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## Stare Decisis at Common Law and under the Civil Code of Quebec\*

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Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change.

In these famous words, Roscoe Pound<sup>1</sup> has characterized the basic problem of any civilized legal system. All laws oscillate between the demands of certainty—which require firm and reliable guidance by authority—and the demands of justice, which require that the solution of an individual case should be equitable and conform to current social ideals and conceptions of justice. Every legal system must compromise between these two pulls; it must balance rigidity with flexibility.

With the problem of judicial authority, the question to what extent the judicial interpretation of statutes as well as of former decisions should be governed by strict rules, both the Common Law and the Civil Law have grappled, though from different angles.

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<sup>1</sup> Interpretations of Legal History (1923) p. 1.

The contrast between the attitudes of these two groups of systems has been often and vividly portrayed, as one between logical and empirical methods, between deductive and inductive thinking, between the rule of reason and the rule of experience. Thus Lord Macmillan has written:

... The law of England exhibits what Lord Westbury calls 'that distinctive peculiarity of the English mind—a love of precedent, of appealing to the authority of past examples rather than of indulging in abstract reasoning.'

All this is constitutionally repugnant to the continental disciples of the civil law. To them the principles of the law are what matters. The particular case must be decided not by invoking previous decisions but by logically subsuming it under the appropriate general proposition applicable to it. The principles of the law of torts, which in this country must be gathered from an innumerable series of decisions, are embodied for France in five brief articles of the Code Civil. Here we have the logical and the empirical methods in their most extreme contrast.<sup>2</sup>

The favourite illustration of this contrast between the civil-law and the common-law approach is the comparison of their attitude towards judicial precedent. An eminent Canadian jurist has described the French doctrine of the authority of judicial interpretations as follows:

En dehors de la contestation même qu'elle a tranchée, elle n'a aucune autorité et n'engage personne; elle ne lie ni les autres tribunaux, ni même le tribunal qui l'a donnée. Si une autre cause, en tous points semblable mais nouvelle se présente, le tribunal saisi est libre de suivre ou la première interprétation ou d'en donner une autre.<sup>3</sup>

The common-law antithesis may be stated in the classical words of Parke J.:

Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised.<sup>4</sup>

The temptation to exaggerate this contrast in legal thinking

<sup>2</sup> Law and Other Things (1937) pp. 81-82. Among many other formulations of the contrast see Allen, *Law in the Making* (5th ed., 1951) pp. 171 ff.; Amos and Walton, *Introduction to French Law* (1935) p. 6; Baudouin, *Droit Civil de la Province de Québec* (1953) pp. 99 ff. and (1950), 10 *Revue du Barreau* 397.

<sup>3</sup> Mignault, *Traité du Droit Civil Canadien*, Vol. 1 (1895) p. 111.

<sup>4</sup> In *Mirehouse v. Rennell* (1833), 1 Cl. & F. 527, at p. 546.

and method is often stimulated by nationalism, ignorance or prejudice against foreign systems and ideas. A deeper mutual understanding of the ways of thought and methods of the two great legal systems which dominate western civilization is a matter of vital importance to the contemporary world, in which countries living under either are in constant and intimate contact. For Canada, such understanding is more than a cultural need or a demand of enlightened internationalism. It is a vital condition of a healthy and balanced growth of Canadian law. For it is in this country alone that the common law and the civil law operate side by side in one country, distinct in philosophy, method and tradition, but brought together by the many contacts of a common nationality, common federal political and legal institutions, and the supervision of a federal court, which comprises both common and civil lawyers, and which interprets both systems.<sup>5</sup> For such mutual legal understanding, a comparative appreciation of the doctrine of stare decisis has much to contribute.

A comparison between stare decisis in the common-law provinces of Canada and in the province of Quebec must first re-examine the basic relationship between the two parent legal systems on which they are based. It must further evaluate the modifications which a transfer of English and French traditions to the Canadian system has produced. It must finally examine critically the merits and demerits of the rules which have emerged, and their adequacy at a time when Canada, with the abolition of all appeals to the Privy Council, has shaken off the last vestiges of legal tutelage.

### *Stare Decisis in the Common-law Provinces of Canada*

The Canadian common-law courts have taken over the essential features of the English doctrine of stare decisis. The first and, probably, the most important part of that doctrine is the principle that all courts are bound by the decisions of superior courts in the

<sup>5</sup> In some countries civil and common law have intermingled. The state of Louisiana has a civil-law background, but its law has been increasingly permeated by common-law influences and the civil law has been largely displaced. See the observations of Judge Saunders as quoted by Mignault in (1935), 1 U. of Toronto L. J. 104, at p. 133. The situation is similar in Puerto Rico (Ramos (1949), 23 Tulane L. Rev. 1, 345). More pertinent is the continued existence of a separate system of Scottish law and legal education in Great Britain, where the House of Lords functions as the highest court of appeal for both English and Scots courts. Procedurally, the parallel to the Canadian position is close, but Scots law has, especially since the union, been subject to far greater common-law influences than Quebec. See Macgillivray, *Sources and Literature of Scots Law* (1936), chap. 17, and Lord Cooper, *The Common and the Civil Law: A Scot's View* (1950), 63 Harv. L. Rev. 468. See further *infra*, footnote 139.

hierarchy. For Canada, this means that all Canadian courts—at least those of the common-law provinces<sup>6</sup>—are bound by the decisions of the Supreme Court of Canada, and that trial courts are bound by the decisions of the appeal court of their province. This doctrine was recently reaffirmed by the Chief Justice of Canada, speaking for the whole court (sitting with seven judges):

It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it is undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee.<sup>7</sup>

The second principle, also adopted by the Canadian courts, after some hesitation, is the rule finally laid down by the House of Lords in 1898<sup>8</sup> that the highest court of the country is bound by its own decisions.<sup>9</sup> A third, and far more contentious and complex, rule deals with the extent to which courts of appeal should be bound by their own decisions, or by those of courts of co-ordinate jurisdictions. Many problems arise from the difficulty of deciding—in view of the former integration of the Canadian with the English judicial hierarchy—what are courts of co-ordinate and superior jurisdiction. Until recently, the Privy Council was the highest appeal court for Canada and, consequently, all Canadian courts considered themselves bound by the decisions of the Privy Council.<sup>10</sup> This link was originally forged by the colonial status of Canada, but it continued long after, as a matter of tradition, sentiment, and inertia. Canadian courts have also accepted the authority of English courts proper as binding. The chain of reasoning is somewhat as follows:<sup>11</sup> Although the Privy Council is not formally

<sup>6</sup> On the application of this principle to appeals from Quebec courts, see *infra*, pp. 740 ff.

<sup>7</sup> *Woods Manufacturing Co. Ltd. v. The King*, [1951] 2 D.L.R. 465, at p. 475.

<sup>8</sup> *London Street Tramway Co. v. London County Council*, [1898] A.C. 375.

<sup>9</sup> *Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516. For a discussion of the implications of this decision, see *infra*, p. 730.

<sup>10</sup> Williams, *Stare Decisis* (1926), 4 Can. Bar Rev. 289, at p. 297.

<sup>11</sup> For earlier surveys, see Anglin, *Some Differences Between the Law of Quebec and the Law as Administered in the Other Provinces of Canada* (1923), 1 Can. Bar Rev. 33, and Williams (1926), 4 *ibid.* 289. For more

bound by its own previous decisions,<sup>12</sup> it has habitually followed them and adhered to the doctrine of stare decisis even in constitutional matters, in which it was the supreme tribunal of the Empire.<sup>13</sup> In matters other than constitutional, the Privy Council, although not formally bound by its own decisions—which are in theory advices to the sovereign—and although not technically identical with the House of Lords, has considered itself bound by decisions of the House of Lords.<sup>14</sup> The House of Lords holds itself strictly bound by its own decisions.<sup>15</sup> All lower English courts are bound to follow the decisions of the House of Lords, therefore Canadian courts must follow the decisions of all English courts which they regard as superior to themselves in the hierarchy. Canadian courts have also generally considered themselves bound by the decisions of English courts of higher or co-ordinate jurisdiction. Around the last two propositions, certain conflicts of judicial opinion have arisen. They are mainly owing to two important aspects of Canada's constitutional and legal development. The first is her emancipation from colonial status. In 1879, the Privy Council<sup>16</sup> had laid down that "colonial courts" ought to follow the decisions of the English Court of Appeal. The ratio of this decision is clearly superseded by the Statute of Westminster of 1931, as interpreted by the Privy Council.<sup>17</sup> Accordingly, the Manitoba Court of Appeal, in *Safeway v. Harris*,<sup>18</sup> reversed the judge of first instance and held that a Canadian court of appeal was not bound by a decision of the English Court of Appeal. The court emphasized the "great change in the relationship between the various parts of the Empire" since *Trimble v. Hill*.<sup>19</sup>

The second reason for a growing sense of independence of the Canadian courts, in their approach to English decisions, is a steady growth of specifically Canadian trends and traditions in legislation recent surveys see Laskin, *The Supreme Court of Canada* (1951), 29 Can. Bar Rev. 1069, and the comments by Gilbert D. Kennedy in (1948), 26 Can. Bar Rev. 581; (1949), 27 Can. Bar Rev. 465, 600; (1951), 29 Can. Bar Rev. 92; and (1953), 31 Can. Bar Rev. 87, 697.

<sup>12</sup> *Tooth v. Power*, [1891] A.C. 284, at p. 292.

<sup>13</sup> Cf. Laskin, *op. cit.*, at p. 1070.

<sup>14</sup> *Robins v. National Trust Co.*, [1927] A.C. 515.

<sup>15</sup> *London Street Tramway Co. v. London County Council*, [1898] A.C. 375. Quite recently, this attitude was confirmed by Lord Reid in categorical terms, not without a hint of regret, "This House has debarred itself from ever re-considering any of its own decisions", in *Nash v. Tamplin & Sons Brewery*, [1952] A.C. 231.

<sup>16</sup> *Trimble v. Hill* (1880), 5 App. Cas. 342.

<sup>17</sup> *British Coal Corp. v. King*, [1935] A.C. 500; *A. G. for Ontario v. A. G. for Canada*, [1947] A.C. 127.

<sup>18</sup> [1948] 4 D.L.R. 187.

<sup>19</sup> For an earlier repudiation of *Trimble's* case, cf. *Jacobs v. Beaver* (1909), 17 O.L.R. 496, at p. 499.

and public policy. Recently, the Ontario Court of Appeal, in reversing the direction of the trial judge to the jury, on corroboration of evidence, dissented from the English Court of Criminal Appeal:<sup>20</sup> "With the utmost respect for the great learning and judgment of all members of the Court, I must nevertheless decline to accept the judgment as a statement of the law in this Province".<sup>21</sup> The Manitoba Court of Appeal<sup>22</sup> carried unorthodoxy much further by openly dissenting from the House of Lords on the assessment of damages for loss of expectation of life. The court preferred an earlier decision of the House of Lords<sup>23</sup> to its latest decision on that matter.<sup>24</sup> One reason for such boldness was a difference in wording between the relevant English and Manitoba statutes. But the court went further: "There is too . . . a difference between the value of life in England and Canada" (*per* Adamson J.A.). In the short judgment which approved the decision of the Manitoba court,<sup>25</sup> the Supreme Court of Canada, so orthodox in its own adherence to *stare decisis*, expressly approved this rather remarkable thesis.<sup>26</sup> On the other hand, an Ontario High Court judge<sup>27</sup> recently reaffirmed that he was bound by the decision of the English Court of Appeal, except where there was a contrary decision of the Ontario Court of Appeal. And there are, of course, many decisions in which English precedents are applied without any discussion of the problem of *stare decisis*.

A number of recent decisions show an increasing independence, not only towards English precedent, but towards earlier decisions of the same court, or of Canadian courts of co-ordinate jurisdiction. In the first place, a number of Canadian appeal courts have disregarded *stare decisis* in criminal matters. In 1920, the Appellate Division of the Alberta Supreme Court,<sup>28</sup> against the emphatic dissent of Harvey C.J., decided to overrule an earlier decision of its own. One reason was that in the later case the court sat with five, and in the earlier case, only with three judges.<sup>29</sup> But the main basis of the decision is the qualification of the rule of *stare decisis* in criminal cases: "The general principle seems to rest mainly upon

<sup>20</sup> *R. v. Zielinski* (1950), 34 Cr. App. R. 193.

<sup>21</sup> *R. v. Kelso* (1953), 105 C.C.C. 305, *per* Laidlaw J.A.

<sup>22</sup> *Anderson v. Chasney*, [1949] 4 D.L.R. 71.

<sup>23</sup> *Rose v. Ford*, [1937] A.C. 826.

<sup>24</sup> [1941] A.C. 157.

<sup>25</sup> [1950] 4 D.L.R. 223.

<sup>26</sup> It was followed in *Maltais v. C.P.R.*, [1950] 2 W.W.R. 160.

<sup>27</sup> Wells J. in *Re Cox*, [1950] 2 D.L.R. 449, at p. 468.

<sup>28</sup> *R. v. Hartfeil* (1920), 55 D.L.R. 524.

<sup>29</sup> The "full court" argument is also used by the English Court of Criminal Appeal in *R. v. Taylor*, [1950] K.B. 368, at p. 371, and by the Australian High Court in *Cain v. Malone* (1942), 66 C.L.R. 10.

the desirability of giving certainty to the property and contractual rights of the parties who may have, upon advice of their solicitors, acted upon the faith of a decision" (*per* Stuart J.). In *Rex v. Thompson*<sup>30</sup> the Manitoba Court of Appeal overruled an earlier construction of the Lord's Day Act by itself because "the doctrine of *stare decisis* does not compel a court to perpetuate an error" (Dennistoun J.A.). In *Ex parte Yuen*<sup>31</sup>—turning on the question whether habeas corpus was part of criminal law and therefore not within provincial legislative competence—the British Columbia Court of Appeal also overruled a prior decision of its own of 1925. In the words of Martin C.J.B.C., "our decision in Macadam's case should . . . yield . . . to considerations which are paramount to it in importance".<sup>32</sup> In *Rex v. Eakins*<sup>33</sup> the Ontario Court of Appeal—in an appeal from a conviction on a charge of keeping a common betting house—dissented from an earlier decision of its own<sup>34</sup> on the ground that it had overlooked a section of the Criminal Code. This decision too does not emphasize a distinction between criminal and civil cases. The Saskatchewan Court of Appeal recently overruled a decision of its own in a case under the Matrimonial Causes Act.<sup>35</sup> Finally, a member of Canada's youngest provincial court of appeal, in a majority decision on the evidentiary value of a court's viewing of an accident, made a remarkably uninhibited statement on *stare decisis*:

We are not here to administer the law according to precedent: we are here to do practical justice, guided in essentials by precedent. The two attitudes are quite different. If precedent hinders practical justice, precedent should be stretched. If a court of equal status with ourselves has once, or even twice, uttered, as we all do at times, a generality which is rather wide, must we all follow the generality? I think not. Of course, a long chain of decisions would be a different matter.<sup>36</sup>

These decisions indicate, however tentatively, a new philosophy which gives priority to the justice of the case over orthodox obedience to precedent. But it does not affect the principle of strict obedience to precedent set by a higher court in the hierarchy, although the position of the English courts in that hierarchy is no longer beyond doubt.

Does the Supreme Court itself leave any loophole for departure

<sup>30</sup> [1931] 2 D.L.R. 282.

<sup>31</sup> [1940] 2 D.L.R. 432.

<sup>32</sup> At p. 435.

<sup>33</sup> [1943] 2 D.L.R. 543.

<sup>34</sup> *R. v. Marin*, [1937] 2 D.L.R. 782, O.R. 507.

<sup>35</sup> *Davidson v. Davidson*, [1953] 1 D.L.R. 297.

<sup>36</sup> Dunfield J. in *Power v. Winter* (1952), 30 M.P.R. 131, at p. 148 (Newfoundland).

from *stare decisis*? In *Stuart v. Bank of Montreal*,<sup>37</sup> the leading judgment of Anglin J. laid down, in the following words, what has become accepted doctrine:

but we should not, in my opinion, hesitate now to determine that, in other cases,<sup>38</sup> unless perhaps in very exceptional circumstances, a previous deliberate and definite decision of this court will be held binding.

The further statement of Anglin J., that "it is of supreme importance that people may know with certainty what the law is, and this end can only be attained by a loyal adherence to the doctrine of *stare decisis*", has recently been reiterated in emphatic terms by the Supreme Court.<sup>39</sup> In a recent judgment of the Exchequer Court,<sup>40</sup> Thorson P. demonstrated that the Supreme Court had in fact overruled itself as regards the principles of assessment in expropriation proceedings. But this pertains to the wider and far more complex problem how far the apparent certainty and definiteness of *stare decisis* disguises uncertainty, qualifications and downright exceptions to the principle.

Lastly, Canadian trial courts consider themselves no more strictly bound by decisions of courts of co-ordinate jurisdiction, English or Canadian, than do the corresponding English courts.<sup>41</sup>

This outline of the hierarchy of *stare decisis*, as accepted by Canadian common-law courts, reveals three major elements of doubt. The first is the incipient but still rather uncertain rebellion of Canadian courts against the unconditional authority of English decisions where "inapplicable" to Canadian conditions. The second is the readiness of some courts to depart openly from a precedent where they strongly disapprove of it, mainly but not exclusively in criminal cases. Lastly, the abolition of the appeal jurisdiction of the Privy Council removes the formal authority of the Privy Council in constitutional matters from the date of the abolition of its appeal jurisdiction. On the other hand, it does not affect the authority of its earlier decisions until and unless the Supreme

<sup>37</sup> (1909), 41 S.C.R. 516, at p. 549.

<sup>38</sup> *I.e.*, other than an irreconcilable conflict on a question of law between a decision of the Supreme Court and a subsequent decision of an English Court of Appeal, in which case, in view of *Trimble v. Hill*, the duty of the Supreme Court "would require most careful consideration".

<sup>39</sup> See *supra*, p. 726. In saying that "if the rules in question are to be accorded any further examination or review, it must come. . . from this Court. . .", the Supreme Court has not excluded that it might modify its own doctrine of *stare decisis*. But so far it has not done so, nor has it made use of the reservation of "exceptional circumstances".

<sup>40</sup> *R. v. Sisters of Charity*, [1952] 3 D.L.R. 358.

<sup>41</sup> A temporary, statutory exception to this rule, in Ontario, was abolished in 1931.



Court of Canada, in its new rôle of sovereign and ultimate court of appeal for Canada, chooses to depart from them.

But, at best, these rules on stare decisis establish a formal chain of command. The real problem lies in the effective operation of the rule. With the acceptance of stare decisis the Canadian courts have also taken over all its complexities. How far does stare decisis produce the fixity and certainty of judicial interpretation which it purports to support? For an examination of this problem we must turn to the English experience.

### *The Meaning of Stare Decisis*

The argument for the strict doctrine of stare decisis was put by Lord Eldon in a much quoted statement: "It is better that the law should be certain than that every judge should speculate upon improvements in it".<sup>42</sup> The assumption behind this statement—reiterated time out of number by many authorities, judicial and non-judicial—is that the strict doctrine of precedent makes the law certain. This claim is linked with another closely related one: that there must be a strict delimitation between the legislative and judicial spheres. Where adherence to precedent leads to injustice or to the preservation of outworn social policies, the defence usually made is that the improvement of the law must be left to the legislator.<sup>43</sup>

Recent analysis has done much to throw doubt on this superficial equation of precedent and certainty, as well as on the oversimplification of the doctrine of separation of powers. Indeed, it is the qualifications of stare decisis which have enabled the courts to develop the law and justify, at least in some degree, the claim made by Sir William Holdsworth that the English method "hits the golden mean between too much flexibility and too much rigidity".<sup>44</sup> The following survey may be sufficient for a comparative evaluation:<sup>45</sup>

<sup>42</sup> *Sheddon v. Goodrich* (1803), 8 Ves. 441, at p. 447.

<sup>43</sup> Among recent judicial statements to this effect, see Lord Macmillan in *Read v. Lyons*, [1947] A.C. 156, at p. 175: "Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalise the law of England. . ."; and Lord Justice Asquith, in *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, at p. 195: "I am not concerned with defending the existing state of the law or contending that it is strictly logical. It clearly is not—but I am merely recording what I think it is. If this relegates me to the company of 'timorous souls', I must face that consequence with such fortitude as I can command." See also Lord Jowitt L.C. as quoted *infra*, footnote 100.

<sup>44</sup> *Case Law* (1934), 50 L.Q. Rev. 180, at p. 193.

<sup>45</sup> Cf., among notable discussions by eminent judges, Lord Wright's article on Precedent in (1942), 4 U. of Toronto L.J. 247; Lord Justice

I. A subsequent court is bound by the "principle of law" established by precedent. This presupposes a distinction of fact and law which is by no means always easy to establish.<sup>46</sup> The great difficulties of distinguishing between mistake of fact and mistake of law illustrate this problem.<sup>47</sup>

II. It is now accepted that what serves as authority is not the bare principle of law but the material facts of the case in so far as they are necessary to the decision. This seemingly simple statement has been a source of endless difficulties.

1. How far are the facts of two cases identical? There is seldom complete coincidence. It does not often happen that a sash cord of a window breaks in identical circumstances and causes comparable injuries.<sup>48</sup> In most cases there is much room for manoeuvring. What were the material facts in *Donoghue v. Stevenson*?<sup>49</sup> Was the relevant element the deficiency of an article of food and drink, or that of any article of mass consumption liable to affect the consumer, including, for example, a defective motor car repair,<sup>50</sup> or was it perhaps the relationship between two parties, one of which could reasonably be expected to rely upon the care of the other?<sup>51</sup> Judicial vacillations on this question are largely responsible for the continuing uncertainty of the scope of the rule in *Donoghue v. Stevenson*. Again, in *Radcliffe v. Ribble*,<sup>52</sup> the House of Lords held that the doctrine of common employment did not apply to an accident caused by the driver of a bus to another driver

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Asquith, *Some Aspects of the Work of the Court of Appeal* (1950), 1 *Journal of Society of Public Teachers of Law* 350; Evershed M.R., *The Court of Appeal* (as quoted from Allen, *Law in the Making*, 5th ed., p. 336).

For recent juristic analyses of the problems and working of precedent, see in particular Allen, *Law in the Making* (5th ed., 1951), Chaps. III-IV; Stone, *Province and Function of Law* (1946), Chap. VII, pt. III; Paton, *Jurisprudence* (2nd ed., 1952), Chap. VIII; Friedmann, *Legal Theory* (3rd ed., 1953) pp. 320-33.

Among major critical articles, see Goodhart, *Precedent in English and Continental Law* (1934), 50 *L.Q.Rev.* 40, and his analysis of the ratio decidendi, reprinted in *Essays in Jurisprudence and the Common Law* (1937) p. 1, criticized by Gooderson, *Ratio Decidendi and Rules of Law* (1952), 30 *Can. Bar Rev.* 892. See further Schmitthoff, *The Growing Ambit of the Common Law* (1952), 30 *Can. Bar Rev.* 48; Oliphant, *The Return to Stare Decisis* (1928), 14 *A.B.A.J.* 71.

<sup>46</sup> Cf. Paton, *Jurisprudence* (2nd ed.) p. 157.

<sup>47</sup> Cf. *Solle v. Butcher*, [1951] 2 All E.R. 1107.

<sup>48</sup> Cf. *Summers v. Salford Corp.*, [1943] A.C. 283; *Morgan v. Liverpool Corp.*, [1927] 2 K.B. 131.

<sup>49</sup> [1932] A.C. 562.

<sup>50</sup> *Herschthal v. Stewart and Arden*, [1940] 1 K.B. 155.

<sup>51</sup> Cf. in particular the decision of the Court of Appeal in *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164, and the dissent of Denning L.J.

<sup>52</sup> [1939] A.C. 215.

employed by the same company whom he attempted to assist. But some years afterwards<sup>53</sup> the House of Lords did apply the doctrine of common employment to the injury caused to the conductress of a tram car by the driver of another tram car, a fellow employee. The cases were distinguished on the facts.

2. In the discovery of legal principles, the greatest difficulty is that of distilling the ratio decidendi from the common minimum of essential reasoning of different judgments, which usually make up the decision of a superior court.<sup>54</sup> Some years ago, Professor Goodhart defined the ratio decidendi as being the decision based on the facts which the judge has treated as material.<sup>55</sup> But this, or any other definition, leaves great uncertainties, as has been demonstrated in a recent article by Professors Paton and Sawyer.<sup>56</sup> The learned authors have analyzed a number of cases, mainly Australian, in which a common ratio decidendi either did not exist or a majority of the rationes decidendi were actually opposed to the decision. Further famous examples of leading cases where it is all but impossible to discover a common ratio decidendi are *Bell v. Lever*<sup>57</sup> and *River Wear Commissioners v. Adamson*.<sup>58</sup> In the former case only two judges in the House of Lords agreed on the reasons for dismissing the action; in the latter, there was such a variety of rationes decidendi that the Court of Appeal, in a later case, selected one of them with great difficulty.<sup>59</sup>

3. Perhaps the most favoured way of disposing of an earlier decision is the distinction between ratio decidendi and obiter dictum. Out of the abundant wealth of illustrations for this method of departing from an earlier decision, obliquely rather than directly, one recent and important example may be chosen. In *Fairman's* case,<sup>60</sup> the House of Lords was generally supposed to have decided that a tenant's visitor is, in relation to the landlord, a licensee and not an invitee. In his dissenting judgment in *Haseldine v. Daw*,<sup>61</sup>

<sup>53</sup> *Graham v. Glasgow Corp.*, [1947] A.C. 8.

<sup>54</sup> The elimination of this difficulty in the judgments of the Privy Council, as well as those of continental courts, is a factor of great importance for the doctrine of stare decisis, upon which comment will be made later.

<sup>55</sup> Goodhart, *Essays in Jurisprudence and the Common Law* (1937) p. 1. For some recent comments on this definition, see Gooderson, *op. cit.*, footnote 45; Glanville Williams, *Learning the Law* (4th ed.) pp. 62 ff.

<sup>56</sup> Ratio Decidendi and Obiter Dictum in Appellate Courts (1947), 63 L.Q. Rev. 461.

<sup>57</sup> [1932] A.C. 161.

<sup>58</sup> (1877), 2 App. Cas. 743.

<sup>59</sup> Cf. Lord Dunedin's analysis in *The Mostyn*, [1927] P. 25, and the comment by Allen, *op. cit.*, pp. 270 ff.

<sup>60</sup> *Fairman v. Perpetual Investment Building Soc.*, [1923] A.C. 74.

<sup>61</sup> [1941] 2 K.B. 343, at p. 350.

Scott L.J. maintained that the judicial pronouncements to this effect were obiter dicta and that the ratio decidendi was the finding that no actual trap had been laid by the licensor for the licensee. In *Jacobs v. London County Council*,<sup>62</sup> the House of Lords rejected this interpretation and maintained that the classification of the tenant's visitor as a licensee was an essential ground for the decision. Dr. Goodhart, in a searching analysis,<sup>63</sup> has strongly criticized this interpretation, and with it the ratio decidendi of *Jacob's* case.

4. Sometimes an obiter dictum is raised to the dignity of a binding principle by time and repetition. The doctrine of common employment formulated by Lord Abinger in *Priestly v. Fowler*<sup>64</sup> is a celebrated and unhappy example.

5. A rather similar difficulty is presented by an accumulation of several reasons in a decision. This was one of the problems discussed in *Jacob's* case, where the House of Lords held that the classification of the legal position of the visitor was as essential a ground for the decision in *Fairman's* case as the finding on the question of fact. Another famous example of cumulative reasoning is the decision by Astbury J. in the *General Strike* case.<sup>65</sup> The learned judge based his decision deliberately on two grounds, but many commentators hold that his conclusions on the illegality of the general strike under common law were in the nature of an obiter dictum.

6. A not infrequent, and convenient, way of disposing of a precedent is not to cite it. Thus, in *Craven-Ellis v. Cannons*<sup>66</sup> the Court of Appeal awarded the full amount of a contractual salary to the director of a company whose contract was void, although the House of Lords in *Sinclair v. Brougham*<sup>67</sup> had rejected the action for money had and received where the contract between the parties was ultra vires. Yet the latter decision was not quoted in court, and it may be that in a future case the authority of the *Craven-Ellis* case could be rejected on the ground that it had overlooked the contrary decision of a higher court.

7. Lastly, there are a number of situations in which the court feels free to develop the law more or less openly because there is no binding authority or a new situation has arisen. Some of the

<sup>62</sup> [1950] A.C. 361.

<sup>63</sup> The "I think" Doctrine of Precedent: Invitors and Licensors (1950), 66 L. Q. Rev. 374.

<sup>64</sup> (1837), 3 M. & W. 513.

<sup>65</sup> *National Seamen's Union v. Reed* (1926), 42 T.L.R. 513.

<sup>66</sup> [1936] 2 K.B. 403.

<sup>67</sup> [1914] A.C. 398.

great landmarks of the common law are the result of such creative activity. But the scope for it is becoming narrower with the increase in the number of precedents and the tightening of the rule of stare decisis. In *Pasley v. Freeman*,<sup>68</sup> the court established the modern tort of deceit. In *Rylands v. Fletcher*,<sup>69</sup> Blackburn J. collected a number of cases of liability without fault and "in a sentence epochal in its consequences . . . coordinated them all in their true category".<sup>70</sup> But in *Donoghue v. Stevenson*<sup>71</sup> the majority of the House of Lords, particularly Lord Atkin in his celebrated judgment, felt compelled to disguise what was in effect the establishment of a new principle of manufacturers responsibility in an age of mass manufacturing behind an extremely strained and unconvincing series of distinctions of earlier cases, none of which was strictly binding on the house. Stare decisis cast its shadow not by preventing a creative development of the law but by forcing the court into an artificial technique.

Together, all these qualifications, inherent in the very methods and technique of the common law, have given enough elasticity to the doctrine of stare decisis to make many modifications of old principles, and sometimes even new departures, possible. But the situation is one of uncertainty and hazard. Judges and courts differ greatly in their enthusiasm for stare decisis as well as in their determination to make use of its loopholes in order to arrive at a desired result. Whatever their attitude, they must choose one of the devious routes mentioned to justify any departure from a bad precedent. No client, counsel or scholar can know which of them will be used. The process of legal evolution is disguised, and the pious fiction can be maintained that judges only apply the existing law. Yet the defenders of the common-law technique assert that it is sufficiently elastic to make adaptation of the law to new social conditions possible. It is therefore of particular importance to analyze the limitations which—mainly in recent cases—have been grafted on the principle of stare decisis itself.

#### *Limitations on the Rule of Stare Decisis*

1. At the highest judicial level the acceptance of stare decisis is just over half a century old. It was only in 1898 that the House of Lords unconditionally accepted the binding force of its own de-

<sup>68</sup> (1789), 3 T.R. 51.

<sup>69</sup> (1866), L.R. 1 Ex. 265.

<sup>70</sup> Wigmore, Responsibility for Tortious Acts (1893), 7 Harv. L. Rev. 441, at p. 454.

<sup>71</sup> [1932] A.C. 562.

cisions.<sup>72</sup> Since that time the House of Lords has never openly and deliberately departed from a decision of its own. Prominent illustrations of this self-imposed disability are: its regretful refusal to abolish the doctrine of common employment, as distinct from not unsuccessful attempts to whittle it down;<sup>73</sup> its unwillingness to rationalize the duties of occupiers of land to visitors;<sup>74</sup> and the continued application of the rule in *Cavalier v. Pope*<sup>75</sup> in derogation of the rule in *Donoghue v. Stevenson*. Yet the House of Lords has at times shown remarkable independence towards well established precedents other than its own. In his article on precedents, Lord Wright quotes as examples the *Nordenfelt* case,<sup>76</sup> where the House of Lords demolished the distinction made in many earlier decisions between covenants limited and unlimited in space; the decision in *Bowman v. Secular Society*,<sup>77</sup> where a new public policy was laid down with the upholding of a bequest to a society which denied the principles of Christianity; and *Fender v. Mildmay*,<sup>78</sup> where the majority took account of changed conceptions of the sanctity of marriage in regarding a decree nisi as equivalent to a final dissolution of marriage. In all these cases public policy considerations—religious tolerance, freedom of trade, sanctity of marriage and of contract—were paramount. In regard to public policy decisions, Lord Watson had said<sup>79</sup> that they “cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal”. Since then, the House has also departed from precedent, though not quite openly, in a more technical matter. In *The Fibrosa*,<sup>80</sup> an earlier decision of the House of Lords, which had denied recovery of money paid under a subsequently frustrated contract, was, in the words of a learned commentator, “conjured out of the way”.<sup>81</sup> But the claims made by such eminent contem-

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<sup>72</sup> In *London Street Tramways Company v. London County Council*, [1898] A.C. 375. Lord Wright, in his article cited *supra* footnote 45, at p. 249, seems to regard an earlier decision, *Attorney-General v. Dean of Windsor* (1860), 8 H.L.C. 369, as the turning point. Before *Stuart v. Bank of Montreal*, the Supreme Court of Canada had also repeatedly overruled itself, as the references in *Stuart's* case show.

<sup>73</sup> *Radcliffe v. Ribble*, [1939] A.C. 215.

<sup>74</sup> *London Graving Docks v. Horton*, [1951] A.C. 737; *Jacobs v. London County Council*, [1950] A.C. 361.

<sup>75</sup> [1906] A.C. 488.

<sup>76</sup> [1894] A.C. 535.

<sup>77</sup> [1917] A.C. 406.

<sup>78</sup> [1938] A.C. 1.

<sup>79</sup> In *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, at p. 553.

<sup>80</sup> [1943] A.C. 32.

<sup>81</sup> Glanville L. Williams, *The End of Chandler v. Webster* (1942), 6 Mod. L. Rev. 46, at p. 48.

porary judges as Evershed M.R.<sup>82</sup> and Cohen L.J. (as he then was)<sup>83</sup> in justification of stare decisis for the lower courts, that the House of Lords is not strictly bound by precedent, is not accepted by the house itself, which has seldom been more orthodox in its respect for precedent than in recent years, and which is unlikely, at least in its present temper, even to accept Lord Watson's distinction between "public policy" questions and "purely legal" questions.

2. Far more important in practice is the qualification of stare decisis introduced by the Court of Appeal in 1944.<sup>84</sup> The full court reaffirmed that it is bound by its own decisions, but it defined certain exemptions as follows:

(1) The court is entitled and bound to decide which of the two conflicting decisions of its own it will follow.

(2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

(3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

In addition, Lord Greene M.R. mentioned two further exceptions, which may be regarded as adding to the list of qualifications:

Two classes of decisions per incuriam fall outside the scope of our inquiry, namely, those where the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction—in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such case a subsequent court is bound by the decision of the House of Lords.

This formulation does not eliminate the difficulties of deciding when preceding authorities are or are not in conflict.<sup>85</sup>

Some years later Lord Goddard C.J., in a case before the Divisional Court,<sup>86</sup> justified the departure from a previous decision on the ground that it had not been argued on both sides, and he restated the principle of *Young's* case as follows:

... where material cases or statutory provisions, which show that a court has decided a case wrongly, were not brought to its attention the court is not bound by that decision in a subsequent case.

Taken at its face value, this formula would considerably relax the

<sup>82</sup> *Op. cit.*, footnote 45, *supra*, at p. 17.

<sup>83</sup> Jurisdiction, Practice and Procedure of the Court of Appeal (1951), 11 Camb. L. J. 3, at pp. 11 ff.

<sup>84</sup> *Young v. Bristol Aeroplane Co. Ltd.*, [1944] K.B. 718.

<sup>85</sup> Cf. Allen, *op. cit.*, at p. 234, Asquith L.J. (1950), 1 Journal of the Society of Public Teachers of Law 350, at p. 362, and Goodhart, Precedents in the Court of Appeal (1947), 9 Camb. L.J. 349.

<sup>86</sup> *Nicholas v. Penny*, [1950] 2 K.B. 466.

rule of stare decisis, though it would apparently leave untouched cases in which an earlier court had interpreted statutory provisions or cases wrongly instead of overlooking them.

The scope of judicial liberty provided by *Young's* case is as yet far from settled, but the impact of the case is undeniable.

In *Rex v. Northumberland Compensation Appeal Tribunal*<sup>87</sup> a divisional court of three judges presided over by Lord Goddard C.J. felt authorized by *Young's* case to disregard a decision of the Court of Appeal,<sup>88</sup> which it considered to be inconsistent with two earlier decisions of the House of Lords. In *Gower v. Gower*,<sup>89</sup> the Court of Appeal criticized the standard of proof in adultery cases set up by an earlier decision of its own. Denning L.J. suggested no fewer than five reasons for disregarding the earlier decision.<sup>90</sup> In *Fitzsimons v. Ford Motor Co.*,<sup>91</sup> the Court of Appeal overruled three prior decisions of its own on the ground that they were inconsistent with a decision of the House of Lords given before two of the three. Yet, the claim that "... the qualifications which have been placed on the principle of *stare decisis* in the Court of Appeal have completely changed the character of that rule in modern English law"<sup>92</sup> goes much too far.

3. In 1950, the full Court of Criminal Appeal overruled an earlier decision of its own in 1939 on a question of bigamy and laid down its own principles of stare decisis.<sup>93</sup> The reasoning, as formulated by Lord Goddard C.J. for the court, is remarkable in its implications:

This court . . . has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person has been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present. . . .

The direct effect of this statement—the most open attack on

<sup>87</sup> [1951] 1 K.B. 711.

<sup>88</sup> *Race Course Betting Control Board v. Secretary of State for Air*, [1944] Ch. 114.

<sup>89</sup> [1950] 1 All E.R. 804.

<sup>90</sup> *Ginesi v. Ginesi*, [1948] 1 All E.R. 173. Among them were absence of full argument, failure to cite a decision of the House of Lords, and the refusal of the High Court of Australia to follow the previous Court of Appeal decision.

<sup>91</sup> [1946] 1 All E.R. 429.

<sup>92</sup> Schmitthoff, *op. cit.*, footnote 45, *supra*, at p. 58.

<sup>93</sup> *R. v. Taylor*, [1950] 2 K.B. 368.



stare decisis yet made by a modern English court—is of course limited to criminal cases, but the reasoning has wider implications. Some of the most important decisions involving the liberties of the subject, such as *Liversidge v. Anderson*,<sup>94</sup> have been civil decisions. Can it be seriously contended that expulsion from a trade union<sup>95</sup> or professional disqualification<sup>96</sup> are of less fundamental importance to the individual concerned than conviction for a minor offence? Or is a distinction between major and minor criminal offences implicit in the reasoning of the Court of Criminal Appeal? Or did the court wish to limit stare decisis to “property and contractual rights”, like the Alberta Appellate Division in 1920?<sup>97</sup> Whatever the direct consequences of the decision, its motivation is a powerful attack upon the whole *rationale* of the doctrine of stare decisis. It openly admits that vital considerations of justice may be more important than past authorities.

On the whole, the result of recent developments may be, not that English or Commonwealth courts will now feel free to develop the law more openly in accordance with changing social needs, but that even more scope than before is provided for conflicting interpretations. Judges sceptical of judicial adaptations of the law based on considerations of public policy or current ideas of justice will cling to the stricter aspects of stare decisis. Those who see the true function of the common law in its adaptation to new social wants and ideas will make the most of the exceptions and qualifications. Both philosophies have room within the modern framework of stare decisis. As a result, reformist and orthodox tendencies in the common law alternate in a way which may make sense in the longer perspective of history but seems, over a shorter span, determined by accidents of judicial outlook and personality. I have recently pointed out<sup>98</sup> that the House of Lords has in the last twenty years vacillated between both approaches. The two philosophies are made articulate by the conflicting pronouncements of Lord Wright in 1942<sup>99</sup> and Lord Jowitt in 1951.<sup>100</sup>

<sup>94</sup> [1942] A.C. 206.

<sup>95</sup> Cf. *Lee v. Showmen's Guild*, [1952] 1 All E.R. 1175.

<sup>96</sup> Cf. *General Medical Council v. Sparkman*, [1943] A.C. 337.

<sup>97</sup> See *supra* pp. 728-729.

<sup>98</sup> Friedmann, *Judges, Politics and the Law* (1951), 29 Can. Bar Rev. 811, at p. 818, and the authorities there cited.

<sup>99</sup> *Op. cit.*, footnote 45 *supra*., at p. 271: “Law is not an end in itself. It is a part in the system of government of the nation in which it functions, and it has to justify itself by its ability to subserve the ends of government, that is, to help to promote the ordered existence of the nation, and the good life of the people.”

<sup>100</sup> (1951), 25 Aust. L. J. 296: “It is quite possible that the law has produced a result which does not accord with the requirements of today. If

It is, of course, true that the uncertainties and vacillations apply only to the marginal cases, not to the thousands of routine cases. But although the routine cases represent the bulk of the daily law, it is the marginal cases decided by higher courts which determine the direction of the law and which provide the landmarks in its development.

*Stare Decisis under the Civil Code of Quebec*

As the common law in Canada derives its inspiration from the English law, so the Quebec Civil Code derives its structure and its way of thinking from the French Civil Code. The French attitude towards the authority of precedent has been formulated as follows in a leading French text-book:<sup>101</sup>

L'interprétation judiciaire est *libre*, en principe; chaque tribunal a le droit d'adopter la solution qui lui paraît la plus juste et la meilleure; il n'est lié ni par les décisions qu'il a rendues antérieurement pour des affaires analogues, ni par les décisions d'un autre tribunal, même supérieur en degré. Ainsi les tribunaux de première instance peuvent avoir sur les questions controversées une jurisprudence contraire à celle de la Cour d'Appel à laquelle ils ressortissent; mais leurs décisions ont alors de grandes chances d'être réformées en appel.

Even the *Cour de Cassation* only binds the lower court in the particular case under review and after a second *cassation*. It has no direct authority in future cases.

Recent studies have corrected earlier misconceptions about the French doctrine and practice regarding *stare decisis*.<sup>102</sup> The main difference between the pure French and the pure common-law doctrine of *stare decisis* lies, first, in the freedom which the former provides for the courts to depart from precedent, when they feel sufficiently moved to overcome the reluctance of the lower court to expose its decisions to reversal by a higher court, or, in the case of the highest court itself, to depart from established doctrine; secondly, in a franker acceptance in France of the creative rôle of the courts, which take their inspiration and authority from the code as such rather than from judicial interpretations. This has

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so, put it right by legislation, but do not expect every lawyer, in addition to all his other problems, to act as Lord Mansfield did, and decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is."

<sup>101</sup> Planiol, *Traité Élémentaire de Droit Civil* (5th ed., 1950) s. 128.

<sup>102</sup> Amos and Walton, *Introduction to French Law* (1935) p. 6; Allen, *op. cit.*, pp. 171 ff.; Ancel, *Case Law in France* (1934), 16 *J. Comp. Leg.* 1; Lambert and Wasserman, *The Case Method and the Possibilities of Its Adaptation to the Civil Law* (1929), 39 *Yale L.J.* 1.

enabled French courts to develop entirely new principles and doctrines from a code enacted in 1805.<sup>103</sup>

This creative pioneering—both by the *Cour de Cassation* and by the lower courts—would scarcely have been possible had they been subject to strict stare decisis. French *jurisprudence* shows static and dynamic periods like any other. Certainly the civilian love of deductive logic has not prevented an experimental and, at times, adventurous approach by the courts to the interpretation of the civil law.

Although the Civil Code of Quebec is essentially a revised version of the *Code Napoléon*, the position of the Quebec courts, and their approach to stare decisis, has from the beginning been very different from that of the French courts. This is due to a number of factors. In the first place the Quebec civil law operates in a framework dominated by the common-law mentality and technique.<sup>104</sup> In the second place, the highest appeal court for the courts of Quebec is the Supreme Court of Canada, a majority of whose members are trained in the common law. They deliberate together with the minority trained in the civil law on matters arising from either system. Thirdly, the technique of judgment of the Quebec courts is closer to that of the common law than to that of the French law. This has induced an approach to stare decisis which has more in common with the method of the common law than of the civil law.<sup>105</sup> Lastly, the desire to preserve the civil-law tradition against encroachments of the common law has made the Quebec courts more sympathetic to stare decisis than those of France or other continental systems, which need not fear for the preservation of their legal tradition. One result of this apprehension is that the Quebec courts are far more reluctant than the French courts to develop new judicial doctrines from the *Code Civil* (such as abuse of rights or strict liability in delict and quasi-delict).<sup>106</sup> Some of these factors require more detailed consideration.

As I have pointed out already, the Supreme Court has uncon-

<sup>103</sup> Among them are the validation of life insurance policies in favour of third parties; the development of liability for unjust enrichment through the *actio de in rem verso*; the principle of abuse of right; the development of strict liability for motor-car owners in case of motor-car accidents, and for employers in the case of workers' accidents, through art. 1384 C.C. See Antoinette Maurin, *Le Rôle Créateur du Juge* (Paris, 1938).

<sup>104</sup> Mignault, *The Authority of Decided Cases* (1925), 3 Can. Bar Rev. 1, at p. 11. Constitutional, commercial and criminal law in particular are dominated by the common-law approach.

<sup>105</sup> Cf. on this point, Baudouin, *Le Droit Civil de la Province de Québec* (1953) pp. 92 ff.; and in (1950), 10 *Revue du Barreau* 397, at p. 416.

<sup>106</sup> Cf. in particular Maurin, *Le Rôle Créateur du Juge*, pp. 85 ff., 283 ff.; Baudouin, *Le Droit Civil*, pp. 1278 ff.

ditionally accepted for itself the doctrine of *stare decisis*. It has refused to differentiate between appeals from common-law and civil-law cases. In *Groulx v. Bricault*,<sup>107</sup> Mignault J. observed: "D'ailleurs, la décision rendue dans *Meloche v. Simpson*<sup>108</sup> nous lie, et la question se trouve ainsi résolue définitivement". In his comparative analysis of *stare decisis*,<sup>109</sup> Mignault states that the decisions of the Privy Council and of the Supreme Court are binding in the province of Quebec. And Anglin C.J.C., who also gave the leading judgment in *Stuart v. Bank of Montreal*,<sup>110</sup> emphatically rejected, in *Daoust, Lalonde & Cie. Ltée v. Ferland*,<sup>111</sup> any departure from precedent in the interpretation of the Civil Code:

. . . Nor will it do to say that, although *stare decisis* may be a good enough doctrine for the rest of Canada, it forms no part of Quebec jurisprudence and it, therefore, should not be applied in this court to cases from that province. . . . In my opinion, the doctrine of *stare decisis* must equally apply in the determination of any case which comes before this court, whatever may be the province of its origin.

French influences are more important in the approach to the authority of *stare decisis* within the province of Quebec itself, that is, in the attitude of the Quebec Court of Queen's Bench (Appeal Side) and of the lower Quebec courts. As a general rule the appeal court follows precedent as a matter of course. But it has not formally committed itself to *stare decisis*, and on occasions it has deliberately departed from precedent. In *Reid v. McFarlane*,<sup>112</sup> the court overruled two previous decisions of its own on the ground that they had been based on an erroneous interpretation of a decision of the Privy Council. Again, in *Migner v. St. Lawrence Fire Insurance Company*,<sup>113</sup> in a case involving the nullity of an insurance policy, the court departed from two previous decisions on the ground that they wrongly interpreted the law and that the judge who rendered judgment in both cases had overlooked the relevant French literature. The dissenting judgment of Cimon J. contains an eloquent plea for the adoption of the doctrine of *stare decisis*:<sup>114</sup>

Il est vrai que la question ne paraît s'être présentée que deux fois devant cette cour, mais elle a été, chaque fois, décidée de la même manière, et ce, à dix ans d'intervalle, et en des termes très clairs qui ne laissent pas le moindre doute sur le sens de ces deux décisions. . . .

Il faut de la stabilité dans les jugements . . .

<sup>107</sup> (1921), 63 S.C.R. 32, at p. 43.

<sup>109</sup> *Op. cit.*, footnote 104, at p. 15.

<sup>110</sup> [1932] S.C.R. 343, at p. 351.

<sup>111</sup> (1901), 10 K.B. 122.

<sup>108</sup> (1899), 29 S.C.R. 375.

<sup>110</sup> (1909), 41 S.C.R. 516.

<sup>112</sup> (1899), 8 Q.B. 130.

<sup>114</sup> *Ibid.*, at pp. 147, 148, 149.

On sait quelle grande autorité ont les jugements ou précédents en Angleterre. Quand bien même on les y croit contraire à la loi, souvent on n'ose pas y toucher, de crainte de porter préjudice à des droits acquis, et on laisse au législateur le soin de les corriger, ce qui n'a pas d'effet rétroactif.

The majority of the court considered, however, that two judgments of doubtful value did not constitute a *jurisprudence* and that even English and American courts had modified their former views on a similar problem. Some support for an elastic view of stare decisis may also be derived from the *Vandry* case,<sup>115</sup> where Lord Sumner emphasized that the question of quasi-delictual liability under article 1054 C.C. had to be answered by the text of the law rather than by the previous decisions of any court, French or Canadian. In a recent case,<sup>116</sup> the Superior Court deliberately departed on two grounds from a judgment of the Supreme Court of Canada rendered in 1888.<sup>117</sup> Langlais J. considered that the interpretation of article 1867 C.C. by the Supreme Court based on a distinction between "things" and "money" was not supported by the history and meaning of that section. He also thought that the Supreme Court as well as the lower courts had been deeply divided on the matter and that the decision rested, therefore, on a small and unconvincing majority.<sup>118</sup>

On the whole, however, cases of deliberate departure from precedent in Quebec are remarkably rare. There is even considerable judicial support for strict adherence to stare decisis. Thus in *Baudet v. Le Roi*<sup>119</sup> Stein J., in an appeal from a magistrate's court against a conviction for illegal import of spirits, chose to adhere to a line of decisions against his personal doubts, on the ground that public interest demands certainty and continuity of decision. His action is particularly remarkable because, as has been shown earlier, the criminal appeal courts both of England and the common-law provinces of Canada do not consider themselves strictly bound by precedent. In *O'Kane v. Palmer*,<sup>120</sup> Greenshields C.J. remarked that the learned trial judge, whose judgment he reversed, "has apparently steadfastly neglected or refused to follow the rule known as *stare decisis*". In *Dame Mazurette v. Cité de Montréal*,<sup>121</sup> Judge

<sup>115</sup> *Quebec Railway, Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662.

<sup>116</sup> *Levasseur v. Pineau*, [1951] S.C. 448.

<sup>117</sup> *Shaw v. Cadwell* (1889), 17 S.C.R. 357.

<sup>118</sup> See, in the same sense, Perrault, *Traité de Droit Commercial*, vol. II (1936) p. 463.

<sup>119</sup> (1937), 75 S.C. 538.

<sup>120</sup> (1929), 67 S.C. 296.

<sup>121</sup> [1942] S.C. 210.

Archambault accepted *stare decisis* with some qualifications in a civil-law suit:

. . . bien que les tribunaux de la province de Québec ne connaissent pas la doctrine *stare decisis*, il est dans l'intérêt de l'administration de la justice que les juges de la Cour Supérieure ne rendent pas de décision contraire aux arrêts de la Cour du Banc du Roi.

There has been far less discussion, judicial and otherwise, of the place of *stare decisis* in Quebec *jurisprudence* than in the common law.<sup>122</sup> The observations made in 1923 by an eminent common-law judge, who was also learned in the civil law, still hold good:<sup>123</sup>

. . . The status of *stare decisis* cannot be said to be quite settled, and individual judges and even courts of appeal, acting on the Justinian maxim, 'Non exemplis sed legibus judicandum est', occasionally consider themselves free to decline to follow decisions of tribunals of co-ordinate and even of superior jurisdiction when not satisfied with the reasoning on which such decisions were based. But, so far as my opportunities have enabled me to form an opinion, the modern tendency in Quebec seems to be in the direction of treating decisions of the courts which lay down principles of law as precedents to be followed when like questions again arise. This growing inclination to accord recognition to the authority of judicial decisions may be—no doubt is—in a large measure ascribable to the fact that in the Supreme Court of Canada and in the Privy Council—ultimate appellate courts for Quebec as for the other provinces of Canada—(subject to what I have said as to the anomalous position of the Judicial Committee) the binding effect of judicial decisions is fully recognized.

In so far as the theoretical doctrine of *stare decisis* in Quebec differs at all from that of the common-law provinces, it has occasioned remarkably few divergences in practice. The authority which the Supreme Court of Canada has over both, and the fact that it regards its decisions as binding on all inferior courts of any province of Canada,<sup>124</sup> is the most important reason for this.

The inclination of Quebec courts to follow the common-law pattern rather than the French pattern is strongly reinforced by the technique of judgment which has established itself in Quebec. Under article 541 of the Quebec Code of Civil Procedure judgments in contested cases must give a summary of the issues of law and fact raised and decided, the "reasons upon which the decision is founded, and the name of the judge by whom it was rendered". Accordingly, Quebec courts render judgment in the strictly syllo-

<sup>122</sup> A recent treatise on the civil law of Quebec (Trudel, *Traité de Droit Civil de Québec*, vol. I (1942) p. 79) has only a brief observation on *stare decisis*: "En pratique, les décisions de nos tribunaux supérieurs ont . . . une autorité telle qu'elles sont respectées par les cours de juridiction inférieure".

<sup>123</sup> Anglin J., *op. cit.* (1923), 1 Can. Bar Rev. 33, at p. 42.

<sup>124</sup> See *supra*, p. 742.

gistic and highly compressed form of the French tradition, in which the presuppositions are followed by the conclusions. To this the Quebec courts append, however, the individual opinions of the judges, which state facts and legal conclusions in the manner of the common-law tradition. The printed reports frequently omit the formal judgment and confine themselves to the opinions. Thus, the Quebec judgment is, like that of any common-law court, the judgment of one or several individual judges, as opposed to the collective and anonymous judgment of the French court. In that way, the technique as well as the complexities of the common-law doctrine of stare decisis are introduced into Quebec law. This is true, particularly of the distinction between ratio decidendi and obiter dictum, a problem which in the French *jurisprudence* has a far smaller significance. In a witty and incisive protest against "dicts et silences", a chief magistrate of Quebec<sup>125</sup> has analyzed the well-known *Regent Taxi* case<sup>126</sup> to show the confusion arising from the diverging judgments of the different members of the Court of Appeal, the Supreme Court of Canada and the Privy Council. In that case, the Canadian courts were divided but explicit on the interpretation of article 1053 C.C., while the Privy Council preferred a "mutissement déficitaire" and decided the case on a formal point. The learned author considers such obstructive silence as no less objectionable than the equally obnoxious obiter dictum, which he describes as the "hors-d'oeuvre variés" of jurisprudence:

L'obiter dictum . . . n'est que l'expression d'un doute, il ne renseigne que sur l'ignorance, confessée par la juge même, de la solution qui serait la sienne s'il n'était pas appelé à en trouver une, et s'il avait suffisamment étudié la question pour y donner réponse.

All these factors bring the Quebec *jurisprudence* far closer to the common-law approach to stare decisis than to the French doctrine.

This attitude is, lastly, reinforced by a political factor of great importance. The very desire of Quebec lawyers to preserve the integrity of the civil law in alien surroundings has led them to sympathize with the common-law doctrine of precedent, as a means of safeguarding the traditions and principles inherited from the French law. Thus Mignault, who emphatically opposed the intrusion of common-law interpretations and ideas into the Quebec civil law, strongly favoured the doctrine of precedent.<sup>127</sup> His main res-

<sup>125</sup> F. Roy, *Dicts et Silences de la Magistrature* (1941), 1 *Revue du Barreau* 18, at p. 19.

<sup>126</sup> *Regent Taxi Co. v. Congrégation des Petits Frères de Marie*, [1929] S.C.R. 450, [1932] A.C. 295.

<sup>127</sup> *Droit Civil Canadien*, vol. 1, p. 111; (1925), 3 *Can. Bar Rev.* 1, at pp. 15, 17.

ervations were that the code must remain the paramount authority and that the decisions of the Supreme Court should be accepted as authoritative in Quebec only in so far as they concerned matters of Quebec law but not in so far as they concerned questions arising in the other provinces.<sup>128</sup> It has recently been suggested<sup>129</sup> that in matters concerning the *ordre public* adherence to stare decisis should be modified by regard to changing moral and social ideas. This, it is said, should apply to such matters as the interpretation of clauses in a will regarded as immoral by current conceptions of public order. Even if this departure from precedent in matters of public policy is accepted, the position would be no different from that of the common law, where changing concepts of public policy have repeatedly caused the House of Lords to modify or even reverse established doctrine.<sup>130</sup>

In conclusion, the position of stare decisis in the civil law of Quebec may be summarized as follows:

(1) Stare decisis is accepted in all its rigour in so far as the decisions of the Supreme Court of Canada on the Quebec civil law are concerned.

(2) As regards the Quebec Court of Queen's Bench (Appeal Side) and the lower Quebec courts, they overrule themselves or depart from the judgments of a higher court in the hierarchy on very exceptional occasions. The acceptance of the French doctrine that the text of the code, as distinct from any judicial or non-judicial commentary, is supreme authority enables them to do so. The record shows that such departures are rare.

(3) On the other hand, the theoretical liberty to depart from precedent is countered by the strong traditionalism of the Quebec courts, which makes them look to the established doctrine and precedent of the civil law with an orthodoxy far stricter than that practised by French courts.

(4) The Quebec technique of individual judgments, which is that of the common-law courts, brings in its train the complexities of the common-law doctrine of stare decisis, and the oblique methods of disregarding precedent which have been analyzed in regard to the common law.

(5) In its total practical effect, the Quebec doctrine and practice of precedent is remarkably close to that of the common law. The latter is not nearly as absolute in its obedience to precedent

<sup>128</sup> 3 Can. Bar Rev. at p. 15. This litigation does not appear to have been accepted by the Supreme Court of Canada.

<sup>129</sup> Wasserman, comment (1951), 30 Can. Bar Rev. 189, at p. 194.

<sup>130</sup> See *supra*, pp. 736 ff.



as is commonly supposed, while the Quebec courts are generally most reluctant to depart from precedent. It may even be said that since *Young's* and *Taylor's* cases the English civil and criminal courts of appeal have given themselves a greater freedom to depart from precedent than the courts of Quebec.

It remains to examine critically the adequacy of the present position of stare decisis in the light of principle and of a proper balance between stability and adaptability of the law, with particular regard to the problems which face Canada since its complete judicial emancipation.

### *Some Critical Observations*

Criticisms may be divided into those of principle and those of technique.

1. A brief reference may suffice on the question of stare decisis in constitutional cases, which affect the common-law and the civil-law provinces alike. This problem has recently been analyzed.<sup>131</sup> In constitutional matters, the case for a restrained but undisguised liberty to depart from rigid stare decisis is strongest. The Privy Council itself has acknowledged the need for a flexible interpretation of constitutional statutes,<sup>132</sup> as has the High Court of Australia.<sup>133</sup> The Supreme Court of the United States has, in the field of constitutional law even more than in any other, openly justified departure from precedent, "recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function".<sup>134</sup> As distinct from its flexible approach to the evolution of relationships between Britain and the Dominions, the Privy Council has, however, ostensibly adhered to precedent in its interpretation of the British North America Act proper, with results which a majority of constitutional authorities regard as unfortunate.<sup>135</sup>

2. In non-constitutional cases, the greatest weakness of the present doctrine, as applied both in England and Canada, lies in

<sup>131</sup> Laskin, *op. cit.*, footnote 11, *supra*.

<sup>132</sup> *Att.-Gen. for Ont. v. Att.-Gen. for Canada*, [1947] A.C. 127, at p. 153.

<sup>133</sup> *Bank of New South Wales v. Commonwealth* (1948), 76 C.L.R. 1; (1949), 79 C.L.R. 497.

<sup>134</sup> Brandeis J. in *Burnet v. Coronado Oil and Gas Co.* (1932), 285 U.S. 393. For further references see Laskin, *loc. cit.*, footnote 131, p. 1074.

<sup>135</sup> See among others: W. P. M. Kennedy, *The British North America Act: Past and Future* (1937), 15 Can. Bar Rev. 393; Scott, *The Consequences of the Privy Council Decisions* (1937), 15 Can. Bar Rev. 485; Laskin, "Peace, Order and Good Government" Re-examined (1947), 25 Can. Bar Rev. 1054; MacDonald, *The Constitution in a Changing World* (1948), 26 Can. Bar Rev. 21; O'Connor, Report to the Senate of Canada on the B.N.A. Act, pp. 11-13.

the rigid application of stare decisis to the decisions of the highest court of the country. It is bad enough that the rule in *Cavalier v. Pope*, or the antiquated and artificial distinctions between invitees and licensees in the law of tort, should be preserved because the House of Lords or the Supreme Court of Canada feel bound by precedent.<sup>136</sup> But worse than the self-inflicted disability of the highest court to correct itself is the devious effect of forcing the highest as well as the lower courts into subterfuges. The many qualifications of stare decisis which have been outlined in this paper provide some scope for judicial law reform. But the uncertainties as well as the inevitable hypocrisies of this method of evading rather than departing from precedent scarcely increase the respect for law. Neither do they give it that stability and certainty which is claimed for strict stare decisis. The open though limited revolt against stare decisis, started by both the Court of Appeal and the Court of Criminal Appeal in recent years, is an indirect consequence of the rigidity of the doctrine as practised by the House of Lords. Strong support for its modification has come from an eminent Lord of Appeal,<sup>137</sup> the present Master of the Rolls,<sup>138</sup> and the President of the Scottish Court of Sessions.<sup>139</sup> These criticisms are a more moderate re-statement of Justice Holmes' famous protest "that it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imita-

<sup>136</sup> These cases also show that the alleged alternative, legislative reform, is an utopia under modern conditions when the pressure of political, social and economic legislation very seldom leaves time for reforms of "lawyers' law". Cf. McWhinney, *Judicial Positivism in Australia: The Communist Party Case* (1953), 2 Am. J. Comp. L. 36, at p. 37. Even such urgent reforms as the abolition of Crown immunities in civil proceedings, or the doctrine of common employment, or the abolition of the doctrine of *Edwards v. Porter*, [1925] A.C. 1, have taken many years to achieve, while a host of other matters important to the lawyer and his client, but not of obvious political interest, remain unattended.

<sup>137</sup> Lord Wright, *op. cit.*, footnote 45 *supra*, and (1950), 13 Mod. L. Rev. at p. 23.

<sup>138</sup> Sir Raymond Evershed M.R., in *The Court of Appeal in England*, maintains that the House of Lords is not in fact strictly bound by stare decisis: "The House can, and on occasions must, modify its previous pronouncements when they cease to conform to the social philosophy of the day". It is on this supposition that Sir Raymond defends stare decisis for lower courts. As Allen has pointed out, *op. cit.*, at p. 336, the House of Lords does not unfortunately attribute to itself such liberty.

<sup>139</sup> Lord Cooper deplores the introduction of the "suffocating grasp" of the English doctrine into Scotland, *op. cit.*, footnote 5 *supra*, at p. 472. A recent monograph by Professor T. B. Smith, *The Doctrine of Judicial Precedent in Scots Law* (1952), points out that, although Scottish courts are bound by the decisions of the House of Lords, within the Court of Session itself the doctrine is not strict.

tion of the past."<sup>140</sup> Among legal scholars, Goodhart<sup>141</sup> and Paton<sup>142</sup> have criticized the present common-law doctrine. As the experience of other countries shows, such elasticity at the highest level would do little if any harm to the certainty of judicial authority. In no developed legal system, whether of common-law or civil-law vintage, does the highest court overrule itself except for urgent and gravely considered reasons.<sup>143</sup> Safeguards can be re-inforced,—as has sometimes been done by legislation in some continental countries—by requiring that the full court only should have power to overrule a decision of the court.<sup>144</sup>

3. The case for a measured liberty of departure from stare decisis is particularly strong in Canada since the mantle of the Privy Council has fallen on the Supreme Court. Although the Privy Council was never strictly bound by precedent, it made insufficient use of its liberty. The Supreme Court now has the ultimate responsibility for the development of the law of Canada. Neither of the two other highest federal courts in the common-law world adheres to strict stare decisis. If the example of the United States Supreme Court is rejected, because the sheer multitude of American cases makes adherence to stare decisis technically impossible, the example of the Australian High Court is all the more persuasive. The latter clearly considers itself empowered to overrule its prior decisions, although only "with great caution and only in a clear case where the prior decision was manifestly wrong".<sup>145</sup> This is a modest enough liberty, but it should suffice to enable judicial adaptations of the law in some of the instances outlined in the text, and to make it easier for the lower courts to abide by precedent, without subterfuge.

4. Many of the uncertainties and conflicts in the application of stare decisis have resulted from the multiplicity of judgments and the discordance of rationes decidendi. The joint judgment—

<sup>140</sup> Collected Legal Papers (1920) p. 187.

<sup>141</sup> *Op. cit.*, footnote 85 *supra*.

<sup>142</sup> Jurisprudence (2nd ed.) p. 165.

<sup>143</sup> Cf. for France, Ancel, *Case Law in France* (1934), 16 J. Comp. Leg. & Int'l. L. 1; for Germany, *Manual of German Law* (1949) pp. 2 ff.; for Australia, Harrison, *Precedent in Australia* (1933), 7 Austr. L. J. 405.

<sup>144</sup> This practice was followed by the Court of Appeal in *Young's case*, and by the Court of Criminal Appeal in *R. v. Taylor*.

<sup>145</sup> *Per* Latham C.J. in *Cain v. Malone* (1942), 66 C.L.R. 10, at p. 15. In *Att.-Gen. for New South Wales v. Perpetual Trustee* (1952), 85 C.L.R. 189, quoted from (1953), 25 Austr. L.J. 62, the High Court restated its liberty to reverse earlier decisions, but the majority declined to do so in the case of a "recent and well considered decision upon . . . a highly disputable question . . . unless it be a sufficient ground simply that the opposite conclusion be preferred" (*per* Dixon C.J.). Williams J. (dissenting) was of the opinion that the previous decision should be overruled as "manifestly wrong . . . and injurious to the public interest".

customary in the "advice" tendered by the Privy Council to the monarch—avoids at least this source of trouble. It is obviously desirable that joint judgments should be the rule not the exception. Only where a member of the majority reaches his concurrent conclusions on substantially different grounds is a separate judgment justified. Indeed, recent judgments of the Supreme Court of Canada, as well as of the English Court of Appeal and, on occasions, of the House of Lords, appear to favour the joint judgment technique increasingly. Sometimes one judgment is delivered for the whole court; sometimes there are two or three judgments when groups of judges agree in the result but not in the reasoning. This substantially corresponds to the practice of the United States Supreme Court.

The question remains whether, in accordance with the practice of the Privy Council, there should not even be dissenting judgments. In the present writer's view, the abolition of the dissenting judgment would eliminate one of the truly great traditions of the common law. The dissenting judgment is part of the very conscience of the law. It is an indispensable corollary to the individual identification of the common-law judge with his judgment, which forms the most striking and characteristic difference between the judicial systems of continental and Anglo-American jurisprudence.<sup>146</sup> The dissenting judgments have often been great landmarks in the development of the common law. They have frequently heralded turning points in the development of the law or registered historic protests. Modern American law would be unthinkable without the dissenting judgments of a Holmes or a Brandeis. The dissenting judgments of Lord Shaw in the *Zamora* case<sup>147</sup> and of Lord Atkin in *Liversidge v. Anderson*<sup>148</sup> form part of English legal history. Lord Justice Denning's dissent in the *Candler* case<sup>149</sup> may well be of the same order. There is perhaps one additional *raison d'être* for the dissenting judgment in Canada. Although differences in interpretation between the common-law and the civil-law judges on the Supreme Court are not frequent, they have occurred.<sup>150</sup> There may well be future occasions on which the civil-law judges would wish

<sup>146</sup> The only exception to this in Anglo-American law, the practice of the Privy Council, is due to a purely historical and no longer applicable reason: technically the judgment of the Privy Council is an "advice" and no conflicting advice should be tendered to the sovereign.

<sup>147</sup> [1916] 2 A.C. 77.

<sup>148</sup> [1942] A.C. 306.

<sup>149</sup> [1951] 2 K.B. 164.

<sup>150</sup> Cf. for example, *Curley v. Latreille* (1920), 60 S.C.R. 131, and *Desrosiers v. le Roi* (1920), 60 S.C.R. 105. In both cases Brodeur and Mignault JJ., joined by Anglin J., protested against the use of English decisions in civil-law cases.

to record a view differing from that of the common-law trained majority. There is every reason for far greater economy in the technique of judgment than has been practised in the past. Unnecessary dicta, ambiguous statements of principles, and other exercises in irrelevancy greatly obstruct the path of the law. More than one judgment for the court, or for the majority as the case may be, should be delivered only when a judge differs on major questions. But the abolition of the dissenting judgment would strike at a most precious heritage of the common law.<sup>151</sup>

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### Dissent

Dissenting opinions are not in themselves objectionable. There are very good reasons why the judges of our highest courts should not always agree. Nor does their occasional disagreement show a bad state of uncertainty in the law. Cases calling for everyday application of everyday rules of law do not as a rule go to the highest courts, nor, if they sometimes go there, do they evoke dissents. Reasons for dissent exist chiefly in two types of cases. In one the case is not governed by a settled rule of law clearly covering it. It must be decided by a process of judicial reasoning proceeding upon some applicable principle. But in order to do this choice must often be made from among two or more equally authoritative starting points drawn by analogy from past adjudications. Hence the decision will turn ultimately upon a comparative valuing of these starting points. In the other type of case, the court has to find the meaning of a statute which expressly covers a whole field and must be applied to all cases within it. But unfortunately it frequently happens that a state of facts within that field arises of which the legislator did not think and for which he made no provision or no clear provision. Here again a valuing is called for. The court must value the possible interpretations and reach a rule for the case in hand as the legislator should have done. The difficulty at bottom is that the law does not and cannot provide an absolute detailed criterion of values for these cases. Ultimately the process of valuing gets down to the conception one has of the ideal relation among men of the ideal of a civilized human society. There are to some extent generally received ideals of this sort; to some extent so generally and authoritatively received as to be part of the law. But in the social and economic developments in the society of today these ideals are far from settled in their content and application. It cannot be expected that judges will be agreed on all the novel questions of analogical reasoning for new states of fact and of interpretation of the huge output of legislation which come before them. (Roscoe Pound, *Cacæthes Dissentiendi: The Heated Judicial Dissent* (1953), 29 A. B. A. J. 794)

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<sup>151</sup> Since this essay was written, the problem outlined in the concluding section has been discussed in much greater detail by McWhinney, *Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals* (1953), 31 Can. Bar Rev. 595.