v. Mostyn*, [1928] A. C. 57; Goodhart, *op. cit.*, p. 54. It may be that the pendulum is swinging back to a rule of precedent which allows judges considerable freedom: see C. M. Schmitthoff in (1952), 30 Can. Bar Rev. at p. 52.

⁶⁵ Wambaugh, *op. cit.*, p. 17.

⁶⁶ Vaughan, pp. 360, 382.

⁶⁷ (1947), 63 L. Q. Rev. 461, at p. 475.

⁶⁸ [1950] A.C. 361, at pp. 367, 370.

⁶⁹ (1930), 46 L. Q. Rev. 261.

wick's case, if the whole judgment of Willes J. is read, as being that the master is liable for his servant's intentional tort even if the master does not benefit. Yet had Willes J. expressly stated this immediately after the disputed passage cited earlier, this would be *obiter* on Wambaugh's test, since the reversal of the proposition would not alter the decision for the plaintiff. It is submitted that there must inevitably be cases where Dr. Goodhart's view of *ratio decidendi* conflicts with Wambaugh's test of *obiter*, since, according to Dr. Goodhart, if a judge expressly rules a fact to be immaterial a subsequent court is bound by that ruling,⁷⁰ whereas Wambaugh's test may establish that this ruling is merely *obiter*.

It must be admitted that Wambaugh's test is somewhat artificial. Everything will depend on the way the judge states his proposition. That such a doctrine would be anathema to the realists, who look at what the judge does rather than what he says, is an objection that can hardly be stressed in an article avowedly in support of orthodoxy, but a more serious objection is that the test will not give protection against a courageous and taciturn judge who states a wide proposition of law as succinctly as possible. For instance in *Rex v. Fenton*, as Tindal C. J. framed his proposition of law in wide terms, it is the *ratio decidendi* of the case. Had he gone on to say that the crime was manslaughter even though the prisoner's act was not dangerous, this would have rendered his statement *obiter* so far as non-dangerous acts were concerned. No doubt the test is too simple a one to provide a satisfactory answer in every case, but wedded to the doctrine that the proposition of law, so far as necessary for the decision, is the *ratio decidendi*, it seems likely to be the approach most helpful to the student and the judge, and most likely to lead to a combination of certainty and flexibility in fair measure.

La confraternité

La confraternité est plus difficile à définir qu'à pratiquer. On s'aperçoit, la plume à la main, que c'est une notion fort complexe. C'est un lien quasi-familial, mais le sang ne le crée point. C'est un lien volontairement accepté, mais on ne choisit point ceux à qui on se lie. C'est un lien de forme sentimentale, mais des règlements lui donnent sa force, des peines en sanctionnent la rupture. . . . Des règlements? Non. Des traditions plutôt, et ce dernier mot explique tout. Il a fallu l'obscur travail des siècles pour créer, dans ces Palais de Justice où les avocats travaillent côte à côte, l'atmosphère d'estime mutuelle, d'égalité absolue, de courtoisie et de cordialité disciplinée en quoi consiste la confraternité. (Fernand Payen: *Le Barreau, L'art et la fonction* (Editions Bernard Grasset, Paris, 1934) p. 172)

⁷⁰ See footnote 23 *supra*.