1.3 LEGAL METHOD

READING MATERIAL

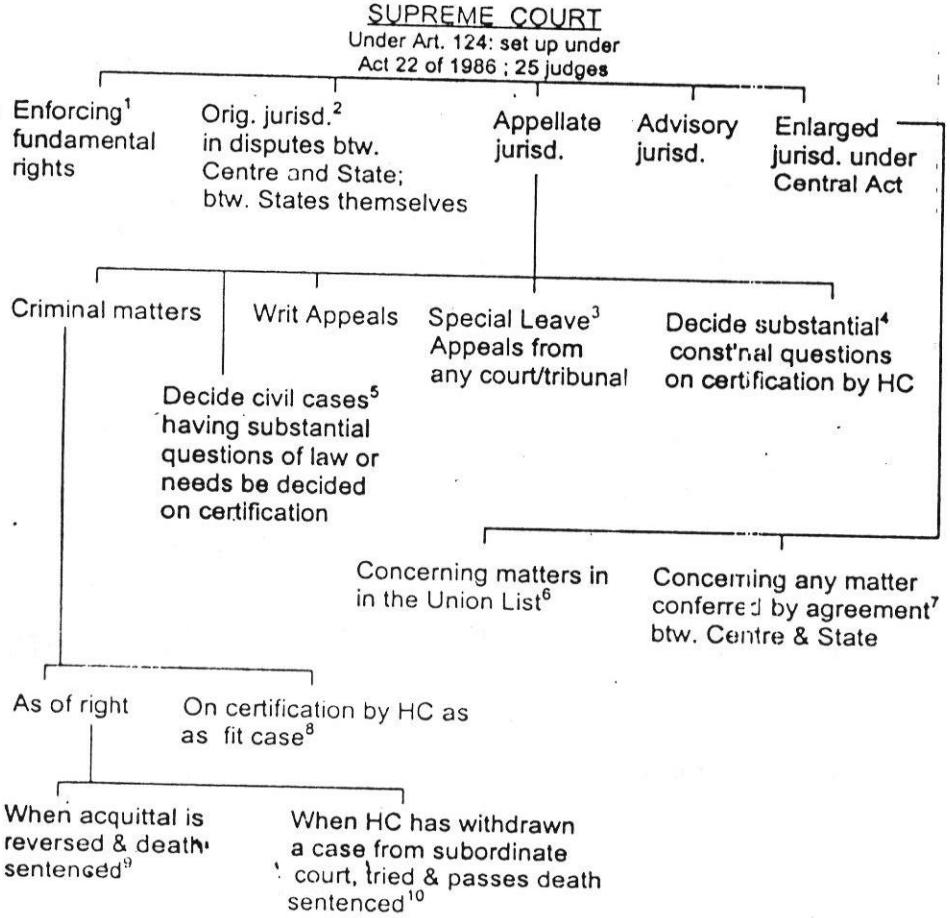
for

I YEAR, I TRIMESTER

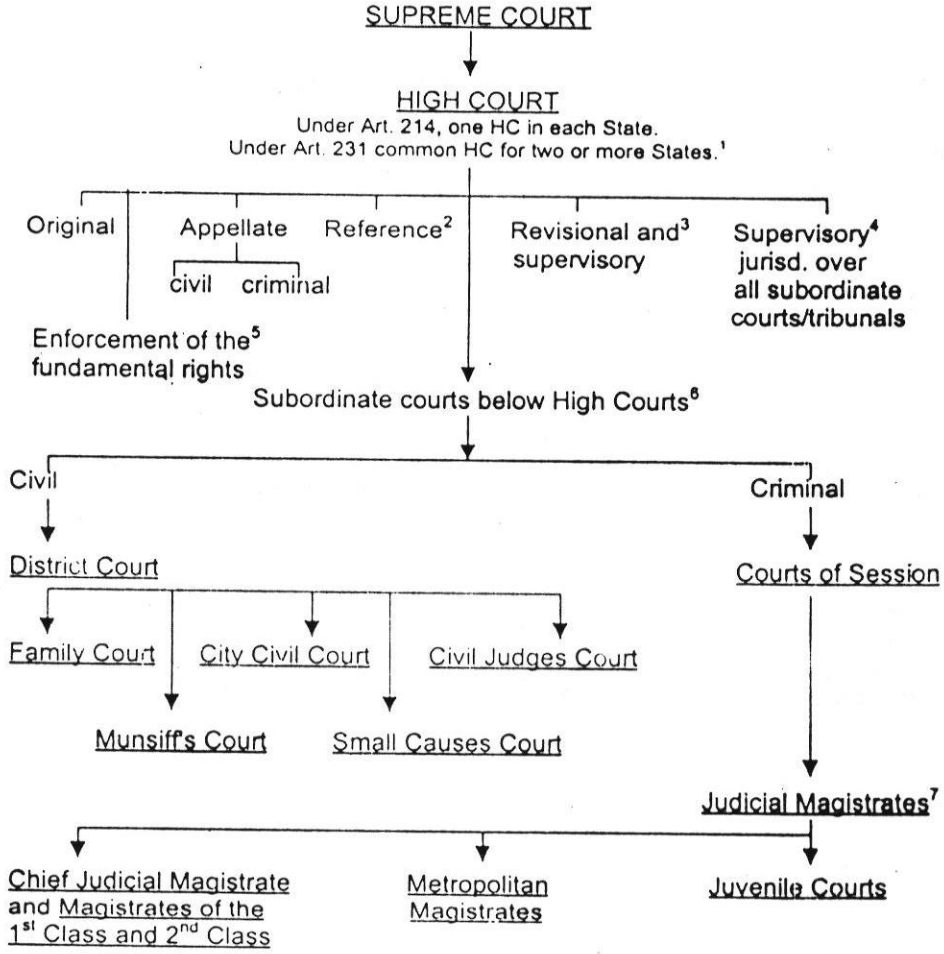
MODULE-VII: PRECEDENT & COURT STRUCTURE

INDEX

INDIAN COURT STRUCTURE



[1] Under Article 32
[2] Under Article 131
[3] Under Article 136
[4] Under Article 132
[5] Under Article 133 read with Sections 109-110 of CPC
[6] Under Article 138(1)
[7] Under Article 138(2)
[8] Under Article 134(1) (c)
[9] Under Article 134(1) (a)
[10] Under Article 134(1) (b)



[1] Number of judges varies from state to state. Jurisdiction remains the same as before the Constitution except that original jurisdiction under Article 225 for revenue matters is added. The High Courts of Allahabad, Bombay, Calcutta and Madras were set up under the Letters Patent Act prior to Independence. Other High Courts set up under different statutes. Ex: Karnataka HC set up under Mysore High Court Act r/w Karnataka High Court Act 1961
[2] Under Section 113 & Order XLVI of CPC
[3] Under Section 115 of CPC
[4] Under Article 227
[5] Under Article 226
[6] Under Articles 233 to 237
[7] As distinguished from Judicial Magistrates there are also Executive magistrates with a different hierarchy under Cr PC, discharging functions mainly dealing with law and order. Under Police Acts, the Taluk Magistrates are subordinate to Sub-divisional Magistrates who function under District Magistrates.

LEGAL METHOD
I YEAR I TRIMESTER

COURT OF RECORD - MEANING

The Supreme Court of India and the High Courts are said to be "Courts of Record"(Art.129 & Art.215). In England certain courts are expressly declared by statutes to be courts of records.

A "Court of Record" meant originally a court whose acts and proceedings were enrolled in parchment (a document written on the skin of a sheep or goat or some other animal specially prepared for writing). Court of Star chamber, chancery court acting as a court of equity, admiralty and ecclesiastical Court were not courts of record as their proceedings were not recorded. At about the beginning of the 17th century the Common Law Courts developed the doctrine that only a court of record could imposed fine or imprisonment.

Now in England the question whether a court is or is not a court of record, apart from those declared to be so by a state, "seems to depend in general upon whether it has power to fine or imprison, by a statute or otherwise, for contempt of itself or other substantive offences; if it was such a power, it seems that it is a court of record"[1].

In India the subordinate courts do not have jurisdiction to fine or imprison a person for contempt. Courts competent to try a person for contempt of courts are governed by the Contempts of Courts Act, 1971, specially under Sec.10. Therefore, power to punish for contempt seems to be the criterion for calling a court of record. Maintenance of record of proceedings is not the criterion as all courts do maintain records of their proceedings.

CIVIL COURTS

1. In India there is a three tier court hierarchy on civil side except where City Civil Courts are established.

2. Principal court of original jurisdiction is District Courts(DC). Below DC is the Civil Judges Court/Court of Subordinate Judge. And at the lowest level is the Munsiff's Court.

   These courts differ in their jurisdictions in terms of the value of the suits.

3. Nomenclature varies from State to State as for example, the court immediately sub-ordinate to District Court is called as 'Civil Judge Court' in Karnataka whereas it is called as 'Court of Sub-ordinate Judge' in Orissa.

4. Establishment: The Civil Courts in Karnataka are established under Section-3 of Karnataka Civil Courts Act, 1964.

5. Principal Court Original Civil Jurisdiction:
   The District Courts are vested with this Jurisdiction in that particular district. For eg.:Sec.2(2) of the Orissa Civil Courts Act, 1984. Similarly, the City Civil Court may have the above mentioned Jurisdiction over a particular city. Eg.:Sec.3(3) of The Bangalore City Civil Court Act, 1979.

6. District Courts have administrative control over all the Civil Courts subject to superintendence of the High Courts.

7. System of Appeal:
   Orissa Act 1984 under Sec.16(2)(b) From DJ to HC if the value is in excess of Rs.20,000/-. Under Sec.16(2)(a) - Civil/Sub-ordinate Judge to DJ if value is Rs.20,000/-.

   Under Sec.16(3) Munsiff to DJ if High Court doesn't provide for appeal to subordinate court.

8. A Family Court(FC) is a court parallel to DC or the Civil/Subordinate Judge as the case may be under the Family Courts Act, 1984. FC exercises jurisdiction of DJ/CJ in respect of suits under Sec.7, Family Act, 1984.

9. Juvenile Courts are courts parallel to the court of JMFC and MMFC in respect of dealing with Juvenile Delinquents under the Juvenile Justice Act, 1986.

   Under Sec.37 Juvenile Act, 1986 appeal to Court of Session under Sec.38 Revision to HC.

SMALL CAUSE COURTS(SCCs)

1. In Karnataka, SCCs are established under Sec.3 of SCC. Act, 1964.

2. SCCs try cases involving small amounts of money. The amount may vary from one State to another. For eg. Under Sec.8(2), the SCCs in Karnataka Training Civil suits the value of which don't exceed Rs.500/-.

3. SCCs conduct summary proceedings under Order 37 CPC.

4. Under Sec.4 of the Act, Civil Judges are appointed to SCCs in the mofussil areas and District Judges are appointed as Chief Judges in Bangalore City.

5. Administrative Control :- Bangalore City SCC -> High Court under Sec.20(3).

6. Administrative Control of other SCC -> District Court
   Superintendence of these Courts -> High Court under Sec.20(1).

[1] 10 Halsbury Laws of England (4th ed.) 319. See also, Holdsworth's History of English Law, (7th ed.) 157 - 161.

7. Appeal from Bangalore City SCCs lies to High Court [2]-
   1) Under Sec.35 A CPC against ORDERS
   2) Under Sec.95 CPC
   Appeal is from Mofussil SCCs lies to District Court under Sec.17(b) under above named provisions of CPC.

8. Revision from Bangalore City SCCs + other SCCs lies to HC under Secs.10 .

9. Revision means a re-examination for correction whereas appeal means resort to a superior court to review the decision on merits of an inferior court or administrative agency and may substitute its judgement to that of the inferior court[3].

CITY CIVIL COURTS (CCCs)

1. CCCs have been established in the Metropolitan Cities like Bombay, Madras, Calcutta, Hyderabad, Ahmedabad and Bangalore and at such other places as the State Government may specify under the States Acts.

2. CCCs consist of Principal City Civil Judge and Addl.City Civil Judges. Eg.under Sec.3(2) of Bangalore City Civil Court Act, 1979.

3. CCC in Bangalore is the Principal Civil Court of Original Jurisdiction under Sec.3(3)(a).

4. Appeals from CCCs lie to HC for Eg.under Sec.9 of Bangalore Act, 1979.

5. CCCs can dispose of all suits of civil nature arising within the city except suits or proceedings cognizable by the HC and the Court of Small Causes. For eg. Under Sec.3(3)(b) of Bangalore Act, 1979.

6. CCCs subordination and superintendence -> HC under Sec.4 of Bangalore Act, 1979.

7. Original jurisdiction means jurisdiction to consider a case in the first instance, try it, and pass judgement upon law and facts[4].

8. Subordinate means to be placed below in rank/class 'superintend' means to regulate with authority or to have charge and direction of[5].

9. Civil Suit means a suit of civil nature (refer CPC).

CRIMINAL COURTS

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[2]Subject to limit in proviso to section 104(1)(ff) of CPC

[3]Black's Law Dictionary

[4]Black's Law Dictionary

[5]Ibid

1. In India there is hierarchy of courts on the criminal side. At the top is the Court of Session. Below which come the judicial magistrates. The latter are at 2 levels - the Chief Judicial Magistrate and Judicial Magistrate First Class (JMFC) and Judicial Magistrate Second Class(JMSC).

2. Some States have only JMFC for Eg:Karnataka.

3. Chief Judicial Magis
4. trate (CJM) has got power to try certain serious offences and lesser offences are tried by other Magistrates.

5. CJM has administrative control over other JM within his jurisdiction.

6. CJMs are subordinate to Session Judge. Other Magistrates are subordinate to CJM subject to general control of Session Judge. Under Sec.15(1) Cr.Pc.
   Similar provisions are found in Sec.19(1) for Metropolitan Magistrates.

7. The jurisdiction of CJMs and Munsiffs is specified by State Government in consultation with High Court.

EXECUTIVE MAGISTRATES:

1. Magistracy consists of 3 tiers of DM/SDM/Taluk Magistrate in that order of hierarchy.

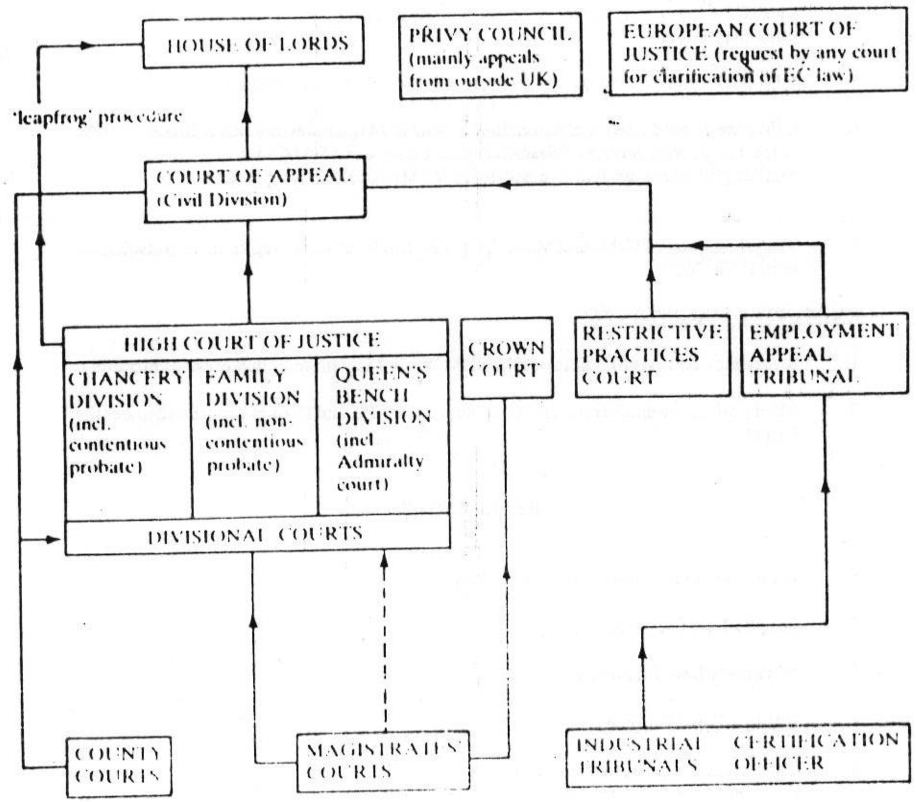
2. Their powers are enumerated in Police Acts and Cr.PC and Offices are created under the Cr.PC.

REFERENCES

1. Karnataka Small Cause Courts Act, 1964.
2. Black's Law Dictionary.
3. Wharton's Law Dictionary.
4. Collin's Law Dictionary.
5. The Orissa Civil Courts Act, 1984.
6. The Juvenile Justice Act, 1986.
7. The Family Courts Act, 1984.
8. Bangalore City Civil Court Act, 1979.
9. Karnataka Civil Courts Act, 1964.
10. Code of Civil Procedure, 1908.
11. Code of Criminal Procedure, 1973.
12. The Police Act, 1961.
13. The High Court Act, 1963.
14. The Mysore High Court Act, 1884.
15. The Karnataka High Court Act, 1961.

(8)

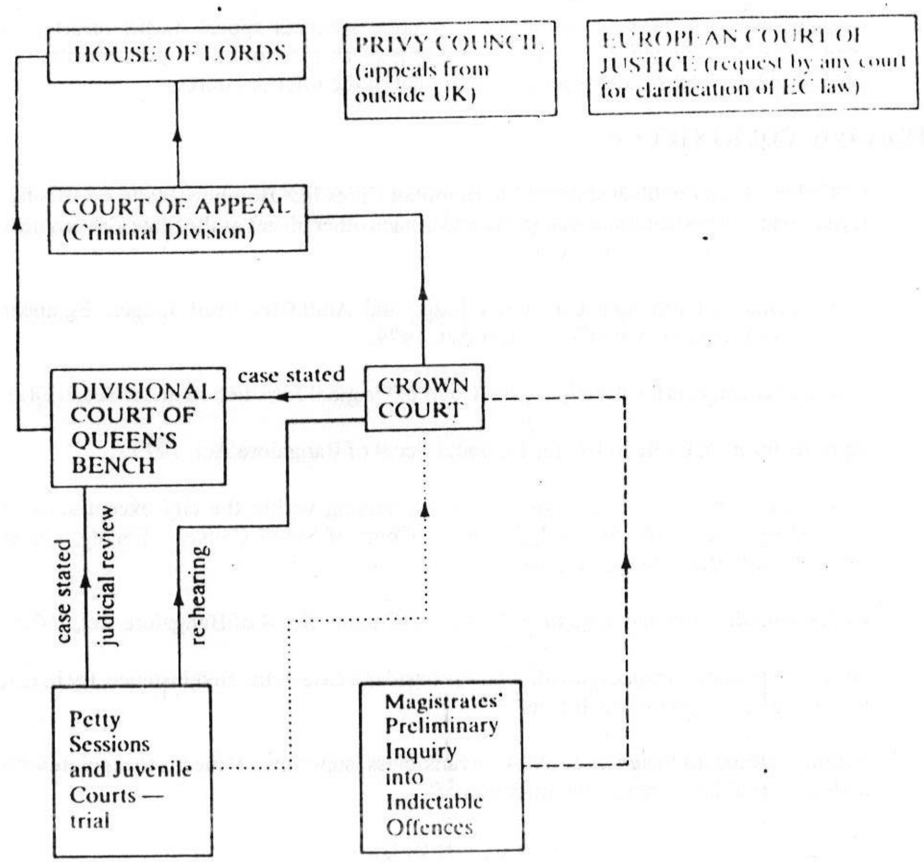
SYSTEM OF COURTS EXERCISING CIVIL JURISDICTION



Appeals are indicated thus

Appeals by way of case stated thus

SYSTEM OF COURTS EXERCISING CRIMINAL JURISDICTION



Appeals are indicated thus

Committed for trial, thus

Committed for sentence, thus

4

House of Lords

The Lord High Chancellor of Great Britain: Lord Mackay of Clashfern

Lords of Appeal in Ordinary

Lord Goff of Chieveley
Lord Browne-Wilkinson
Lord Mustill
Lord Slynn of Hadley
Lord Lloyd of Berwick
Lord Nolan
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Clyde
Lord Hope of Craighead
Lord Hutton of Bresagh
(appointed 6 January 1997)

Court of Appeal

The Lord High Chancellor of Great Britain

The Lord Chief Justice of England: Lord Bingham of Cornhill
(President of the Criminal Division)

The Master of the Rolls: Lord Woolf
(President of the Civil Division)

The President of the Family Division: Sir Stephen Brown

The Vice-Chancellor: Sir Richard Rashleigh Folliott Scott

Lords Justices of Appeal

Sir Martin Charles Nourse
Dame Ann Elizabeth Oldfield Butler-Sloss
Sir Murray Stuart-Smith
Sir Christopher Stephen Thomas Jonathan Thayer Staughton
Sir Anthony James Denys McCowan
Sir Alexander Roy Asplan Beldam
Sir Andrew Peter Leggatt
Sir Paul Joseph Morrow Kennedy
Sir David Cozens-Hardy Hirst
Sir Simon [illegible]
Sir Anthony Howell Meurig Evans
Sir Christopher Dudley Roger Rose
Sir John Douglas Waite
Sir John Ormond Roch
Sir Peter Leslie Gibson
Sir John Stewart Hobhouse
Sir Denis Robert Maurice Henry
Sir Mark Oliver Saville
Sir Peter Julian Millett
Sir Swinton Barclay Thomas
Sir Robert Andrew Morritt
Sir Philip Howard Otton
Sir Robin Ernest Auld
(Senior Presiding Judge for England and Wales)
Sir Malcolm Thomas Pill
Sir William Aldous
Sir Alan Hylton Ward
Sir Michael [illegible]
Sir Konrad [illegible] Theodor Schiemann
Sir Nicholas Addison Phillips
Sir Mathew Alexander Thorpe
Sir Mark Howard Potter
Sir Henry Brooke
Sir Igor Judge
Sir George Mark Waller
Sir John Frank Mummery

High Court of Justice

The Lord High Chancellor of Great Britain

The Lord Chief Justice of England

The President of the Family Division

The Vice-Chancellor

The Senior Presiding Judge for England and Wales

The puisne judges of the High Court

Chancery Division

The Lord High Chancellor of Great Britain

The Vice-Chancellor

Sir Jeremiah LeRoy Harman
Sir Donald Keith Rattee
Sir Francis Mursell Ferris
Sir John Murray Chadwick
Sir Jonathan Frederic Parker
(Vice-Chancellor of the County Palatine of Lancaster)
Sir John Edmund Frederic Lindsay
Dame Mary Howarth Arden
Sir Edward Christopher Evans-Lombe
Sir Robin Raphael Hayim Jacob
Sir William Anthony Blackburne
Sir Gavin Anthony Lightman
Sir Robert Walker
Sir Robert John Anderson Carnwath
Sir Colin Percy Farquharson Rimer
Sir Hugh Ian Lang Laddie
Sir Timothy Andrew Wigram Lloyd
Sir David Edmund Neuberger

Queen's Bench Division

The Lord Chief Justice of England

Sir Christopher James Saunders French
Sir Iain Charles Robert McCullough
Sir Oliver Bury Popplewell
Sir Richard Howard Tucker
Sir Patrick Neville Garland
Sir Michael John Turner
Sir John Downes Alliott
Sir [illegible]
Sir John Arthur Dalziel Owen
Sir Francis Humphrey Potts
Sir Richard George Rougier
Sir Ian Alexander Kennedy
Sir Stuart Neill McKinnon
Sir Thomas Scott Gillespie Baker
Sir Edwin Frank Jowitt
Sir Douglas Dunlop Brown
Sir Michael Morland
Sir Roger John Buckley
Sir Anthony Brian Hidden
Sir John Michael Wright
Sir Charles Barrie Knight Mantell
Sir John Christopher Calthorpe Blofeld
Sir Peter John Cresswell
Sir Anthony Tristram Kenneth May
Sir John Grant McKenzie Laws
Dame Ann Marian Ebsworth
Sir Simon Lane Tuckey
Sir David Nicholas Ramsey Latham
Sir Christopher John Holland
Sir [illegible]
Sir Richard Herbert Curtis
Sir Stephen John Sedley
Dame Janet Hilary Smith
Sir Anthony David Colman
Sir Anthony Peter Clarke
Sir John Anthony Dyson
Sir John Thayne Forbes
Sir Michael Alexander Geddes Sachs
Sir Stephen George Mitchell
Sir Rodger Bell
Sir Michael Guy Vicat Harrison
Sir Bernard Anthony Rix
Dame Anne Heather Steel
Sir William Marcus Gage

[continued on next page]

Queen's Bench Division *(continued)*

Sir Jonathan Hugh Mance
Sir Andrew Centlivres Longmore
Sir Thomas Richard Atkin Morison
Sir Richard Joseph Buxton
Sir David Wolfe Keene
Sir Andrew David Collins
Sir Maurice Ralph Kay
Sir Frank Brian Smedley
Sir Anthony Hooper
Sir Alexander Neil Logie Butterfield
Sir George Michael Newman
Sir David Anthony Poole
Sir Martin James Moore-Bick
Sir Julian Hugh Gordon Langley
Sir Roger John Laugharne Thomas
Sir Robert Franklyn Nelson
Sir Roger Grenfell Toulson
Sir Michael John Astill
Sir Alan George Moses
Sir Timothy Edward Walker

Family Division

The President of the Family Division

Sir Anthony Barnard Hollis
Sir Edward Stephen Cazalet
Sir Robert Lionel Johnson
Dame Joyanne Winifred Bracewell
Sir Michael Bryan Connell
Sir Jan Peter Singer
Sir Nicholas Allan Roy Wilson
Sir Nicholas Peter Rathbone Wall
Sir Andrew Tristram Hammett Kirkwood
Sir Christopher Stuart-White
Dame Brenda Marjorie Hale
Sir Hugh Peter Derwyn Bennett
Sir Edward James Holman
Dame Mary Claire Hogg
Sir Christopher John Sumner

CITATION

These reports are cited thus:

[1997] 1 All ER

REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 26 *Halsbury's Laws* (4th edn) para 577 refers to paragraph 577 on page 296 of volume 26 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn reissue) para 267 refers to paragraph 267 on page 200 of reissue volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 40 *Halsbury's Statutes* (4th edn) 734 refers to page 734 of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 19 *Halsbury's Statutes* (4th edn) (1994 reissue) 497 refers to page 497 of the 1994 reissue of volume 19 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The Digest

(formerly The English and Empire Digest)

The reference 37(2) *Digest* (Reissue) 424, *2594* refers to case number 2594 on page 424 of the reissue of green band volume 37(2) of *The Digest*.

The reference 27(1) *Digest* (2nd reissue) 330, *2849* refers to case number 2849 on page 330 of the second reissue of green band volume 27(1) of *The Digest*.

Halsbury's Statutory Instruments

The reference 17 *Halsbury's Statutory Instruments* 305 refers to page 305 of volume 17 of the grey volumes series of *Halsbury's Statutory Instruments*.

The reference 14 *Halsbury's Statutory Instruments* (1994 reissue) 201 refers to page 201 of the 1994 reissue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

thus quite different from the House of Lords. The *Cour de cassation* reviews the judgment, not the case. Its sole function is to ensure that the judgments of the lower courts are in accordance with the law. It can either reject the *pourvoi* or quash[3] the decision under attack and send the case back to another court of the same level. A *pourvoi* is not an appeal.[4] The nearest English equivalent is an appeal by case stated under ss. 83 ff. of the Magistrates Courts Act, 1952, except that the Divisional Court can make a decision on the merits. The *Cour de cassation* also differs from the House of Lords in that a *pourvoi* is admissible against every decision of any court which is final (i.e. not subject to appeal) so that even cases from the lowest courts can go directly to the highest, e.g. a decision of a *tribunal d'instance* if the sum involved is less than 2 500 frs.

5. The difference between *tribunaux de droit commun* and *tribunaux d'exception* must not be considered as equivalent to the English distinction between 'superior' and 'inferior' courts. The French distinction refers to the technique of formulating the range of a court's jurisdiction, whether by statutory tabulation (*tribunaux d'exception*) or by a grant of residuary power (*tribunaux de droit commun*).

A. Principles of Organization

Loi sur l'organisation de l'ordre judiciaire et l'administration de la justice, 20 avril 1810

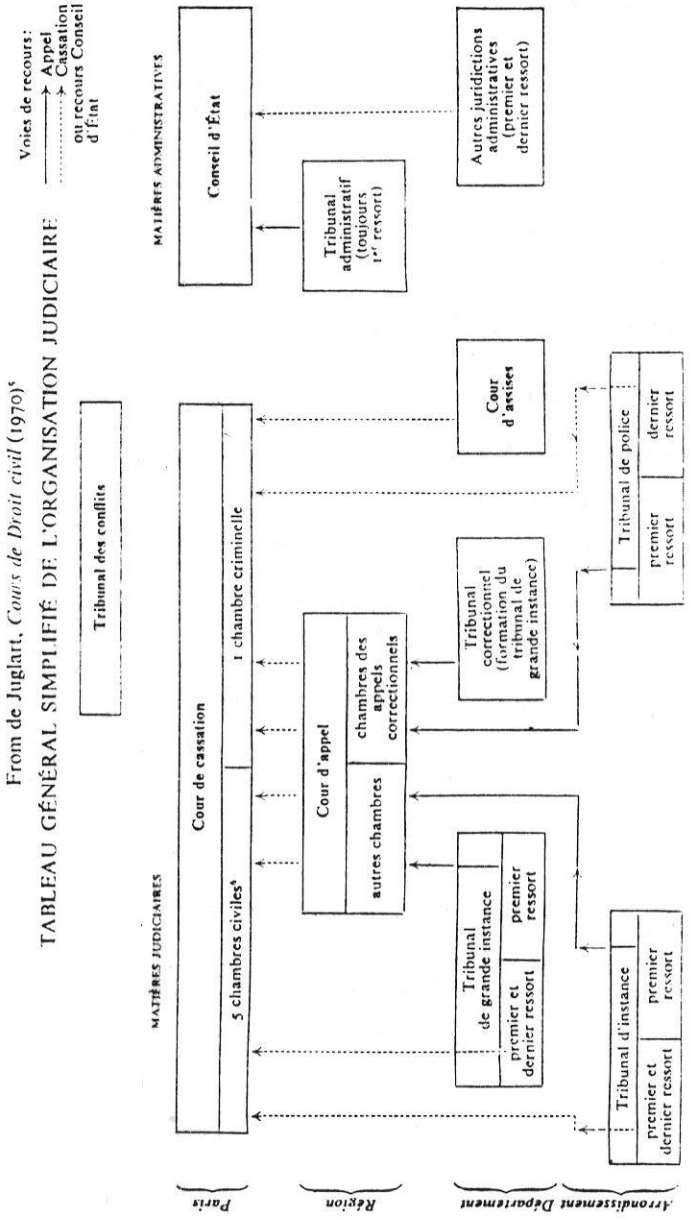
ART. 7: La justice est rendue souverainement par les cours impériales; leurs arrêts, quand ils sont revêtus des formes prescrites à peine de nullité, ne peuvent être cassés que pour une contravention expresse à la loi. Les arrêts qui ne sont pas rendus par le nombre de juges prescrit, ou qui ont été rendus par des juges qui n'ont pas assisté à toutes les audiences de la cause, ou qui n'ont pas été rendus publiquement, ou qui ne contiennent pas les motifs, sont déclarés nuls.

La connaissance du fond est toujours renvoyée à une autre cour impériale.

[3] 'Casser' equals 'quash'—the same word.
[4] Note the different kinds of lines in the Tables below.

From de Juglart, *Cours de Droit civil* (1970)[5]

TABLEAU GÉNÉRAL SIMPLIFIÉ DE L'ORGANISATION JUDICIAIRE



N.B. — Ce tableau est l'œuvre de Mme Foyer-Perrot, maître assistante à la Faculté de Droit de Paris. [Author's remark]

[5] B. , vol. 1 (1), pp. 137, 138. [6] Including a *Chambre sociale* and a *Chambre commerciale*.

Constitutional Council

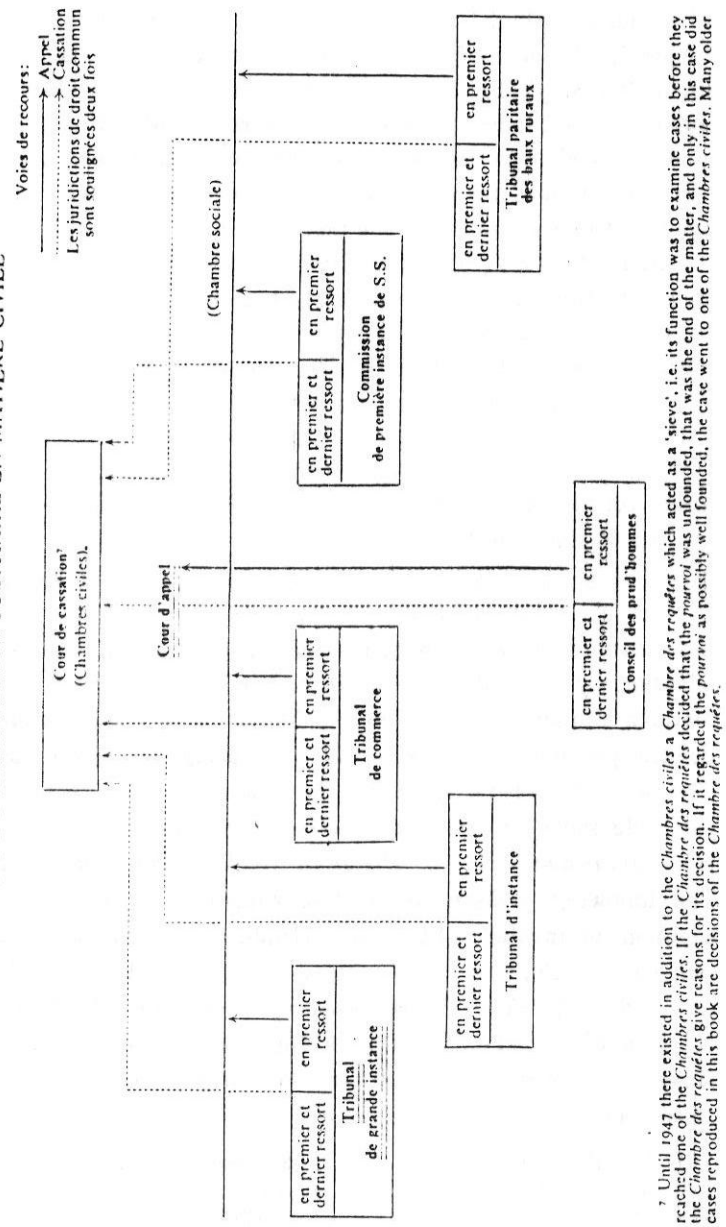
des Members de droit des members de nommés

Former presidents of the Republic
9 members désignés,
à raison de trois par chacune
de personalités suivantes:
président de la Republique,
president de l'Assemblée nationale
president du Sénat

period for nine years & not renewable
the council is reconstituted every 3 years

i) Control of constitutional matters
ii) contentious matters concerning elections & referendum
(iii) interventions in exceptional circumstances

TABLEAU DE L'ORGANISATION JUDICIAIRE EN MATIÈRE CIVILE



[7] Until 1947 there existed in addition to the *Chambres civiles* a *Chambre des requêtes* which acted as a 'sieve', i.e. its function was to examine cases before they reached one of the *Chambres civiles*. If the *Chambre des requêtes* decided that the *pourvoi* was unfounded, that was the end of the matter, and only in this case did the *Chambre des requêtes* give reasons for its decision. If it regarded the *pourvoi* as possibly well founded, the case went to one of the *Chambres civiles*. Many older cases reproduced in this book are decisions of the *Chambre des requêtes*.

From de Juglart, *Cours de Droit civil* (1970)[8]

Notions fondamentales sur le procès civil

85. Nous aurons souvent l'occasion de parler de 'procès', d' 'action en justice', de 'justiciable', de 'défendeur', de 'recours en appel' ou 'en cassation'; il convient donc, tout d'abord, de savoir comment se déroule un procès civil. Pour cela, le plus simple est de prendre un exemple.

M. Jean Martin, entrepreneur, demeurant à Toulouse, 50, rue de l'Arbre-Mort, demande à la Compagnie Générale d'Assurances le paiement d'une somme de 10.000 F en réparation du préjudice qu'il a subi du fait d'un incendie et en exécution d'un contrat qu'il avait souscrit auprès de cette compagnie. La compagnie d'assurances contestant sa dette et se refusant à l'exécution de son contrat, prétextant que la déclaration de sinistre n'a pas été faite dans le délai de cinq jours prévu par la police, M. Martin la met en demeure[9] de lui payer la somme qu'il estime lui être due. Cette mise en demeure se fait, en pratique, par lettre recommandée avec accusé de réception ou même par acte d'huissier.

Faute d'un accord amiable, M. Martin va 'citer' son adversaire devant le tribunal de grande instance de Toulouse par voie d'huissier. Autrement dit, il charge un huissier de remettre de sa part à la Compagnie Générale d'Assurances un acte sur papier timbré, appelé 'exploit d'ajournement', par lequel il fait connaître à son adversaire le nom de son avoué[9a] (dont l'intervention est obligatoire devant le tribunal), l'objet de sa demande et lui fixe un délai de comparution (en général à huitaine franche) devant le tribunal qui doit juger l'affaire et connaître de la demande.

La Compagnie Générale d'Assurances ayant reçu l'exploit d'huissier, doit 'comparaître', c'est-à-dire venir à l'audience devant le tribunal pour se défendre (d'où le nom de 'défendeur' sous lequel on la désignera) contre la demande de M. Martin (qui est désigné sous le nom de 'demandeur'). Mais cette comparution se fait, là aussi, obligatoirement par l'intermédiaire d'un autre avoué.

Si, à l'expiration du délai d'ajournement, le défendeur n'a pas 'constitué' (choisi) avoué, le demandeur peut faire juger l'affaire par le tribunal en l'absence du défendeur (procédure 'par défaut').

La Compagnie Générale d'Assurances ayant régulièrement constitué avoué, l'affaire est 'mise au rôle', c'est-à-dire inscrite au greffe du

[8] B. 24, pp. 115 ff. [9] Below, p. 469.
[9a] See appendix; for *avoué* read *avocat*.

appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The appellants will have their costs here and in the Courts below.

Solicitors for appellants: *Downer & Johnson.*
Solicitors for first respondent: *T. L. Wilson & Co.*
Solicitor for second respondent: *E. Dalgado.*

J. C.
1915
BAL GANGADHAR TILAK v. SHRINIWAS PANDIT.

PUTTU LAL AND OTHERS . . . . . APPELLANTS;

AND

PARBATI KUNWAR AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

J. C.*
1915
April 15, 16; *May* 5.

Hindu Law—Adoption—Widow adopting Brother's Son—Validity—Authority of Dattaka Mimansa.

A Hindu widow making an adoption by virtue of her deceased husband's authority can validly adopt her brother's son.

Jai Singh Pal Singh v. *Bijai Pal Singh* (1904) I. L. R. 27 Allah. 417 approved.

The Dattaka Mimansa is a work of high authority and has become embedded in Hindu law, but caution is required in accepting the glosses of its author where they deviate from or add to the Smritis.

APPEAL from a judgment and decree of the High Court (December 15, 1909) reversing a judgment and decree of the Subordinate Judge of Mainpuri (May 18, 1908).

One Gandharp Singh, a wealthy Brahman, died childless in November, 1898, leaving him surviving as his sole heir according to Hindu law his widow, the first respondent. On June 17, 1902, she executed a deed by which she declared that, with the oral permission of her late husband, she had adopted the second respondent, who was her brother's son and then about twelve years of age.

On June 17, 1907, the appellants instituted the suit, claiming to be reversionary heirs of Gandharp Singh, and praying for a declaration that the alleged adoption was invalid.

* *Present:* LORD DUNEDIN, LORD ATKINSON, SIR GEORGE FARWELL, and SIR JOHN EDGE.

J. C.
1915
PUTTU LAL v. PARBATI KUNWAR.

The Subordinate Judge held that the ceremony of adoption did in fact take place, but neither at the time nor with the publicity alleged by the respondents, and without the authority of Gandharp Singh. While recognizing that it was his duty to follow the decision of the High Court in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1), in which it was held that a widow could validly adopt her brother's son, the learned Subordinate Judge, upon an elaborate discussion of the texts, expressed the view that the adoption was invalid according to Hindu law. He made a decree in favour of the plaintiffs (appellants).

The High Court (Sir J. Stanley C.J. and Banerji J.) concurred in the finding of the Subordinate Judge that the adoption had in fact taken place, but differed from his finding as to the authority, which they held to be established by the evidence. The learned judges pointed out that upon the question of the validity of a widow's adoption of her brother's son the Subordinate Judge was bound by the previous decision of the High Court above referred to, and they did not consider it necessary further to discuss that question.

Lowndes, for the appellants. Upon the evidence the alleged oral authority to adopt was not established. But if it were, the adoption by the widow of her brother's son was invalid. The Dattaka Mimansa (s. 2, vv. 33 and 34, and s. 5, v. 16) contains a definite prohibition against a widow adopting her brother's son. The very high authority of the Dattaka Mimansa appears from the judgments in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (2) and *Bhagwan Singh* v. *Bhagwan Singh*. (3) The following modern authorities support the view that the adoption is invalid: Strange's Hindu Law, ch. iv., par. 2 (6th ed.), p. 83; Sir F. Macnaghten's Considerations of Hindu Law (1824), p. 170; W. H. Macnaghten's Hindu Law (1839), vol. i., p. 67; West and Bühler's Digest (3rd ed.), p. 1032; and it was directly so held in *Musammat Battas Kuar* v. *Lachman Singh*. (4)

(1) I. L. R. 27 Allah. 417.
(2) (1899) L. R. 26 Ind. Ap. 113, at p. 131.
(3) (1899) L. R. 26 Ind. Ap. 153, at p. 161.
(4) (1875) 7 N. W. P. H. C. 117.

A widow is precluded from adopting a son whom she could not have procreated with the natural father without incest. The prohibition is connected with the obsolete custom of niyoga, under which a sapinda or other person was appointed to procreate upon a wife or widow a son to a sonless man. The authorities all support the prohibition down to the publication of Mayne's Hindu Law in 1878. His view (see Mayne's Hindu Law, 7th ed., par. 137, p. 176) cannot weigh against the great authority of the Dattaka Mimansa. In *Sriramulu* v. *Ramayya* (1) the adoption was by the husband; that case is, therefore, not in point. The decisions in *Bai Nani* v. *Chunilal* (2) and *Jai Singh Pal Singh* v. *Bijai Pal Singh* (3) are erroneous. [*Vellanki Venkata Krishna Row* v. *Venkata Narsayya* (4) was also referred to.]

[Their Lordships intimated that they only required to hear the respondents' counsel upon the question whether the adoption was invalid in law.]

De Gruyther, *K.C.*, and *Dubé*, for the appellants. The decision and reasons in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (3) were right. The prohibition against a widow adopting her brother's son contained in the Dattaka Mimansa is not to be found in the Dattaka Chandrika, nor is it supported by the Smritis. It is a mere gloss of the author's. It is not a principle of Hindu law that a widow cannot adopt a son whose father she could not have married. The passage in Dattaka Mimansa, s. 5, v. 16, is taken from Dattaka Chandrika, s. 2, v. 8; it means that the son to be adopted should be one of the twelve kinds of sons recognized by the Smritis, and referred to in Mayne's Hindu Law, 7th ed., par. 67, p. 81. The anomalous results which would follow if the niyoga test were applied are pointed out in *Bai Nani* v. *Chunilal*. (2) Mandlik rightly describes niyoga as being "a mere fossilized relic of the past" and as having no bearing upon the question: Hindu Law, pp. 480—482. The passage relied on in West and Bühler shows that adoptions of the kind referred to were recognized in practice. A husband can adopt his wife's brother's son; this would not be the case if the principle contended

(1) (1881) I. L. R. 3 Madr. 15.
(2) (1897) I. L. R. 22 Bomb. 973.
(3) I. L. R. 27 Allah. 417.
(4) (1876) L. R. 4 Ind. Ap. 1.

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for applied. An adoption by a widow under her husband's authority is made on behalf of the husband; the question of her relationship to the adopted son is therefore not material: *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1). [*Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (2); *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra* (3); (as to meaning of "adya") *Debé Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (4); Dattaka Mimansa, s. 1, vv. 19—21, s. 2, v. 28; Jolly's Hindu Law, pp. 162 and 163; and Mayne's Hindu Law, 7th ed., par. 112, p. 142, were also referred to.]

Lowndes replied.

1915 May 5.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. This is an appeal by the plaintiffs from a decree of the High Court of Judicature at Allahabad, dated December 15, 1909, which reversed a decree of the Subordinate Judge of Mainpuri, and dismissed the suit with costs.

The plaintiffs brought their suit in the Court of the Subordinate Judge of Mainpuri on June 15, 1907, to have it declared that Jwala Parshad, who is a defendant and one of the respondents, was not the adopted son of one Tiwari Gandharp Singh, deceased, who had been the husband of Musammat Parbati Kunwar, who is the other defendant and respondent. The adoption which is impugned was made by Musammat Parbati Kunwar in March, 1899, to her deceased husband, Tiwari Gandharp Singh, who had died on November 9, 1898, without issue surviving him, and had been a Brahman. Jwala Parshad was the son of a brother of Musammat Parbati Kunwar. The plaintiffs, who claimed as reversioners, denied that Jwala Parshad had been in fact adopted, and alleged that Tiwari Gandharp Singh had not given to Musammat Parbati Kunwar authority to adopt Jwala Parshad to him, and further alleged that Jwala Parshad, being a son of a brother of Musammat Parbati Kunwar, was in law ineligible for adoption by her as a son to her deceased husband.

(1) (1869) 12 Moo. Ind. Ap. 350.
(2) (1868) 12 Moo. Ind. Ap. 397, at p. 436.
(3) (1878) L. R. 5 Ind. Ap. 40.
(4) (1912) L. R. 39 Ind. Ap. 121, at p. 128.

The Subordinate Judge framed six issues; two only of the issues are now of importance. It was concurrently found by the Courts below that the adoption was in fact made. The two issues which have to be decided in this appeal are as framed by the Subordinate Judge:—

"(4.) Did Gandharp Singh give permission to his wife to adopt Jwala Parshad?"

"(6.) Is the adoption invalid, inasmuch as the boy is the son of the adoptive mother's brother?"

The authority to adopt Jwala Parshad was alleged to have been given to Musammat Parbati Kunwar by an oral will of her husband, Tiwari Gandharp Singh, a few days before his death. The Subordinate Judge held that the evidence that the authority to adopt Jwala Parshad had been given was untrustworthy, and found that no authority to adopt Jwala Parshad was proved to have been given.

The High Court on appeal saw no reason whatever for doubting the trustworthiness of the evidence of the witnesses who had deposed to the fact that Tiwari Gandharp Singh had given permission to his wife to adopt Jwala Parshad as a son to him, and after a careful consideration of the evidence and the surrounding circumstances found as a fact that the permission to adopt Jwala Parshad had been given. In their Lordships' opinion the learned judges of the High Court could have come to no other conclusion unless they had perversely disregarded the evidence and all the probabilities of the case. The direct evidence that the authority to adopt Jwala Parshad had been given by Tiwari Gandharp Singh to his wife was clear, and in their Lordships' opinion was unassailable, and other facts showed that it was probable that such an authority would be given. Tiwari Gandharp Singh was a man well advanced in years; he had been thrice married; he had no surviving issue; there was no sagotra sapinda in his family; he was the last of the male line; he was a man of some considerable estate and position; and he had taken Jwala Parshad, when a child of four or five years of age, to live in his house with the object of adopting him as his son, should Jwala Parshad prove himself to be a boy worthy of adoption as his son. Their Lordships agree with the finding of

the High Court that the authority to adopt Jwala Parshad had been given. That authority was not a general authority to Musammat Parbati Kunwar to adopt a son to Tiwari Gandharp Singh, it was a specific authority to her to adopt Jwala Parshad as the son to her husband.

There remains to be considered the question of law raised by the sixth issue which had been framed by the Subordinate Judge. The Court of the Subordinate Judge of Mainpuri is a Court which is subordinate to the High Court at Allahabad, and the Subordinate Judge of Mainpuri is bound to follow the decision in law of a Bench of the High Court to which he is subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council, or unless the law has been altered by a subsequent Act of the Legislature. As the Subordinate Judge was well aware, it had been decided five years before this suit was instituted by a Bench of the High Court at Allahabad, composed of Sir John Stanley, the then Chief Justice, and Banerji J., in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1), that an adoption by a Hindu widow, in virtue of an authority to adopt given to her by her deceased husband, of her brother's grandson or son is not, according to Hindu law, an invalid adoption, as the adoption by the widow is not an adoption to herself but is an adoption to her deceased husband, and that the test of eligibility of the adopted son for adoption in such case must be the test which would have applied had the adoption been made by the husband himself in his lifetime.

The Subordinate Judge of Mainpuri, Chhajju Mal, professing disapproval of that decision of the High Court, which he was bound to follow, entered upon a consideration of Sanskrit texts bearing more or less upon the subject, and decided that as Musammat Parbati Kunwar could not have married her brother, the father of Jwala Parshad, the adoption of Jwala Parshad was invalid. It is difficult to follow the arguments of the Subordinate Judge, but he does not appear to have kept clearly before his mind that the question in this case was whether a Hindu widow,

(1) I. L. R. 27 Allah. 417.

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acting on her husband's authority, could validly adopt as a son to him the son of her brother, and was not the question as to whether a Hindu female could validly adopt to herself a son of her brother. On appeal, Sir John Stanley C.J. and Banerji J. applied the decision in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1), which had not been overruled, and accordingly decided that the adoption of Jwala Parshad was a valid adoption, and by their decree dismissed the suit with costs. From that decree of the High Court this appeal has been brought.

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The foundation of the decision of the Subordinate Judge on this question of Hindu law is the Commentary of Nanda Pandita, which is known as the Dattaka Mimansa. The Dattaka Mimansa is undoubtedly a high authority on the law of Hindu adoption and is treated with respect. The authority of the Dattaka Mimansa was considered by this Board in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (2) and in *Bhagwan Singh* v. *Bhagwan Singh* (3), and the view of this Board was that the Dattaka Mimansa is a work which has had a high place in the estimation of Hindu lawyers in all parts of India and has become embedded in Hindu law, but that caution is required in accepting the glosses of Nanda Pandita, its author, where they deviate from or add to the Smritis. It was pointed out by Banerji J., in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (4), on this question as to whether a widow can lawfully adopt to her deceased husband a son of her own brother, that Nanda Pandita in the Dattaka Mimansa extended to adoption by females the rule of Hindu law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension by Nanda Pandita which is not based upon the authority of any of the Smritis or institutes of sages.

As Banerji J. further pointed out in the same case the extension of the rule by Nanda Pandita is not supported by any text of the Dattaka Chandrika, or by any of the texts of the sages Sannaka and Sakala from which most of the rules of the Dattaka Mimansa were deduced. It has not been shown to their Lordships that

(1) I. L. R. 27 Allah. 417.
(2) L. R. 26 Ind. Ap. 113.
(3) L. R. 26 Ind. Ap. 153.
(4) I. L. R. 27 Allah. at p. 433.

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the extension by Nanda Pandita to which they are referring has been accepted as the law in India, at least, so far as adoptions by widows to their deceased husbands are concerned. It is true that in the case of *Musammat Battas Kuar* v. *Lachman Singh* (1) Pearson and Spankie JJ. said: "No sufficient reason is shown why the doctrine of Nanda Pandita that a woman may not affiliate a brother's son should not be accepted as correct, and why it should not apply to the case of a woman adopting a son with the sanction and on behalf of her husband. Indeed, it does not appear that the Hindu law contemplates or provides for the adoption by a widow of a son in her own right."

It was not necessary for these learned judges to express any opinion on the subject, nor is it clear how the case came on appeal to the High Court, as the two Courts below had concurrently found that it was not proved that the husband had given his wife authority to adopt a son.

It is quite clear that Tiwari Gandharp Singh could, in his lifetime, have legally adopted Jwala Parshad, the son of his wife's brother, and had he done so the adoption would have been a valid adoption, and their Lordships fail to see any reason why Jwala Parshad, who was legally eligible for adoption by Gandharp Singh, should have become ineligible by reason of the death of Gandharp Singh. It must be remembered that the adoption was not by the widow in her own right and to herself; the adoption was to her deceased husband and under the authority which he had given to her. In *Srimulu* v. *Ramayya* (2) the adoption of a son of a wife's brother was held to be a valid adoption, and it was rightly pointed out that the rule of Hindu law that a legal marriage must have been possible between the adopter and the mother of the adopted boy refers to their relationship prior to marriage. In *Bai Nani* v. *Chunilal* (3) it was held that the adoption by a Hindu widow of her brother's son was valid. Their Lordships have not thought it necessary to discuss the texts and authorities which have been referred to and are relevant to this question, as they have been fully and exhaustively considered by Sir John Stanley C.J. and

(1) 7 N. W. P. H. C. 117.
(2) I. L. R. 3 Madr. 15.
(3) I. L. R. 22 Bomb. 973.

[FROM AIR MANUAL, (5TH Ed.) VOL. 32]

[THE INDIAN] LAW REPORTS ACT, 1875

(ACT 18 OF 1875)

[The text of the Act printed here is as on 30-4-1996]

CONTENTS

STATEMENT OF OBJECTS AND REASONS

"The second section of the Indian Law Reports Act (II of 1875) declares that every judgment of any High Court established under Ss. 24 and 25 Vic, c. 104 shall, if reported in the authorised reports, have the same authority in all subordinate Courts beyond the limits of its appellate jurisdiction as, independently of the Act, such judgment would have within such limits.

The Secretary of State for India objects to this provision and suggests that Act 2 of 1875 should be repealed and re-enacted with the omission of the second section.

The present Bill has been prepared to give effect to this suggestion."—Gaz. of Ind., 1875, Pt. V, p. 139.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 38 of 1920; 32 of 1925; 34 of 1926; 3 of 1951.
—Adapted by A.O., 1937; A.L.O., 1950; 2 A.L.O., 1956.
—Extended by Acts 59 of 1949; 30 of 1950; Regns. 6 of 1963; 8 of 1965.
—Extended in Bombay by Act 4 of 1950.
—Extended in Tamil Nadu by Act 35 of 1949.

[THE INDIAN] LAW REPORTS ACT, 1875

(ACT 18 OF 1875)[a]

[13th October, 1875.]

An Act for the improvement of Law Reports.

[b][* * * *]

[a] The Act has been declared, by notification under the Scheduled Districts Act, 1874 (14 of 1874), sec. 3(a) to be in force in the following Scheduled Districts, namely:—

The Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dalbhum and the Kolhan in the District of Singbhum. (The District of Lohardaga included at this time the present District of Palamau, which was separated in 1894; Lohardaga is now called the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44).—See Gazette of India, 1881, Pt. I, p. 504. All these areas are in Bihar State.

The Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), sec. 3 (1-1-1950) and to the States of Manipur, Tripura and Vidhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), sec. 3 (16-4-1950). Manipur and Tripura are Union territories now but Vindhya Pradesh has merged with the State of Madhya Pradesh.—See Act 37 of 1956, sec. 9(1)(e).

It has also been extended to States merged in the States of—

Bombay: see Bom. Act 4 of 1950, sec. 3 (30-3-1950);

Madras: see Mad. Act 35 of 1949, sec. 3 (1-1-1950).

It is now extended to the Union territories of Dadra-Nagar Haveli and Laccadive, Minicoy and Amindivi-Islands by Regns. 6 of 1963 and 8 of 1965 respectively.

[b] Preamble repealed by A.O., 1937.

1. Short title.— This Act may be called The Indian Law Reports Act, 1875.

Local extent.

It extends to the whole of India [a][except the State of Jammu and Kashmir];

Commencement.

And it shall come into force on such day[b] as the [c][Central Government] notifies in this behalf in the [d][Official Gazette].

[a] Substituted for "except Part B States", by Part B States (Laws) Act, 1951 (3 of 1951), sec. 3 and Sch. (1-4-1951).
[b] The Act came into force on 1-1-1876: see Notification No. 22, D/- 23-11-1875, Gaz. of India, 1875, Pt. I, p. 589.
[c] Substituted for "Governor-General in Council" by A.O., 1937.
[d] Substituted for "Gazette of India", ibid.

2. Repeal of Act 2 of 1875.— [Repealed by the Repealing Act, 1876 (12 of 1876).]

3. Authority given only to authorised reports.— No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case [a][decided by any High Court for a [b][State]], other than a report published under the authority of [c][any State Government].

Section 3

(1) All that the Law Reports Act does is to ensure that Judges who have no access to the decisions themselves shall be provided with accurate copies of them. AIR 1944 Nag 44 (51) (DB).

(2) Section 3 does not prevent the Court from looking at an unreported Judgment of other Judges of the same Court. (1901) 28 Cal 289 (292).

(3) A view expressed in a Judgment of a High Court not officially published is entitled to respect, but

[a] Substituted for "decided on or after the said day by any High Court for a Part A State" by Part B States (Laws) Act, 1951 (III of 1951), sec. 3 and Sch. (1-4-1951).
[b] Substituted for "Part A or Part B State" by 2 A.L.O., 1956.
[c] The original words "the Governor-General in Council" have successively been amended by the Devolution Act, 1920 (38 of 1920), A.O., 1937 and A.L.O., 1950 to read as above.

4. Authority of judicial decisions. — Nothing herein contained shall be construed to give to any judicial decision any further or other authority than it would have had if this Act had not been passed.

Section 3 (contd.)

is not to be followed blindly, like one that is officially published, though good reasons must be found for not following it. AIR 1925 Nag 414 (414) ** AIR 1930 Nag 270 (270) ** **AIR 1926 Rang 164 (165) (FB).** (Decision reported in private publication not absolutely binding.)

(4) The Court in exercising its discretion in the matter of following a decision reported in an unauthorised report should give weight to the prevailing practice in the Courts with reference to any particular report from which a decision is sought to be cited. AIR 1931 Mad 71 (72).

(5) The Indian Law Reports Act has no application to a decision of the Privy Council, and therefore the Courts can refer to an unauthorised report of the decision of the Privy Council and if they are satisfied that it is a correct report, they are bound to follow it. AIR 1926 Mad 20 (23).

(6) The language of S. 3 is quite clear that it is only when a report other than the one published under the authority of a State Government is cited before a Court that such a Court is not bound to hear such a report cited or to receive or treat it as an authority binding upon it. There is nothing in the language of S. 3 that a certified copy of a decision of the High Court is not to be treated as binding upon a lower Court. What is binding is the decision of the High Court and not merely a report. AIR 1958 Bom 381 (385) : 1958 Cri LJ 1296.

(7) Cases reported in 1980 Bombay Cases Reporter 503 not shown to be based on certified copy of the judgment — Report not allowed to be cited before the Court. AIR 1982 Bom 538 (538) : 1982 Cri LJ 2147.

(8) Certified copy of the judgment of the High Court could be taken note of. Merely because the said decision have not been reported in an authorised journal it could not be rejected. (1976) 2 All LR 501 (504).

(9) Notes of cases in law journals — Placing reliance on them may often lead to misunderstanding of case and may result in misleading the court. AIR 1995 Bom 351.

(10) Practice of relying upon unreported judgments suddenly in Court room is objectionable. Practice of suddenly taking out a copy of unreported judgment without supplying its copies to other side advocates and court in advance, results in lot of inconvenience to every one. Party who is thus taken by surprise can legitimately insist that time should be given to him to get acquainted with facts of the judgment and to see whether it really takes different view or is distinguishable from facts of case. Therefore an unreported judgment of the same court could be cited before Bench of that court but in such case it is duty of Advocates who want to rely on it to prepare copies of same in advance and supply same to other side and also to Court. (1986) 88 Bom LR 308 (319) : ILR (1986) Bom 645.

Section 4

(1) A Court can refer to reports of cases as precedents but where an order is meant to be operative in a particular case the Court cannot refer to the report for such order or take cognisance of such an order as is said in the report to have been passed. The Court cannot act upon the order unless it has been produced and filed in the record of that case. (1901) 28 Cal 171 (176).

(2) Decision printed elsewhere than in authorised reports stands on the same footing as unreported cases. AIR 1921 Oudh 257 (257).

(3) The Act is little more than an addendum to S. 78 of Evidence Act which provides for the manner in which public documents may be proved. The fact that a certified copy of a decision of a Court of Record is to be supplied neither enhances nor detracts from the authority and binding force of the decision. A lower Court is bound by an unpublished ruling of its own High Court. **AIR 1944 Nag 44 (46, 51) (FB).** (Single Judge of High Court is bound to follow the decision of the Division Bench even though it has not been reported.) ** 28 Cal 289 (292). (A judgment is still an authority even though not reported.)

[See AIR 1926 All 346 (350).]

[**See however** (1900) 4 Cal WN 732 (734). (A Judge is not bound to follow and treat an unreported case as binding on him.)]

(4) A subordinate Court is not entitled to compare the soundness or otherwise of the views on a question of law contained in a decision reported in an unauthorised series of the High Court to which it is subordinate with those of other High Courts. AIR 1931 Mad 71 (72).

(5) Management of certain Textile Mills taken over by Central Government — Competency of State Government to refer disputes relating to the Mills — Not lost. 1979 Lab IC 1024 (1027) (DB) (All).

1C. Saxena: "The Doctrine of precedent in India"
(1963) 3 Jaipur law journal 188-214

British Period in India

Significant developments in the theory of precedent were made during British rule in India. In 1813, Mr. Dorin suggested that statutory force be given to this theory. He said, "I think it should be enacted by a Regulation, that from a given period, the judgments of the court shall be considered as precedents binding upon itself and on the inferior courts in similar cases which may arise thereafter".[22]

In the nineteenth century, the publication of reports of decided cases and digests added to the value of decisions.[23] Act XII of 1843 made the publication of the decisions of the *Sudder* Courts at Calcutta and Agra compulsory. Similarly, the Law Reports Act, 1875, referred to the publication of decisions of High Courts in India.[24] To evaluate the growth of the theory of precedents in India, one has to bear in mind that in England too the law reporting system played a remarkable part in the development of the theory of *stare decisis*.[25]

(1930) 46 LQR 411
Dd Law. 3.

Twentieth century has been the fulfilment of Mr. Dorin's wishes; the doctrine of precedent has been codified, at least in part.[26] Thus section 212 of the Government of India Act, 1935, made the "law declared by Federal Court and Privy Council to be binding on all Courts".[27] It ran as follows:

> The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognised as binding on, and shall be followed by, all courts in British India, and, so far as respects the application and interpretation of this Act or any order in Council thereunder or any matter with respect to which the Federal Legislature, has power to make laws in relation to the State, in any Federated State.

This provision became necessary because if the Privy Council and the Federal Court gave one interpretation about a section of the Government of India Act, 1935, and the High Court of a (Federal) State gave another, legal difficulties would have arisen in the absence of the above provision.[28] Under the Act, therefore, the High Courts in India were bound by the law declared by the Federal Court and by the judgment of the Privy Council.[29] Under the present Indian Constitution also "...the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court".[30]

22 Selections from Records of East-India House vol II. 20. Adopted from Mookerji, Administration of Justice in India 331-346 (1958) Mukerjee AIR 1962 Jour 89

Even prior to the Government of India Act of 1935 (section 212), the Indian High Courts were bound by judgments of the Privy Council. In the celebrated Privy Council Case, *Mata Prasad* v. *Nageshwar Sahai*,[31] Mr. Ameer Ali, who delivered the judgment of the Committee, gave the following warning to Indian courts:

> ...their Lordships think it desirable to point out that it is not open to the courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them whether on account of 'judicial dignity' or otherwise, to question its decision on any particular issue of fact.[32]

The Present-day India

The present legal position of decisions of the Supreme Court and the High Courts may now be examined in the light of the theory of *stare decisis*.

(a) Supreme Court of India and its Decisions

The following deductions may be made as regards the theory of precedent:

(a) According to Article 141 of the Constitution of India, "the law declared by the Supreme Court shall be binding on all courts within the territory of India".[33] About a decade ago, controversy raged whether the Supreme Court itself was bound by its decisions under this provision. In the Supreme Court case of *Dwarkadas Shriniwas* v. *Sholapur Spinning and Weaving Co.*[34] Mr. Justice Das, (as he then was), expressed the view: "Accepting that the Supreme Court is not bound by its own decisions and may reverse a previous decision especially on constitutional questions the court will surely be slow to do so unless such previous decision appears to be obviously erroneous".[35] In 1955, in *Bengal Immunity Co.* v. *State of Bihar*,[36] the question arose in an acute form before the Supreme Court whether it could review or reconsider its previous decision in the *United Motors Case*.[37] The judges expressed the view that the Supreme Court was not bound by its previous decisions, and could in appropriate cases, overrule them. There was nothing in the Constitution of India which bound the Supreme Court to follow its previous pronouncements. And Article 141 which made the decision of the Supreme Court binding "on all courts within the territory

of India" referred to "other" courts both by its spirit and collocation of the words. The opinion was expressed that the Supreme Court would not lightly dissent from its previous decisions.

The Supreme Court's power of reversal of its earlier decisions is necessary, because in England where an error of the House of Lords (who are bound by their previous decisions) can be rectified by a simple majority of Parliament both in constitutional and non-constitutional matters, in India, an error in constitutional matters might be perpetuated because of the rigid nature of the amendment process of the Indian Constitution. The finality of decisions as applicable to House of Lords cannot, therefore, apply to the Supreme Court of India. Even in non-constitutional matters, the English practice of the highest court cannot be followed in India, because India at present is engaged in a mass reconstruction of its economic and social structure,[38] and any error by the Supreme Court will fetter itself and all lower courts in India for future, which might undo certain beneficial, political and social policies of the Government of the day. Only a prompt legislature can then save the nation from catastrophe. No doubt, when the magnitude of the harm is high, the legislature will act promptly, but in ordinary cases, it might take years to set right a wrong done to community.[39]

The Supreme Court of India is the highest court of the country and it is in the fitness of things that it should be at liberty to overrule its previous pronouncements, especially where the law declared by it has proved baneful to the social progress of the country. Under any rational system of *stare decisis*, it is but desirable that the highest tribunal in the land should enjoy a power to correct or qualify its precedents. This qualification upon the strict theory of judicial precedent is a socially necessary doctrine.[40]

Historically speaking, their Lordships of the Privy Council never considered themselves bound by their previous decisions, and asserted this on many occasions.[41] They have, however, expressed that they would seldom exercise their power of reversal.[42] The Federal Court of India also, it appears, was not bound by its previous decisions.[43] The Supreme Court of the United States of America does not believe in the finality of its decisions.[44] The House of Lords, no doubt, is bound by its previous decisions[45] but this theory was propounded by the House itself, and may be overruled by it any day. It is interesting to note the recent development of this subject in the House of Lords case, *Scruttons* v. *Midland Silicones*[46] (1962). Lord Reid severely criticised the decision of the House in *London Tramways Co.* v. *London County Council*,[47] which bound the House for future, and said, "I have on more than one occasion stated my view that this rule is too rigid and that it does not in fact create certainty...but I am bound by the rule until it is altered".[48] Furthermore, Lord Reid challenged the dictum *of London Tramways Co. Case* as follows :

> I would certainly not lightly disregard or depart from any ratio decidendi of this House. But there are at least three classes of case where I think we are entitled to question or limit it: first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes question of how far it is proper to distinguish the earlier decision.[49]

Since the *Bengal Immunity Case*, the Supreme Court of India has reversed some of its previous decisions.[50]

(b) Only the majority decision of the Supreme Court is binding on the lower courts.[51] see 98 of Cpc.

(c) The Supreme Court of India is not bound by the decisions of the late Federal Court of India or by the Privy Council.[52]

(d) A closely divided (majority) decision of the Supreme Court is likely to be reconsidered[53] and possibly reversed whenever a suitable opportunity comes before the court. Furthermore, such a nebulous decision might tend the High Courts to distinguish it with an actual case before it. Thus in practice, under the theory of *stare decisis*, a unanimous decision of the Supreme Court enjoys far better authority as a precedent than does a majority decision of it.

(e) The decision of the Supreme Court binds the courts and not the legislature.[54]

(b) High Courts in India and the Theory of Precedent.[55]

(a) The High Courts (and all other courts) in India are bound by the law declared by the Supreme Court.[56] As stated earlier, the Supreme Court is not bound by its previous pronouncements.

(b) A High Court will be bound by the decision of the Supreme Court even though it could not be bound by the decision of the

formal Federal Court of India[57] on the ground that it was located in an Indian State and not in British India.

(c) It is not yet finally settled whether the High Courts are bound by the *obiter dictum* of the Supreme Court.[58]

(d) The High Courts in India are still bound by *old* decisions of the Privy council, unless the same have been overruled by the Supreme Court or abrogated by a Statute.[59]

(e) A decision by a High Court finds implicit obedience from inferior courts within its jurisdiction unless the decision is inconsistent with a statute or has been overruled by a court of superior Jurisdiction. The subordinate courts cannot cavil at the decision of the High Court, nor can they depart from it on the ground that they consider it wrong or against their conscience. Any disregard of authority by subordinate courts is dereliction of duty, and is, therefore, to be deprecated. In *Rex* v. *Ram Dayal*,[60] Mr. Justice Seth expressed the view that "omission (to follow precedents of High Courts) is as much dereliction of duty as omission to refer to sections of the statute. The disregard of authority is, however, something still more objectionable. It amounts to an act of insubordination".[61]

The subordinate courts, however, are not bound to follow decisions of other High Courts, which have only a persuasive authority.[62]

Although no such written doctrine of precedent exists for the decisions of High Courts as exists for the decisions of the Supreme Court of India, nevertheless the principle of *stare decisis* in relation to High Courts is too well embedded in Indian Jurisprudence to require any proof. The following arguments may, however, still be advanced to support the view that decisions of the High Courts are binding on their respective subordinate courts :

First, the Judicial Committee of the Privy Council has laid down, as a matter of duty, that a subordinate court in India is bound to follow the decision of the High Court to which it is subordinate.[63] Since decisions of the Privy Council are binding on Indian courts, this rule of duty must also be deemed binding on subordinate Indian courts.

Second, the Indian High Courts have also laid down that their inferior courts are bound by their decisions.[64] It is but a fair deduction from the hierarchy of courts that a subordinate court should yield to its High Court in matters of law.

Third, under Article 225 of the Constitution of India, subject to certain reservations "...the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in court...shall be the same as immediately before the commencement of this Constitution". Similarly, Article 372 (i) provides "...all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority". According to the substance of these provisions, the theory of precedent in relation to High Courts, as prevailing in pre-independent era, still prevails.

Fourth, historically speaking, the Law Reports Act, 1875, which dealt with the official publication of High Court decisions only was a great step in the implementation of the theory of precedent in relation to decisions of High Courts. The Act contains in all four sections. The pertinent provision is embodied in section 3 of the Act. It runs thus : "No court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case (decided by any High Court) other than a report published under the authority of (any state Government)". Positively speaking, every court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case (decided by any High Court)...published under the authority of (any State Government)". According to Dias and Hughes,[65] publication of decisions is a condition precedent to the theory of precedent. The provisions of the (Indian) Law Reports Act, 1875, therefore, which suggest publication of High Court decisions, and that too under an *official authority*, cannot be brushed aside as meaningless.[66] Hence authority of High Court decisions.

Lastly, the decision of a subordinate court given in disregard of its superior court will, most generally, be overruled by the superior court when its decision comes before the superior court in appeal.[67]

(f) It has been held, at least in one case, that a subordinate court is not bound by an *obiter dictum* of its High Court.[68]

(g) The High Courts have held that even the *obiter dicta* of their Lordships of the Privy Council are binding on them, if they enunciate a principle of law.[69] This view has generally been based upon the following observation of Mr. Ameer Ali in the Privy Council case of *Mata Prasad* v. *Nageshwar Sahai*: "Their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by the Board".[70] The Indian Courts have expressed from time to time that highest respect had to be shown to the august body, the Privy Council. The net result of all this was that even *dicta* of the Privy Council were held binding on courts. Similar legal position prevails at present with regard to the *obiter dicta* of the Supreme Court of India.[71] The courts seem almost unanimous on this point. Since this view of Indian Courts is in conflict with the common law theory and Western thoughts, it may be interesting to probe the reasons of this difference.

The Western Theory of Obiter Dictum in Indian Jurisprudence

According to the traditional theory of judicial precedent, the only thing binding in a judge's decision is the *ratio decidendi*;[72] all other observations made by the way which were not essential for decision are merely *obiter dictum*.[73] In the Western hemisphere, both the courts and the jurists[74] developed the fine distinction between the *ratio* and the *obiter*, the former were regarded binding and the latter, not. Eminent Western scholars, like Goodhart[75], Llewellyn[76], Wambough[77], Paton and Sawer[78] and, Gooderson[79] have propounded theories to ascertain true *rationes decidendi*. But in practice the difficulty remains, and the task of extracting the *ratio* of a decision is beset with technicalities.[80] It is, therefore, perfectly possible for any two courts to arrive at diametrically opposite views as to the real *ratio* of a decision. Exactly this has happened in some Indian cases.[81]

In India, in the absence of any marked juristic scholarship on the subject, the courts developed their own theory during the British regime in India, that *obiter dicta* of the Privy Council were binding on them. The reasons which led to this view were, briefly, as follows :

First, the Privy Council was then the highest court of appeal for the British Empire, and, therefore, not only its principles of law laid down as a result of *ratio decidendi*, but also its *obiter dicta* were entitled to the highest respect. The eminence of the judges and the nature of this august body contributed to the theory of Indian Courts that even *obiter dicta* of the Privy Council were binding.

Second, on account of the hierarchy of courts, it would have been judicial insubordination to refuse to follow the *dicta* of the Privy Council. Thus respect had to be shown to the *dicta* as a matter of duty.

Third, in the interest of *judicial uniformity* in India even the *obiter dicta* of the Privy Council had to be followed. This reason of departure from English Jurisprudence was emphasised by Mr. Chief Justice Chagla (as he then was) in *Mohan Das Issar Das* v. *A. N. Sattanathan*,[82] where he said, "that it would be in the interest of judicial uniformity and judicial discipline",[83] if not only the actual principles of law but also the *obiter* were followed by Indian Courts.

Fourth, the observations[84] of Mr. Ameer Ali in the Privy Council case of *Mata Prasad* (1925) suggested to Indian Courts that whenever their Lordships of the Privy Council enunciated a principle of law it must be followed. These observations are in the nature of warning to Indian courts.

Lastly, probably, the Indian Courts thought that if they did not follow an *obiter dictum* of the Privy Council which expressed definite views of their Lordships and they laid down law contrary to it then their decision would ultimately be reversed by them.

In a Madras case (1923), however, it was pointed out that if their Lordships of the Privy Council had expressed their desire that they did not wish to be understood that the Indian courts should be bound by their certain remarks, then "it would be most dangerous to treat a dictum of that kind as an authority".[85] The Indian courts have ignored the remarks of Lord Dunedin in the Privy Council case, *Raja Brij Narain* v. *Mangla Prasad*[86] (1924)—a case decided earlier to *Mata Prasad Case* (1925)—where he said, "they (their Lordships) think that the case of SAHU RAM must not be taken to decide more than what was necessary for the judgment, namely..."[87]

In independent India too the High Courts have held,[88] almost uniformly, that they are bound by the *obiter dictum* of the Supreme Court of India. Now under Article 141 of the Constitution of India,[89] the courts have said that it is in the interest of judicial uniformity and judicial discipline that the *dicta* of the Supreme Court be followed.

The Supreme Court is the highest judicial court of the country and its decisions must be shown the greatest respect. In *Union of India* v. *Firm Ram Gopal*,[90] Mr. Justice S. S. Dhavan, said "Article (141) has the effect, in addition to investing the decisions of the Supreme Court with a binding force of creating a constitutional organ whose declaration of law pronounced *ex cathedra* shall be binding on all courts in the republic".[91] Further, the learned Justice said, "an obiter dictum or a mere enunciation of a principle of law would amount to a declaration of law under Article 141, and the manner and circumstances of its pronouncement are immaterial, provided it is made by the Supreme Court *ex cathedra*".[92]

Since about the year 1950, the High Courts[93] have embarked upon an analysis of the term, *obiter dictum* and have held that every kind of *obiter dictum* is not binding. The analysis of *obiter dictum* and the nature of its binding force in each case is as follows :

1. Mere passing observations by the Supreme Court are not binding.

2. Mere passing observations by the Supreme Court are not necessary for decision, nevertheless if the point arose for determination and then the Supreme Court expressed its opinion, it would be binding.[94] Thus where a counsel raises a hypothetical case which is argued and discussed and the court expresses its opinion thereupon, the opinion so expressed would have a binding effect on the lower courts. In the Supreme Court case, *Nanak Chand* v. *State of Punjab*,[95] Mr. Justice Imam observed the distinction between (1) and (2) above, by saying that the *obiter dicta* of a Judge of eminence of the Privy Council "must carry weight", especially, if the observations "directly arose on the argument made before the Privy Council".[96] Thus a considered opinion of the Supreme Court, whether or not in nature of *obiter dicta*, is binding on all courts in India.

3. Where the superior court expresses that its view is merely *prima facie* then the inferior courts are not bound. In *Smt. Haramani* v. *Dinabandhu*[97] (1954), Mr. Justice Narasimham stressed this point :

> ...there is a real distinction between an *obiter dictum* of a superior court and a *prima facie* view taken by the superior court...A *prima facie* view expressed on any question of law by a judge is only his tentative view based on first impression whereas his *obiter dicta* is an expression of his definite opinion, though it was not necessary for the decision of the case before him.[98]

4. In order to be binding, an *obiter dictum* must enunciate a law.[99]

Two Supreme Court cases, touching this subject, may now be referred : First, *I. T. Commissioner* v. *Vazir Sultan & Sons*[100] (1959); second, *Central Bank of India* v. *Their Workmen*[101] (1960).

In the first case, Mr. Justice Bhagwati, who delivered the majority judgment of the Court, said, "it is no doubt true that this court was not concerned with an agency agreement in the last mentioned case and the observations made by this court there were by way of *obiter dicta*. The *obiter dicta* of this court, however are entitled to weight and we on our part fully endorse the same".[102] According to this theory, *obiter dicta* of the Supreme Court are binding.[103]

In the second case, Mr. Justice S. K. Das, who delivered the judgment of the Court, indicated that the Supreme Court would not give "speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient and inexpedient that opinion should be given on such questions".[104] Further, the learned Justice said that it would be "not only unwise but inexpedient that we should forestall questions which may arise in future cases and decide them more or less in vacuo and in the absence of necessary materials for the decisions of those questions".[105]

It is submitted that this case not only expresses a theory of self-control on expressions but also clearly suggests that an *obiter dictum* of the Supreme Court is not binding. The refusal of the Court to give "speculative opinion on hypothetical questions" on the ground of its being contrary to principle, unwise, and inexpedient, is sufficient to impress on the lower courts about the lack of binding efficacy of an *obiter dictum* of the Supreme Court.

It is a sound policy that the Supreme Court should not express its opinion on questions which are not necessary for the decision of the case before it.[106]

Under the literal interpretation of Article 141 of the Constitution, the law declared by the Supreme Court, in whatever manner arising, is binding.[107] But this is too liberal an interpretation. A very clear and specific ruling of the Supreme Court, interpreting Article 141, is needed to set at rest the controversy between the scholarly approach[108] and the judicial approach[109] to the question. Scholarly approach is surely scientific.[110] This interpretation of Article 141 by

the Supreme Court will itself be a precedent for the lower courts in India.

Conclusion

An analysis of the theory of precedent in India suggests certain conclusions :

First, the theory of precedent is not foreign to Indian soil.

Second, the last decade is remarkable for the development of the judicial theory that the *obiter dictum* of the Supreme Court is binding on lower courts. The courts have also developed some propositions on the subject to guide them. A firm decision of the Supreme Court is still awaited, the earlier it comes, the better it is. For a very ugly situation will arise if a High Court follows an *obiter dictum* found in a dissenting judgment of the Supreme Court.[111]

Third, if the Supreme Court of India decides that its *obiter dictum* or certain categories of it are not binding, the problem of extracting the *ratio* of a case or its certain category will lurk in Indian Jurisprudence. For the judges, human beings as they are, may sometimes be tempted to indulge in unnecessary observations.

Fourth, since many concurring judgments in a Supreme Court case will make the task of High Courts and other lower courts very exacting, it is suggested that the Supreme Court should develop a very sound tradition[112] of delivering, one judgment in case of unanimous opinion and, one integrated majority judgment in case of division or else the Constitution be suitably amended to adopt this rule, at least as an experimental measure with some minor exceptions, if desirable. Of course, there can be no such ban (control) on dissenting judgments. The above will make the task of discovering the *ratio* easier,[113] and will decrease load work of Judges.

Fifth, the theory of precedent, although a "wilderness of single instances", plays a useful part in the development of law. Slavish adherence to the doctrine should, however, be abhorred because it will make our legal system rigid and will prove banful rather than beneficial to our society. Lord Wright has said (somewhere), "a good judge is one who is the master, not the slave, of the cases". Some relaxation in the theory of precedent is, therefore, necessary.

Lastly, at a time when we are developing our commercial and constitutional Jurisprudence, it is desirable that the superior courts should be very careful to lay down precedents. Foreign precedents are not to be imported if they in any way impede our constitutional goal of a social welfare State. The superior courts might adopt this goal-pursuance theory. Doubtless, the Supreme Court is an organ of social progress and must illuminate the nation by its decisions.

It will be interesting, indeed, to watch the development of the theory of precedent in India.

Dhavan : The Supreme Court of India.
M.P. Tripat. 1977

Chapter II

AN EXAMINATION OF SOME OF THE JURISTIC TECHNIQUES USED BY THE SUPREME COURT AND OTHER COURTS IN INDIA

1. The Doctrine of Precedent in India

(a) The need to follow precedent

The publication of innumerable Digests[1] in India bears testimony to the fact that Indian lawyers tend to be precedent minded. Despite this only one serious attempt has been made to analyse the theory of precedent in India.[2] There has been, however, the odd stray article on the subject[3] and the Digests contain a vast compendium on the subject of precedent.[4] This reliance on precedent is perhaps in keeping with Hindu and Islamic jurisprudence, both of which lay considerable emphasis on relying on earlier texts and ostensibly treat such texts as of a binding nature.

We have moved very far from the Blackstonian fiction that judges merely declare the law.[5] It is now accepted that judges rely on precedent but at the same time are able to devise ways and means to get away from the binding effect of what they feel is a bad

1. See for example the *All India Reporter Digests* 1950-65; 1965-70.
2. I. C. Saxena: The doctrine of precedent in India in (G. S. Sharma (ed)) *Essays in Indian jurisprudence* 110-136, reprinted at (1963) *III Jaipur Law Journal* 188-214. This contrasts with the wealth of English law on the subject, on which see Winfield: History of Judicial Precedent (1931) *46 L.Q.R.* 207; Allen: *Law in the making* (7th ed.) Chapter III where a historical account of the doctrine of precedent is given. See also references cited *infra*.
3. See for example See-vai: Justice, law and precedents in India (1964) *66 Bom. L.R. Jnl.* 65-73; T. Ramalingam: The Supreme Court of India and the doctrine of *stare decisis* (1965) *S.C.J. Jnl.* 9. This is a comment on *Bengal Immunity Co. v. Bihar A.I.R. 1955 S.C.* 661; V. A. Venkatachalam: Binding force of High Court decisions (1969) *1 M.L.J. Jnl.* 65; Scope for reconsideration *A.I.R. 1970 Jnl.* 40; Binding nature of precedent (1969) *73 C.W.N. Jnl.* 139; G. Sitamasastry: English precedent and the judicial process in India (1969) *Lawyer* 119-125. See also the articles on prospective overruling, cited *infra*, on *Golak Nath's* case Chapter VII Section 1(iv).
4. See *A.I.R. Digest* 1950-65 Vol. 12, 630-669; see also on Article 141 of the Constitution Vol. IV, 5[illegible]-519.
5. Blackstone (1765) *1 Comm.* 63-4, 68-71; Hale: *History of the Common Law* (1820 Ed.) 89. Note also Bentham's comments on the ill effects of the retroactive nature of overruling an earlier case at Volume V *Works* (Bowring Edn.) 225. Note Austin II *Jurisprudence* (1873 Edn.) Lecture 29 pp. 547-8 where he suggests that earlier case law should be departed from only "obliquely".

precedent. More recently critical literature[6] has accumulated against the doctrine of precedent, and recent case law[7] suggests judges are prepared (though with important reservations[8]) to use the doctrine of precedent merely to perform the function of maintaining a continuity in the law without allowing the doctrine to prevent them from dissenting from the view in an earlier case. More recently, in *Jones* v. *Secretary of State*[9] (1972) two judges of the House of Lords were prepared to consider whether the American doctrine of prospective overruling should apply to England. Indian Courts have in fact accepted both these important modifications to the general theory of precedent which they inherited from English law.

(b) Stare decisis and the Indian Supreme Court

Courts in India have always defended the doctrine of precedent on the ground that the law must be certain. In *Keshava Mills* v. *I.T. Commissioner*[10] Gajendragadkar J. laid down a number of reasons for not overruling a case.[11] He further added:

> " . . . unless considerations of a substantial and compelling character make it necessary to do so, this Court would be reluctant to revise its earlier decisions."[12]

6. See Cardozo: *The nature of the judicial process* (1921) Chapter IV. Note the following comment at p. 150 "But I am ready to concede that the rule of adherence to precedent though it ought not to be abandoned, ought to be in some degree relaxed." Report of the Cincinatti Conference on the status of judicial precedent (1940) *14 Univ. of Cin. L. Rev.* 203-355; Holdsworth *XII H.E.L.* 159; also *50 L.Q.R.* 180 at 183 where he quotes Coke to say that a bad precedent should be overruled. Allen: *51 L.Q.R. 40* and 196; Wright: Future of the Common Law 8. See also generally Rupert Cross: *Precedent in English Law* (1968 Edn.) 32-34, and Chapters 6, 7 and 8; Salmond: *Jurisprudence* (12d) 141-188 Paton: *Jurisprudence* (3d) 179-94; Julius Stone: *Legal Systems and lawyers' reasonings* (1964) Chapter 7, Section 3, pp. 281-300.
7. See for example the Practice Statement of the House of Lords in which they gave themselves the power to overrule earlier decisions (1966) 3 *All.E.R.* 77 *I.W.L.R.* 1234. On the position before 1966 and the way in which the House avoided the consequences of a strict theory of *stare decisis* see Dworkin: *Stare decisis* in the House of Lords (1962) *25 Mod.L.R.* 163-178. See also the House using the power it acquired in 1966 in *Conway* v. *Rimmner* (1968) *1 All.E.R.* 874. On the Court of Appeal see *Gallie* v. *Lee* (1969) 2 Ch. 17; *Broome* v. *Cassels Ltd.* (1971) 2 W.L.R. 853 where it stated that an earlier decision of the House of Lords was *per incuriam* and refused to follow it.
8. See the recent decision in *Cassels Ltd.* v. *Broome* (1972), The Times Feb. 24, 1972 p. 27 where the House of Lords reproved the Court of Appeal for not following precedent.
9. (1972) *1 All.E.R.* 145—Lord Diplock at 188-9; Lord Simon at 198-9.
10. *A.I.R. 1965 S.C.* 1636.
11. Ibid at pr. 23 p. 1644 col. 2.
12. Ibid at pr. 25 p. 1645.

The question whether an earlier decision can be overruled was first considered by the Court in *Bengal Immunity Co.* v. *Bihar* (1955)[13] where a minority of 3 out of 7 judges stressed that the power to overrule a case must be exercised very sparingly.[14] The minority judges are referred to to counteract the impression that Subba Rao J. created in *Golak Nath* v. *Punjab*[15] that in the *Bengal Immunity* case all the judges were in favour of abandoning an earlier view if they had the slightest doubt about it. The Supreme Court has always emphasised that overruling must be done with caution.[16] This is apparent from the view of the majority and the minority in *Income-tax Officer, Tuticorn* v. *T. S. D. Nadar.*[17] In that case Hegde J. observed:

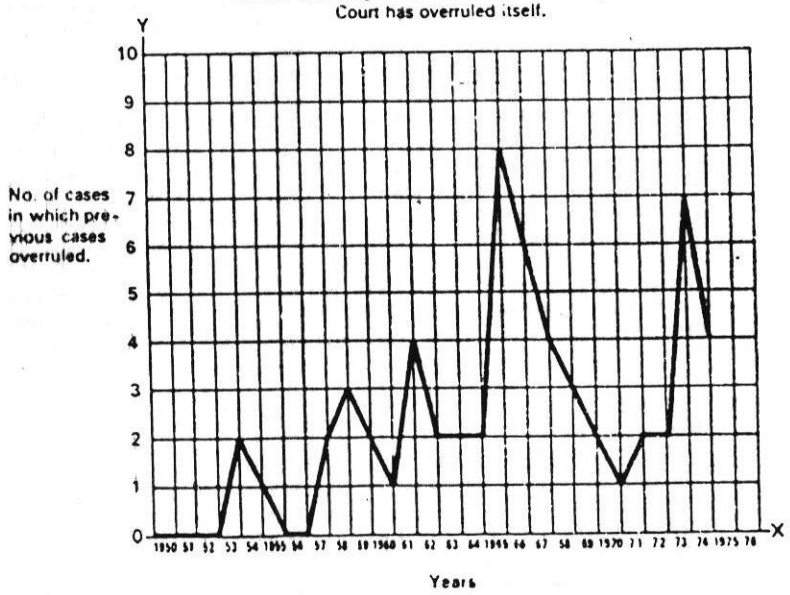
> "Every time (the) Court overrules its previous decision, the confidence of the public in the soundness of the decisions of this Court is bound to be shaken."[18]

The High Courts have made similar observations.[19]

Despite this declared sensitivity to the need for precedent, the Supreme Court appears to have overruled itself in a large number of cases. This is illustrated in a chart below:—

13. *A.I.R. 1955 S.C.* 661.
14. See T. L. V. Aiyar J. at pr. 186 p. 743; Sinha J. at pr. 213, p. 755; Jaganadhdas J. at pr. 115-28 p. 711-18.
15. *A.I.R. 1967 S.C.* 1643 at pr. 57 p. 1670-1. Subba Rao J. also quoted from his own judgement in *W.B.* v. *Corpn. of Calcutta, A.I.R.* 1967 S.C. 997 which deals with the majority's view of *stare decisis* in the *Bengal Immunity case.* Note the views of Wanchoo and Ramaswami JJ. in *Golak Nath* v. *Punjab* (*supra*) at pr. 118 p. 1690-1 and pr. 277, 1742 respectively.
16. On this see Das C.J. in *Bengal Immunity Co.* v. *Bihar A.I.R.* 1955 S.C. 661 at pr. 11-21 pp. 670-1 particularly pr. 19; Gajendragadkar J. in *Sajjan Singh* v. *Rajasthan A.I.R. 1965 S.C.* 845 at pr. 22, Mudholkar J. in *Vidyacharan* v. *Khub Chand A.I.R. 1964 S.C.* 1099 at pr. 40 p. 1116-7; Subba Rao J. in *Corpn. of Calcutta* v. *W.B. A.I.R. 1967* S.C. 997 at pr. 5 1001; see also Shah J in the same case at 1013. See also Gajendragadkar J. in *Maktul* v. *Manbhari A.I.R.* 1958 *S.C* 918 at pr. 9 pp. 922-3 where English and American authorities supporting stare decisis are cited. See further *V. D. Dhanwatey* v. *C.I.T.* A.I.R 1968 S.C 683; *Shama Rao* v. *Union Territory, Pondicherry A.I.R. 1967 S.C.* 1480.
17. *A.I.R. 1968 S.C.* 623 at pr.. 4 p. 627 and prs. 37-8 pp. 637-8 respectively.
18. Ibid at pr. 37-8.
19. P. J. Reddy, C.J.: in *S. Rao* v. *Revenue Divisional Officer Guntur A.I.R. 1969 A.P.* 55 (F.B.) at pr. 7 p. 59 (but he stresses that in the instant case there was scope for more than interpretation); N.G. Shelat J. in *State* v. *Saifuddin A.I.R. 1969 Gujarat* 195 at pr. 9 p. 199 noting that a F.B. decision should not be disturbed unless "a public interest of a very serious nature is seriously affected"; *U.P.* v. *Firm Deo Datt A.I.R. 1966 All.* 73 per Desai C.J. at pr. 22 p. 79-80; *Bessappa* v. *Parvatamma A.I.R. 1952 Hyd.* 39 at pr. 6 p. 103; (per Ali Khan J.) at pr. 40 p. 111 (per Manohar Pershad J.); Chagla C.J. (for Gajendragadkar and Tendolkar JJ) in *Sarkar* v. *Chand Narayan A.I.R. 1951 Bom.* pr. 10 p. 13 col. 2; *Rama Krishna* v. *Hardcastle & Co., A.I.R. 1963 Madras* 103 at pr. 5. p. 105 where blind adherence to precedent is disapproved; *Perumayakam* v. *Sivaram A.I.R. 1952 Mad.* 419 at pr. 80 pp. 453-4 (per Raghava Rao J.) that precedent should be followed.

CHART showing the extent to which the Supreme Court has overruled itself.



The chart has been tabulated in the form of a table which gives the exact figures from year to year.

	SC	PC		SC	PC		SC	PC
1950	0		1961	1		1971	1	
1951	0		1962	4		1972	2	
1952	0		1963	2		1973	2	
1953	0		1964	2		1974	7	
1954	2		1965	2		1975	4	
1955	1		1966	8				
1956	0		1967	6	3			
1957	0		1968	4				
1958	2		1969	3				
1959	3		1970	2	2			
1960	2							

Source of the Table

The main sources of the table are the lists in each annual volume of the *A.I.R. Supreme Court.* The following additions have been made. *Deep Chand* v. *U.P. A.I.R. 1959 S.C.* 648 is taken to have overruled *Bhikajee* v. *M.P. A.I.R. 1955 S.C.* 781 on the strength of Das Gupta J. observations in *M/s N. K. Bhawani* v. *Chief Tax Officer A.I.R. 1961 Mys.* 3 at pr. 7; *Kochunni* v. *Madras A.I.R. 1960 S.C.* 1080 is taken to have overruled *Bhanji Munji's Case, A.I.R. 1955 S.C.* 41; in 1962 the *A.I.R.* includes *Automobile Transport Co.* v. *Rajasthan A.I.R. 1962 S.C.* 1406 as having overruled earlier case law, by having distinguished it. On this basis we have included *Sitabati* v. *W.B.* (1961) reported (1967) *II S.C.R.* 945 as having in one sense tried to modify fundamentally *Kochunni* v. *Madras A.I.R. 1960 S.C.* 1080 on which see the recent case of *R. C. Cooper* v. *Union, A.I.R.* 1970 *S.C.* 564; In 1965 we have

included *Kasturi Lal* v. *U.P., A.I.R. 1965 S.C.* 1039 as having overruled *Vidyawati's* case *A.I.R. 1962 S.C.* (Dhavan J.'s observations in *Chottey Lal* v. *U.P. A.I.R. 1967 All.* 327 at pr. 10 p. 329). In 1966 we have included *Manikayaka* v. *Narasimhaswami A.I.R. 1966 S.C. 470* as having overruled earlier case law on the strength of Jagat Narain J.'s judgement in *Sachidanand* v. *Mangilal A.I.R. 1968 Rajasthan* 1. In 1967 we have included *Golak Nath* v. *Punjab, A.I.R. 1967 S.C.* 1643 which appears to have been overlooked in the *A.I.R.* list. In that same year we have included *Devi Dassan* v. *Punjab A.I.R. 1967 S.C.* 1896 on the strength of an article by G.S. Ullal: Do judges live in an ivory tower? *A.I.R. 1968 Journal* 37.

It should also be noted that in the 1954 list we have included *Dwarkadas etc.* v. *Sholapur Spg. and Wvg. Co. A.I.R. 1954 S.C.* 119 having overruled *Chiranjit Lal* v. *Union A.I.R. 1951 S.C.* 41 on the question of shareholders' rights. Further we have stressed that *Subodh Gopal* v. *W.B. A.I.R. 1954 S.C.* 92 overruled Das J.'s views on the relation between Article 331(1) and (2) *inter se* in the aforementioned 1951 case, even though his views had not at any stage become the views of the Court. What is to be noted is the apologetic manner in which the rest of the Court dissented from the views of a brother judge.

In 1970 we have added that the Supreme Court has overruled 2 Privy Council's decisions in *Raman Nadar* v. *S. Raslamma A.I.R. 1970 S.C.* 1759 and *Raj Kumar* v. *C.I.T.* (1970) *1 S.C.W.R.* 674.

In 1971 we have included *M/s. Travancore Rayons Ltd.* v. *The Union of India*, A.I.R. 1971 S.C. 862 as having affirmed that *Madhya Pradesh Industries Ltd's* case, A.I.R. 1966 S.C. 671 has been overruled by the Court in *Bhagat Raja's* case, A.I.R. 1967 S.C. 1606.

In 1972 we have added that the Supreme Court overruled its two earlier decisions. *The Indian Aluminium Co. Ltd.* v. *Commissioner of Income-tax, West Bengal, Calcutta*, A.I.R. 1972 S.C. 1880 as having modified fundamentally *Travancore Titanium Product Ltd.* v. *Commissioner of Income tax*, A.I.R. 1966 S.C. 1250. *P. R. Nayak* v. *Union of India*, A.I.R. 1972 S.C. 554 has overruled *Govt. of India, Ministry of Home Affairs* v. *Tarak Nath Ghosh*, A.I.R. 1971 S.C. 823.

In 1973 we have included *Shambhu Nath Sarkar* v. *The State of West Bengal* A.I.R. 1973 S.C. 1425 as having overruled *A. K. Gopalan* v. *State of Madras*, A.I.R. 1950 S.C. 27 and *Kesavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461 as having overruled *Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643.

In 1974 we have added that the Supreme Court overruled its seven earlier decisions. *Mohd Shujat Ali* v. *Union of India*, A.I.R. 1974 S.C. 1631 as having overruled its three earlier decisions in *Mohammed Bhakar* v. *Krishna Reddy*, 1970 Serv. L.R. 768 (S.C.), *State of Haryana* v. *S. J. Bahadur*, A.I.R. 1972 S.C. 1546 and *Gurcharan Das Vaid* v. *State of Punjab*, A.I.R. 1972 S.C. 1640. The remaining four decisions have been overruled in *Mysore State Road Transport Corp.* v. *Mysore State Transport Appellate Tribunal*, A.I.R. 1974 S.C. 1940; *Maganlal Chhaganlal (P) Ltd.* v. *Municipal Corporation of Greater Bombay*, A.I.R. 1974 S.C. 2009; *Haradhan Saha* v. *State of West Bengal*, A.I.R. 1974 S.C. 2154 and *Shamsher Singh* v. *State of Punjab*, A.I.R. 1974 S.C. 2192.

It should also be noted that in the 1975 list we have included *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*, A.I.R. 1975 S.C. 1331 as having overruled *Executive Committee of U.P. State Warehousing Corporation Lucknow* v. *Chandra Kiran Tyagi*, A.I.R. 1970 S.C. 1244 and *Indian Airlines Corporation* v. *Sukhdeo Rai*, A.I.R. 1971 S.C. 1828; *Devenport & Co. Pvt. Ltd.* v. *Commissioner of Income-tax*, A.I.R. 1975 S.C. 1996 overruled *Raghunath Prasad Poddar* v. *Commissioner of Income-tax*, A.I.R. 1973 S.C. 2061 and *Shri Umed* v. *Raj Singh*, A.I.R. 1975 S.C. 43 overruled *Mohd. Yunus Saleem* v. *Shiv Kumar Shastri*, A.I.R. 1974 S.C. 1218.

It will be noticed that the Court began to overrule itself in 1954. There was a short lull from 1956-60 and since then there has been a steady stream of overruling. It should be noted that these dates accord with the appointments of new judges to the Court. The early Court

was small and compact and all the judges usually sat together. A large number of appointments were made to the Court in 1954.[20] After that the Court lost its compactness and began sitting in Benches that were changed with increasing frequency. The next set of appointments was made in 1957-58.[21] After 1960 the number of judges was increased to thirteen (it was originally five in 1950),[22] and new appointments were frequently made to the Court.[23] The significance of this can be seen later in the cases in agrarian reform in Chapter III. We shall see that in *Kochunni* v. *Madras* (1960),[24] Sarkar J. protested at the majority's effort to add the test of agrarian reform in cases where Article 31A would technically apply. But neither he nor Imam J. (who concurred in his judgement) ever participated in any case in which the agrarian reform test came up for discussion. The majority view became the law without further protest. Again, in two very important cases on the Constitution the Court overruled the earlier case law by a bare majority.[25] It appears that in India the authority of an earlier case may depend on the manner in which a particular Bench is constituted. The two notable examples of this are two cases on the relationship between Articles 19 and 31(3).[26] Shah J. delivered the judgement in both cases. In the first case he respected the authority of a 1961 decision[27] and ruled that the two Articles were not related to each other but in the second case, sitting in a much larger Bench and in a changed situation two years later, he distinguished and overruled the 1961 case in the briefest possible terms. Another good example is *W. B.* v. *Corp. of Calcutta*[28] where a different Bench overruled a 1960 case and with it dispensed with the common rule of interpretation that the Crown is not bound by a Statute.

The Court seems to have attained some kind of compromise between the need for certainty and what W. Douglas J. in an extra-judicial comment called the "dynamic component of history".[29] But it should be noted that the Court has not in fact laid down clear principles as to when it shall depart from an earlier decision. It has in the past often overruled earlier authority with very little discussion.[30] The

20. See Chapter I Section 4.
21. See Chapter I Section 4.
22. By the Supreme Court Act (13 of) 1960. Note that in 1950 the maximum limit set by the Constitution was 7 (excluding the Chief Justice).
23. See Chapter I Section 4.
24. *A.I.R. 1960 S.C.* 1080.
25. *Bengal Immunity Co.* v. *Bihar A.I.R. 1955 S.C.* 661 (majority 4:3); *Golak Nath* v. *Punjab A.I.R. 1967 S.C.* 1643 (majority 6:5).
26. *Maharashtra* v. *H. N. Rao. A.I.R. 1970 S.C.* 1157 (reported 2 years late); *R. C. Cooper* v. *Union A.I.R. 1970 S.C.* 564.
27. *Sitabati* v. *W.B.* (1962) reported (1967) *II S.C.R.* 945.
28. *A.I.R. 1967 S.C.* 997.
29. *Stare decisis* (1949) *49 Col. L. Rev.* 735 at 736.
30. e.g. *M. S. N. Sharma* v. *Sri Krishna Sharma A.I.R. 1959 S.C.* 395 on *Ganpati* v. *Nafisul Hasan A.I.R. 1954 S.C.* 636; *Deep Chand* v. *U.P. A.I.R. 1959 S.C.* 648 on

Court should, as the House of Lords is trying to do,[31] evolve definite principles on whether an earlier case should be followed or not. It will be clear from later Chapters of this book that even the citing of earlier case law on the subject by the Court has been selective. To give one example: the leading case on the doctrine of colourable legislation is *Kameshwar* v. *Bihar*,[32] but the principles in that case were somewhat widely expressed and this was obliquely pointed out in *Gajapati* v. *Orissa*.[33] Subsequently, the latter and not the former case was cited as the leading authority on colourable legislation, even though the doctrine was in fact used in the former and not in the latter case. Casual overruling and selective citing of case law has become a feature of the use of the doctrine of precedent in the Supreme Court. This will be pointed out later.[34]

(c) *The Supreme Court and the "interhierarchical" structure of precedent*

Despite the fact that the Supreme Court itself has not followed the doctrine of *stare decisis* very strictly, it has been severe in reproving single judges who have stepped out of line or not followed earlier Division and Full Benches of their own Courts.

The High Courts have in the past followed the rule that a single judge is bound by an earlier Division Bench of that Court[35] which is in turn bound by an earlier Full Bench.[36] The Supreme Court have approved of this set up.[37] But three Judges, two from Allahabad and

earlier case on the doctrine of eclipse. *Dhaneshwar* v. *Delhi Adm.* A.I.R. 1962 S.C. 795 at pr. 4 p. 198; *Kulakhil* v. *Kerala* A.I.R. 1966 S.C. 1614 on which see comment A.I.R. 1967 Jnl. 56; Note the unsatisfactory way in which *Gopalan* v. *Madras* A.I.R. 1950 S.C. 27 is overruled in *R. C. Cooper* v. *Union* A.I.R. 1970 S.C. 564 (a case which did not even concern *Gopalan* directly) at pr. 64 p. 597.

31. *Jones* v. *Secy. of State* (1972) 1 All E.R. 145. See particularly Lord Simon at 196-7.
32. A.I.R. 1952 S.C. 252.
33. A.I.R. 1953 S.C. 375.
34. See Chapter III Section 3 (*infra*) 140
35. See on this Article by a High Court Judge: Binding nature of judgements in High Courts A.I.R. 1963 Jnl. 42-44; see also *Ramzan* v. *Bhimson* A.I.R. 1970 Mys. 195 (or a Supreme Court decision) at pr. 8 pp. 197-8.
36. See Article by a High Court Judge cited fn. 35 and also A.I.R. 1971 Orr. 127; A.I.R. 1971 Allahabad 251; A.I.R. 1971 Bom. 317. But see that these rules do not apply where there is a Supreme Court decision on a point. *Aleka* v. *Jagabandhu* A.I.R. 1971 Orr. 127 at pr. 11 p. 137; *I. C. House* v. *S. T. Officer* A.I.R. 1971 All. 250 at pr. 3 pp. 252-3; *Trustees, Port of Bombay* v. *Premier Automobiles* A.I.R. 1971 Bom. 317; *Puran Chand* v. *Subhakaran* A.I.R. 1969 S.C. 547 at pr. 8 p. 549-50.
37. *Jai Kuar* v. *Sher Singh* A.I.R. 1960 S.C. 1118 at 122-3; *Kamalammal* v. *Venkatalakshmi* A.I.R. 1965 S.C. 1349; *Raghavamma* v. *Chenchamma* A.I.R. 1954 S.C. 136; *Mahadeolal* v. *Adm. Gen.* A.I.R. 1960 S.C. 936; *Jasra* v. *Rajdewan Dubey* A.I.R. 1962 S.C. 83; *Sri Bhagwan* v. *Ramchand* A.I.R. 1965 S.C. 1767; *Tribhowani Das* v. *State* A.I.R. 1968 S.C. 372; *Dhanki Mahajan* v. *Rama Chandubhan* A.I.R. 1969 S.C. 89.

one from Gujarat did not follow these rules — the two Allahabad Judges on the ground that the view of the High Court had been superseded by a later decision of the Supreme Court, and the Gujarat Judge on the ground that his "oath" required him to uphold the true law and a Full Bench had no status in law. In the Allahabad cases, there was, strictly speaking, no "refusal" to follow the earlier decisions because the Judge thought that he was bound by the declaration of law by the Supreme Court under Article 141 of the Constitution. One case never came before the Supreme Court, but we shall trace the manner in which the Supreme Court dealt with the "revolts" by the other two Judges.

(i) *The Revolt of the Single Judge*

Mootham J. in *Ishwari Prasad* v. *Registrar, University of Allahabad*[38] rejected the argument that a Full Bench decision that a wrong interpretation of law did not constitute an error apparent on the face of the record for the purpose of a writ of certiorari was binding on him and observed: "That is of course also a decision binding on me and '*prima facie*' concludes the case. . . . Shortly afterwards, however, came the decision in *Basappa* v. *T. Nagappa*."[39] After analysing the decision in detail, the learned Judge held that according to his interpretation of the Supreme Court's decision, the High Court had the jurisdiction to issue a writ of certiorari if there was a manifest error in the impugned order. He did not follow the Full Bench and quashed the order of the Chancellor on the ground that it was erroneous. It is noteworthy that he interpreted the Supreme Court's decision himself instead of referring it to a larger bench.

Dhavan J. in *Ram Chand* v. *Bhagwan Dass*[40] had to consider whether the power of the District Magistrate under section 3 of the U.P. (Temporary) Control of Rent and Eviction Act to grant permission to evict a tenant and of the State Government under section 7F of the Act were quasi-judicial. Several previous decisions of the High Court had held that this power was not quasi-judicial but ministerial. But after his attention had been drawn to a judgement of the Supreme Court, he observed: "In view of the law declared by the Supreme Court, which takes precedence over the decisions of all other courts and is binding on me under Article 141 of the Constitution, it is not necessary for me to refer this case to a larger bench. Following the precedent in *Dr. Ishwari Prasad* v. *Registrar, University of Allahabad*,[41] when Mootham J. ignored a decision of a Full Bench of this Court in view of the law declared by the Supreme Court I am of the opinion that the decision in *Narottam Saran* v. *Government of U.P.*,[42]

38. A.I.R. 1955 All. 131.
39. A.I.R. 1954 S.C. 440.
40. 1963 All. L.J. 752; 1962 All. W.R. (H.C.) 525.
41. fn. 38, *supra*.
42. A.I.R. 1954 All. 382

25

V. S. Johari v. *State of U.P.*,[43] *Sheikh Rafiuddin* v. *Government of U.P.*[44] is no longer good law". On appeal the Supreme Court upheld the view of Dhavan J. that the power under sections 3 and 7F was quasi-judicial and disagreed with the previous decisions of the High Court, but reproved the Judge for having chosen to re-examine an issue on which several Division Benches of the High Court had laid down a clear and definitive ruling. The Court thought that the Judge ought to have laid the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. Gajendragadkar C.J. observed: "It is to be regretted that the learned single Judge departed from this traditional way and chose to examine the question himself."[45] This was not really a case of 'refusal' by a single Judge. The case is unique in one respect: the Supreme Court snubbed a Judge for having delivered a correct judgement himself instead of referring it to a larger bench. The Court did not solve the basic problem which a Judge may have to face — namely, how to ensure that the litigant who had already spent a long time in trying to get his case heard by the High Court, should not go through the time-consuming and costly process of having his case decided (wrongly) by a Full Bench and thereafter by the Supreme Court. Conventions and traditional ways are good servants but can be bad masters. This indeed is a matter that the Supreme Court has overlooked.

V. Raju J. discussed his position at length in an unreported case and again in *State* v. *Ram Prakash*[46] where he emphasised the terms of his oath to uphold the "true" law and further argued that accident played so important a part in particular decisions being decided in the way they were, that he refused to be bound by them.[47] In *Tribhovandas* v. *State*[48] Shah J. dealt with Raju J.'s arguments, and observed:

> "Judicial decorum, propriety and discipline required that he should not ignore . . . (Full Bench) decision of his Court. Our system of the administration of justice aims at certainty in the law and that can be achieved only if judges do not ignore decisions of Courts of co-ordinate authority."[49]

He rejected Raju J.'s argument that a Full Bench had no status in law,[50] stressed that the terms of the oath merely imposed the duty to be impartial, and added:

43. 1962 A.L.J. 672.
44. 1956 A.L.J. 329.
45. A.I.R. 1965 S.C. 1767 at pr. 18. p. 1773.
46. *State* v. *Ramprakash* *A.I.R. 1964 Gujarat* 223 at pr. 6 pp. 225 ff.
47. Ibid at pr. 7.
48. *A.I.R. 1968 S.C.* 372.
49. At pr. 11 p. 377 referring to *Sri Bhagwan* v. *Ramchand* *A.I.R. 1965 S.C.* 1767.
50. Ibid. at pr. 18.

> ". . . but there is nothing in the oath which warrants a judge in ignoring the rule relating to the binding nature of precedents."[51]

Hegde J. made similar observations about another judgement of Raju J. in *Dhanki Mahajan* v. *Rana Chandubha*.[52]

Thus the Supreme Court has been very strict in ensuring that the inter-hierarchical structure of precedent is retained. Their approach accords with the view of the House of Lords in *Cassell Ltd.* v. *Broome* (1972)[53] that the hierarchy of precedent must be retained and that judges who want a particular provision of law changed must go through the existing channels. They are at liberty to record their protest, but not pursue their views at the expense of upsetting precedent. But there is no English equivalent of Article 141.

(ii) *The binding effect of an "obiter dictum" of the Supreme Court*

Article 141 of the Constitution lays down that the law laid down by the Supreme Court "shall be binding on all Courts in India." By and large all High Courts agree that they are bound by even an *obiter dictum* of the Supreme Court.[54] The leading judgement on

51. At pr. 13 p. 377.
52. *A.I.R. 1969 S.C.* 69 at pr. 3 p. 71.
53. *The Times*, Feb. 24, 1972 at p. 27.
54. Allahabad High Court: *Union* v. *Firm Ram Gopal* *A.I.R. 1960 All.* 672; *Babu Nandan* v. *Sumita* *A.I.R. 1961 All.* 287 at 288; *C.I.T.* v. *Manmal* (1961) 42 *I.T.R.* 203 (All.) *Sadhu Singh* v. *State* *A.I.R. 1962 All.* 193 at 196; *Khem Karan* v. *U.P.* *A.I.R. 1966 All* 255; *N.I.A. Co.* v. *Janak Dulari* *A.I.R. 1966 All.* 266 at pr. 8 p. 268; *Rameshwar Prashad* v. *I.T. Commr.* *A.I.R. 1968 All.* 88 at pr. 5 (obiter persuasive); *Ram Manohar Lohia* v. *State* *A.I.R. 1968 All.* 100 at pr. 13 p. 106; *Chobey* v. *Sonu* *A.I.R. 1969 All.* 305 at pr. 8; *H. C. Mishra & Co.* v. *I.T. Commr.* *A.I.R. 1969 All.* 566; *Swami Prashad* v. *Harovind Sahai* *A.I.R. 1970 All.* 251 (but it left the question open). Andhra Pradesh: *K. C. Venkata Chalamayya* v. *Madras* *A.I.R. 1958 A.P.* 173 at pr. 16; *Desu Rayudi* v. *A.P.S.C.* *A.I.R. 1967 A.P.* 353 at pr. 22. Assam: *Nuraddin* v. *Assam* *A.I.R. 1953 Assam* 48. Bombay: *K. P. Doctor* v. *Bombay* *A.I.R. 1955 Bom.* 220 at 224; *Mohandas* v. *A. N. Sattahathan* *A.I.R. 1955 Bom* 113 at 118; *Narayanlal* v. *Maneck Phiroze* *A.I.R. 1959 Bom.* 320 at 327; *B. T. Bhosle* v. *M. S. Aney*, *A.I.R. 1961 Bom.* 29 at 41; *Anant* v. *Baburao* *A.I.R. 1967 Bom.* 109 at 115; *Vishnu* v. *Maharashtra W & G Co.* *A.I.R. 1967 Bom.* 434 at 437; *State* v. *Vali Mohammad* A.I.R. 1969 Bom. 294; *Hiranandini* v. *B. B. & D Mfg. Co.* *A.I.R. 1969 Bom.* 373 at 378. Calcutta: Obiter distinguished in *S. Muchand* v. *Collector* *A.I.R. 1968 Cal.* 174 at 186; but see *Gouri Gupta* v. *Tarani Gupta* *A.I.R. 1969 Cal.* at 309; *State* v. *D. Surya Rao* *A.I.R. 1969 Cal.* 594; *Sailendra Nath Purnedu* *A.I.R. 1970 Cal.* 169; *A. K. Roy* v. *K. C. Sen Gupta* *A.I.R. 1971 Cal.* 252 at 257. Gujarat: *Lalu Jela* v. *Gujarat* *A.I.R. 1962 Guj.* 250 at 255; *Jaswantbhai* v. *Nichhabhai* *A.I.R. 1964 Guj.* 283 at 287; *P. V. Patel* v. *State* *A.I.R. 1966 Guj.* 102 at 105 (but not directly on obiter); *Prithvi Cotton Mills* v. *Broach Mun.* *A.I. 1968 Guj.* 124 at 142; *Chotalal* v. *Vivekanand Mills* *A.I.R. 1970 Guj.* 277 at 284: Himachal Pradesh: *Kalyan Singh* v. *Baldev Singh* *A.I.R. 1961 H.P.* 2 at 7; *Union* v. *Wazir Chand* *A.I.R. 1962 H.P.* 24 at 26. Note the comments of Saxena (cited *supra* f.n. 2) at 1331. Orissa: *S. M. T. Haramani* v. *Dinabandhu* *A.I.R. 1954 Ori.* 54; *F. C. Visalamma* v. *Jagan-*

this is that of Dhavan J. in *Union* v. *Firm Ram Gopal*[55] where he observed:

> "(I)t has been overlooked . . . (in the various authorities cited before me) that the doctrine of supremacy of any declaration of law by the Supreme Court has been made a part of the Constitutional law of the Republic. It therefore rests on a much loftier pedestal than judicial conventions under which every inferior Court is bound to follow previous decisions of a superior Court . . . Article 141 had the effect in addition to investing the decision of the Supreme Court with a binding force of creating a constitutional organ whose declaration of law *pronounced ex cathedra* shall be binding on all courts in India." (emphasis mine)

The problem however is: What part of the judgements of the Supreme Court are made *ex cathedra*? Thus even in the Allahabad High Court, judges have observed that *obiter dicta* of the Supreme Court are only of persuasive value.[56] Again, Satish Chandra J. of the same High Court has opined that he is not bound by a ruling where the argument in the Supreme Court has proceeded on a concession.[57] There are several decisions of other High Courts which distinguish a Supreme Court ruling from a merely casual observation, and held that the Court was bound by an *obiter dictum* but not by a casual observation.[58] Chandrachud J. of the Bombay High Court (now a Supreme Court Judge) has further insisted that an *obiter dictum* is binding only if it is a considered opinion.[59] This contrasts with the

nadha Rao A.I.R. 1955 Or. 160 at 162; *Nain* v. *State* A.I.R. 1965 Or. 7 at 9; Madhya Pradesh: *Suraj Mal* v. *M.P.* A.I.R. 1958 M.P. 103 at 111; *Re Lachman Nandi* A.I.R. 1966 M.P. 261 at 269. Patna: *Bihar* v. *B. L. Agarwala* A.I.R. 1966 Patna 410 at 418; *S.V.P. Cement Co.* v. *Union* A.I.R. 1967 Patna 315 at 317. Rajasthan: *Brij Sunder* v. *Election Tribunal* A.I.R. 1957 Rajasthan 189 at 197; *Jaswant* v. *Lakhmi* A.I.R. 1969 Rajasthan 192 at 209 (the question asked in this judgement is: "Did the Supreme Court intend to lay down the law?"); *Nag Raji* v. *R. K. Birla* A.I.R. 1969 Rajasthan 245 at 247. Mysore: *D. G. Vishwanath* v. *Mysore* A.I.R. 1964 Mys. 132 at 138. (see also the opinion of Manipur in (1962) II Crim. L.J. 147. Madras: *Veerappa Chettiar* v. *I.T. Commr.* A.I.R. 1959 Mad. 56 at 61 (obiter entitled to the highest respect); Jammu and Kashmir: *Sheikh Abdul* v. *Jagat Ram* A.I.R. 1969 J. K. 15; *Karim Bux* v. *State* A.I.R. 1969 J.K. 77 at 86.

55. A.I.R. 1960 All. 672 at 680.
56. *Rameshwar Prashad* v. *I.T. Commr.* A.I.R. 1968 All. 88 at 89.
57. *Nathu* v. *Sub-Divl. Officer W. Pin.* No: 2399 of 1968 referred to in A.I.R. 1970 Allahabad 251 at 255-6.
58. *Mohandas* v. *Sattanathan* A.I.R. 1955 Bom. 113 at 118; *Anant* v. *Baburao* A.I.R. 1967 Bom. 109 at 115; *State* v. *Vali Mohd.* A.I.R. 1969 Bom. 294 at 295; *Hiramanclini* v. *BB & D Mfg. Co.* A.I.R. 1969 Bom. 373 at 378; *Nag Raj* v. *R. K. Birla* A.I.R. 1969 Rajasthan 245 at 247.
59. *Vishnu* v. *Maharashtra W & G Co.* A.I.R. 1967 Bom. 424 at 437; See also Chagla C.J. in *K. P. Doctor* v. *Bombay* A.I.R. 1955 Bom. 220 at 224.

opinion of the Calcutta High Court that the rulings of the Supreme Court are binding even if the point was not argued before the Supreme Court[60] or if the ruling proceeded on an argument different from that before them.[61] The Gujarat High Court has gone one step further still. In *Chotalal* v. *Vivekananda Mills*[62] Mehta J. observed: "(T)he point is concluded by the decision of the Supreme Court, which is completely binding on us and it is not open to this Court to distinguish this decision on facts. It is only in case of the decision of the concurrent Court that the doctrine(s) of *obiter*, *per incuriam* or distinguishable on fact, could be applied."

The Orissa High Court has taken the view that even an *obiter* of the Federal Court is binding unless that court made it clear that its view was intended to be a tentative one.[63] The Madhya Pradesh High Court have also made this distinction between an *obiter dictum* and a tentative opinion.[64]

The Supreme Court cannot really pass a definitive opinion on this question because any statement that the court makes will in fact be an *obiter*, inasmuch as it will be a comment on a situation in which the Supreme Court will never be involved, because of its rulings in the *Bengal Immunity Case*[65] that Article 141 does not apply to them. The Court has however taken the view that their own *obiter dicta* are entitled to the highest respect.[66] But what does "highest respect" mean and imply in law? (Highest respect and dissent can go together). More recently Shah J. observed in *Madhav Rao Scindia* v. *Union*[67]: "It is difficult to regard a word, clause or a sentence occurring in a judgement of this Court, divorced from its context as containing a full exposition of the law on a question, when the question did not even fall to be answered in that case. . . . "

In *G. L. Gupta* v. *D. N. Mehta*[68] the Court ruled that when the attention of the Court was not drawn to a particular statute, it can review its own decision. The question remains: do these rules apply to the High Courts and can they also distinguish the rulings of the Supreme Court in this way? The law on Article 141 is in a state of confusion. The Supreme Court cannot solve this problem. It is up to the High Courts to achieve some kind of uniformity. The Supreme

60. *Ajaib Singh* v. *C.W.T.* A.I.R. 1969 Cal. 249 at 252-3.
61. *Sailendranath* v. *Punedu* A.I.R. 1971 Cal. 169 at pr. 11 p. 170.
62. A.I.R. 1970 Guj. 277 at 284.
63. *F. C. Visalamma* v. *Jagannadha* A.I.R. 1955 Or. 160 at 162.
64. *Re Lachman Nandu* A.I.R. 1966 M.P. 261 at 269.
65. A.I.R. 1955 S.C. 661.
66. *I.T. Commr.* v. *Vazir Sultan & Sons* A.I.R. 1959 S.C. 814 at 821.
67. A.I.R. 1971 S.C. 530 at pr. 13 p. 578 col. 2.
68. A.I.R. 1971 N.S.C. 174.

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Court has declared that it would not give "speculative opinions on hypothetical questions."[69]

(d) *Ways of following and distinguishing a case*

It appears that although Courts in India adhere to a very strict theory of precedent, in actual fact they have discovered a large number of ways in which they can follow or need not follow a precedent. K. Llewellyn, analysing Appellate Court procedure in the United States of America, noted that in America there were at least 64 different reasons given for following or avoiding preceding authority.[70] Indian Courts have produced an equally interesting variety. At least 12 considerations that must be borne in mind can be found in Gajendragadkar J.'s judgement in *Keshava Mills* v. *I.T. Commissioner*[71]: The first three are the usual reasons which were declared by the Court of Appeal in the classic case of *Young* v. *Bristol Aeroplane Co.*[72] Gajendragadkar recounts them by asking:

> "What is the nature of the infirmity of error on which a plea for the review of the earlier decision is based? (In) . . . the earlier decision did some patent aspects of the question remain unnoticed? . . . was the attention of the Court withdrawn (from) any relevant or material statement or provision, or was any previous decision of this Court bearing on the point not noticed?"[73]

To this the learned judge added the following considerations:

> "Is the Court . . . fairly unanimous that there is . . . an error in the earlier view? What would be the impact of the decision on the general administration of the law or the public good? Has the earlier decision been followed on subsequent occasions either by this Court . . . or the High Court(s) and would the refusal (to follow) the earlier decision lead to public inconvenience, hardship or mischief? These considerations become still more significant when the earlier decision happens to be a unanimous one of a Bench of the learned judges of this Court."[74]

Courts in India have added further considerations that must be borne in mind; the Common Law view of the matter must not be upset;[75] has the decision stood the test of time?[76] Will the decision

69. S. K. Das J. in *Central Bank of India* v. *Workmen A.I.R. 1960 S.C.* at 28.
70. *The Common Law Tradition* (1960) 75-92.
71. *A.I.R. 1965 S.C.* 1636
72. *(1944) K.B.* 718 and comment by Cross: *Precedent in English law* (1968) 108-110.
73. *A.I.R. 1965 S.C.* 1636 at pr. 23 p. 1644.
74. Ibid.
75. *Director of Rationing and Distribution, Calcutta* v. *Corpn. of Calcutta A.I.R. 1960 S.C.* 1355 at pr. 7. But note the dissent of Wanchoo J. and the fact that this case was overruled in *W.B.* v. *Corpn. of Calcutta A.I.R. 1967 S.C.* 997.
76. See *Nirsin* v. *Sudhir Kumar A.I.R. 1969 S.C.* 864 at pr. 4, p. 866; *Raman Nadar* v. *S. Raslamma A.I.R. 1970 S.C.* 1759 at pr. 10 p. 1763; *Smt. Indi Devi* v. *Board*

lead to uncertainty in the area of property law;[77] is the point in law covered by a Full Bench decision of the High Court or of the Supreme Court?[78] Will commercial transactions be affected by the decision?[79] the existing procedure to be followed in Courts should not be changed;[80] will the decision affect the hierarchy of precedent;[81] do the facts of the instant case demand that earlier cases be followed?[82]

All these considerations themselves involve further considerations, depending on the facts of the instant case and the emphasis that a particular judge may put on the various factors that must be borne in mind. As Judge Frank observed: "Courts in deciding cases are engaged in a sort of retail, not a wholesale job".[83] These considerations will be borne in mind in the analysis of particular problems later.

(e) *The application of an earlier ruling*

Before the reasoning (*ratio decidendi*) or a casual statement (*obiter dictum*) of one decision can apply to another, some similarity between the two decisions must be proved. The earlier case must be on the same point of law, the same or a similar section of a statute, or a similar section in a statute *in pari materia* and with substantially the same facts. Thus in *Bombay Union of Journalists* v. *Bombay*[84] the Court was not willing to apply the observations made on S. 25(7)(b) of the Industrial Disputes Act 1947 in *Bombay* v. *Hospital Mazdoor*

of Revenue A.I.R. 1955 N.U.C. 2294 (All); *Sakarchand* v. *Narayan A.I.R. 1951 Bom.* 10 at pr. 10; *C & J Bank* v. *M. S. Alikhan A.I.R. 1956 Hyd.* 65; *Thayamma* v. *Giriyamma A.I.R. 1960 Mys.* 176 at pr. 4 p. 177 (per Hegde J.) *Venkamma* v. *Larmisonappa A.I.R. 1951 Bom.* 57 (per Bhagwati J.) at pr. 22 p. 66; S. K. Das J. in *Bhagwat Sharma* v. *Baijnath Sharma A.I.R. 1954 Pat.* 408 at pr. 18 p. 414; *Sakarchand* v. *Narayan A.I.R. 1951 Bom.* 10 at pr. 10; *Smt. Indi Devi* v. *Board of Revenue A.I.R. 1955 N.U.C. 2224 (D. B.)* C. & J. Bank v. *M. S. Ali Khan A.I.R. 1956 Hyd.* 65 at pr. 12 p. 70; *Benoy Krishna* v. *Ashotosh D. E. A.I.R. 1954 Cal.* 389 at pr. 11 p. 322; *Anjaneyul* v. *Rang Charyuly A.I.R. 1958 A.P.* 705 at pr. 6700; *Smt. Reran* v. *Smt. Gour Bai A.I.R.* 1958 M.P. 3 . . at p. 14 p. 334, *Ram Bhatra* v. *Kondama A.I.R. 1963 Mys.* 332 at pr. 11 p. 334; *Adisaranappa* v. *Mallamma A.I.R. 1950 Mys.* 1 at pr. 13 p. 17; *Ambika Prashad* v. *Thakur Prashad A.I.R. 1958 Pat.* 399 at pr. 5 p. 401; p. 230, p. 405.

77. *Venkamma* v. *Larmisonappa A.I.R. 1951 Bom.* 57 (per Bhagwati J.) at pr. 22 p. 66.
78. See section on *obiter dictum supra* and *Mohammad Raza* v. *U.P. A.I.R. 1953 S.C.* 92 at pr. 11 p. 94.
79. *Rama Bhatia* v. *Kondandarama A.I.R. 1963 Mys.* 332 (per Hegde J.); *Ambika Prashad* v. *Thakur Prashad A.I.R. 1958 S.C.* 399 at pr. 30 p. 405; *Adisaranappa* v. *Mallappa A.I.R. 1950 Mys.* 13 at pr. 13 p. 17.
80. *Benoy Krishna* v. *Ashutosh De A.I.R. 1954 Cal.* 382 (per Chakravarta J.) at pr. 11, p. 392; *C & I Bank* v. *M. S. Ali Khan A.I.R. 1956 Hyd.* 65.
81. See the comments earlier on the *obiter* dictum and Article 141 (*supra*).
82. Note the case of *Kameshwar* v. *Bihar A.I.R. 1952 S.C.* 252 and contrast it with *Gajapati* v. *Orissa A.I.R. 1953 S.C.* 375 on the doctrine of colourable legislation. On this see comments *infra* Chapter II Section 3; Chapt. III.
83. *Courts on Trial* (1969 Atheneum Paperback Edn.) P. 11.
84. *A.I.R. 1965 S.C.* 1617 at pr. 9 pp. 1622-3.

Sabha[85] to S. 25(7)(c) of the same statute, even though the sub-sections are similar. But in *State* v. *Bhanji Munji*[86] Bose J. applied the principle of *Gopalan* v. *Madras*[87] on Article 21 to Article 31 of the Constitution. In *Kochunni* v. *Madras*[88] Subba Rao J. applied a different principle to Article 31 and argued that it should apply to Article 21, even though he admitted that they were not *in pari materia*.[89] The attitude of the Courts in India on what is *pari materia* is not always consistent.[90] Thus in *Assam* v. *P. Barua*[91] Grover J. felt that Section 22 of the Income Tax Act 1922 was in *pari materia* to Section 19(3) of the same statute. This contrasts with the view of Chagla C.J. in *Bombay* v. *R. E. Society*[92] that the *pari materia* rule should not apply to fiscal statutes.

Further it should be noted that it has been argued in certain cases that even if the subsequent case is on the same section of a statute, certain orders passed in the case cannot be treated as precedent. Thus in *Satyanarayana Rao* v. *Sree Ramun*[93] Sanjeeva Row J. refused to accept that an order passed in *Re Ganpati Pillai*[94] restricted the revisional power of the High Court under Section 25 of the Provisional Small Cause Courts Act 1887. He felt that such orders were mere ipse dixits. In *Dudh Nath* v. *Sat Narain*[95] Jagdish Sahai J. felt that an order that a case is fit for appeal is not a precedent. In *Cantonment Board* v. *M/s. L. D. Hari Ram*[96] Dua J. observed that in cases on the discretionary power under Article 227 of the Constitution earlier precedent was irrelevant.

No two cases have the same facts. The Courts are not even willing to apply the same rules of construction to facts. In *Nita Ram* v. *Jiwan Lal*[97] Hidayatullah J. stressed in a tenancy case that facts vary from case to case and that an earlier set of facts cannot be used to interpret later ones. In a case[98] on Section 302 of the Indian Penal Code 1860 (murder), Sinha J. pointed out that a previous Court's assessment of the facts is not relevant as precedent. In *Jwala Mohar*

85. *A.I.R.* 1960 *S.C.* 870.
86. *A.I.R.* 1955 *S.C.* 41 at pr. 6 p. 44.
87. *A.I.R.* 1950 *S.C.* 27.
88. *A.I.R.* 1960 *S.C.* 1080.
89. Ibid at pr. 25 p. 1093 col. 1.
90. See G. P. Singh: *Statutory Interpretation in India* (1966) 142-144.
91. *A.I.R.* 1969 *S.C.* 831 at pr. 4 p. 837.
92. *A.I.R.* 1956 *Bom.* 573 at pr. 4 p. 674.
93. *A.I.R.* 1961 *A.P.* 461 at p. 464.
94. (1912) *M.W.N.* 181.
95. *A.I.R.* 1966 *All.* 315.
96. *A.I.R.* 1962 *Punj.* 490 at 491.
97. *A.I.R.* 1963 *S.C.* 499.
98. *Prakash Chandra* v. *U.P. A.I.R.* 1960 *S.C.* 195. See also *Gurcharan Singh* v. *Punjab A.I.R.* 1956 *S.C.* 460 at pr. 9 p. 462-3 on the use of an earlier case by way of illustration; Sinha J. in *Alidas* v. *Univ. of Calcutta A.I.R.* 1951 *Calcutta* 129 at pr. 19 p. 13

v. *State*[99] Desai C.J. protested against earlier judges imposing their assessment of the evidence in a case to similar evidence in later cases. Again Courts have held that documents,[100] deeds,[101] leases[102] and wills[103] and contracts[104] are to be construed without reference to earlier precedent, even though the Courts have accepted certain general rules of interpretation.

Once we have decided that an earlier case is relevant to a later case, we ask ourselves what the *ratio decidendi* of the earlier case was. It should be noted that determining the "ratio" is a second step in applying an earlier ruling. A great deal of controversy has centred around this question.[105] For our purposes the ratio may be defined as the reasons for arriving at a particular decision as indicated by the facts of the case. Goodhart's theory[106] that a ratio must be read as indicated by the "material facts" of the case does not solve the problem as regards which judge — the later or the earlier — should determine the ratio and select the facts. In fact Goodhart himself admits that often further decisions have to "(plot) the points on (the) graph."[107] Opinion can vary as regards determining both the reasons as well as the facts of the case, as has been shown by an analysis of the famous case of *Donoghue* v. *Stevenson*.[108] It will be seen later that varying interpretations of the ratio in a particular case have emerged in different judgements by different judges (and often the same judge) in different cases. It must not be thought that the ratio is in fact indeterminable. Certainly in a large number of cases the ratio is clear, but it may or may not be capable of a wider application. This will be demonstrated in the area of Constitutional law later.

A ratio is contrasted with an *obiter dictum*, which consists of statements which are not necessary to the reasoning of a case but

99. *A.I.R.* 1963 *All.* 161 at 163-5. See also *U.P.* v. *Randhir Sri Chand A.I.R.* 1959 *All.* 727 at pr. 17-18 p. 730; *Mam. Chand* v. *Bashambar Nath A.I.R.* 1957 *M.P.C.* 3304 (All.); *Mohd. Ishaq* v. *Mohd. Bashir A.I.R.* 1951 *Punj.* 8 at pr. 11 p. 11.
100. *Madho Das* v. *Mukand Ram A.I.R.* 1955 *S.C.* 481; but see *Munuswamy* v. *Muniramiah A.I.R.* 1965 *A.P.* 177.
101. *M. P. Davis* v. *Ag.I.T. Commr. A.I.R.* 1959 *S.C.* 719 at pr. 4 pp. 721-2; but contrast *Vodayar Vijayar Bank A.I.R.* 1959 *Mad.* 318 at pr. 5.
102. *Mullick Chand* v. *Surendra A.I.R.* 1957 *Cal.* 217 at pr. 26 p. 229.
103. *Ram Chand* v. *Hilda Brito A.I.R.* 1964 *S.C.* 1325 at pr. 15 p. 1329.
104. *Gulab Chand* v. *Kudi Lal A.I.R.* 1959 *M.P.* 151 (F.B.) at pr. 18 p. 161-162.
105. See for example the controversy on Goodhart's theory of the ratio decidendi: J. L. Montrose (1957) *20 M.L.R.* 587; Goodhart (1958) *21 M.L.* 155; Simpson: (1959) *22 M.L.R.* 45; Stone: (1959) *22 M.L.R.* 28.
106. See Determining the ratio etc. (1930) *40 Yale L.Jnl.* 161-183. (I have relied on the reprint in *Essays in Jurisprudence* 1-26. See also article cited fn. 105 *supra*).
107. Goodhart (1959) *22 M.L.R.* 117 at 124 citing from Paton: *Jurisprudence* (IId) 161.
108. (1932) *A.C.* 562. And note the analysis of Julius Stone in *Legal System and Lawyers' Reasonings* (1964) 269-274. See also [illegible]

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nevertheless have persuasive value. We have seen above that in India judges have further distinguished an *obiter dictum* from "a casual observation", "an argument proceeding on a concession" and "a tentative opinion", and contended that the last three are not even of persuasive value.[109]

Thus, Courts in India are able to invent a large number of rules for distinguishing and applying earlier case law. The two basic questions asked are: (1) Are the two decisions in any way similar? (2) Is the particular argument a part of the reasoning of the case? But surrounding these two basic rules are several fine but fundamental distinctions. This is illustrated later.

(j) The doctrine of prospective overruling

In *Golak Nath* v. *Punjab* the Supreme Court held that Parliament cannot amend Part III of the Constitution, so as to take away or abridge the fundamental rights conferred by this Part. If this judgement were to be given retrospective effect (as all judgements of the Court must be) because of the Blackstonian fiction that judges merely declare the law, the First, Fourth and Seventeenth Amendments and with them a large number of Statutes that they were enacted to protect, would become *ultra vires* the Constitution. The Court therefore ruled that their judgements would only have prospective effect.[110] The Court emphasised that this technique of prospective overruling would be exercised only by the Supreme Court and limited to constitutional matters. This doctrine was evolved in America where it was used in *Linkletter* v. *Walker* (1965).[111] In that case the Court was anxious to ensure that already completed cases should not be reopened because of the ruling in *Mapp* v. *Ohio*,[112] which altered fundamentally the rules about self-incrimination in State criminal trials. As an idea it is very just as it recognises the simple truth that judges do change their minds and make "laws". More recently the Parliamentary Commissioner for Administration in England has used similar principles to work out an equitable settlement where a 1966 decision of the Courts had altered the rules relating to disablement benefit.[113]

109. For a good account of the language used in this area see J. L. Montrose: Language of and a notation for the Doctrine of Precedent (1952-3) *2 Univ. of Western Australia Annual Law Review 301*, 504.
110. *A.I.R. 1967 S.C.* 1643 Subba Rao J. at 1669; Wanchoo J. at 1690-1; Bachawat J. 1728. The last two (Wanchoo J. for Bhargava and Mitter JJ) were against the use of prospective overruling. Subba Rao J. delivered his judgement for Shah, Sikri, Shelat and Vaidialingam JJ as well.
111. *381 U.S.* 618.
112. *367 U.S.* 643. See further B. H. Levy: Realistic jurisprudence and prospective overruling (1966) *100 Univ. of Penn. L. Rev.* 1.
113. See the *Second Report of the Parliamentary Commissioner for Administration* (1970-71) dated Aug. 3, 1971. See the recommendation at pr. 21 p. 9.

We are not concerned here with the wider implications of this aspect of *Golak Nath's* case which are discussed elsewhere,[114] but we shall concentrate on two main points.

First, the Court has in fact used the doctrine of prospective overruling in several cases, even though it has not admitted that it has done so, as in *Venkataramma* v. *Madras*[115] where the Courts had declared the selection process of candidates for certain civil posts *ultra vires* the Constitution. But Das J. stressed that since it was not possible to declare the selection of all the candidates void, a place would be found for the petitioner without reference to communal rotation.[116] Again in a similar situation, in *P. Rajendram* v. *Madras*[117] Wanchoo J. agreed to let current selections stand[118] even though they were *ultra vires* Article 14 of the Constitution. In *B. N. Tewari* v. *Union*[119] the same judge made an extremely intricate *ex poste facto* calculation to reduce the number of vacancies from forty-eight to forty-three to hold that the petitioner having no right to the post could not upset existing appointments. Again, in *Jagdev Singh* v. *J.K.*[120] in connection with a preventive detention matter, the Court was faced with a situation where certain rules had been changed because the Supreme Court overruled its own earlier decision on a particular point.[121] Wanchoo J. gave the authorities an opportunity to correct their error and justified his ruling on the ground that they could not possibly have anticipated the Court's changing its mind.[122] (But, Wanchoo J. voted against adopting the doctrine of prospective overruling in *Golak Nath's* case).[123]

Secondly, the actual doctrine of prospective overruling has been given a curious twist in India. It should logically have followed that the Amendments declared invalid by the Supreme Court in *Golak Nath's* case should become invalid after February 27, 1967 the date of the *Golak Nath* decision. But in a recent[124] case Shah J. on behalf of the Supreme Court ruled that the Amendments are not invalid even prospectively, but that the power to amend Part III to infringe Funda-

114. See *infra*. 578 ff.
115. *A.I.R. 1951 S.C.* 229.
116. Ibid pr. 4-5 p. 229.
117. *A.I.R. 1968 S.C.* 1012.
118. Ibid pr. 16. He admitted that the basis for selection was *ultra vires* Article 14: pr. 13, p. 1017.
119. *A.I.R. 1965 S.C.* 1430 at pr. 7.
120. *A.I.R. 1968 S.C.* 327.
121. The decision in *Sadhu Singh* v. *Delhi Administration A.I.R. 1966 S.C.* 91 was overruled in *P. L. Lakhanpal* v. *Union A.I.R. 1967 S.C.* 1567.
122. See f.n. 120 at pr. 8 p. 330.
123. See f.n. 110 *supra*.
124. (1970) *1 S.C.W.R.* 100. See also *Narayan Nair* v. *State A.I.R. 1971 Kerala* 95 at pr. 6 but note the dissent of Mathew J. at 125-6.

mental Rights was declared invalid and that the Court would declare invalid any future attempts to amend Part III. Thus it appears that prospective overruling in India has come to mean a warning by the Supreme Court, and that existing statutes though void shall be presumed to be valid both retrospectively and prospectively. In *Golak Nath's* case, apart from Hidayatullah J., the majority did not even examine the provisions of the statute to determine which parts of them were invalid and seemed content to deliver a warning to the legislature as regards the future. This approach of the Court may well have been dictated by the fact that invalidating the Amendments even prospectively would have led to disastrous results. But once again a broad principle seems to have emerged from a problem case.

(g) Conclusion

Thus the Supreme Court and High Courts have on the surface adhered very closely to precedent. The merit of following earlier decisions and not disturbing the hierarchy of precedent is recognised; but at the same time the Courts have devised ways and means of distinguishing earlier case law. The Supreme Court has made an independent contribution to the doctrine of prospective overruling and Indian Courts generally have made a very varied and rich contribution to the Common Law rules on precedent.

2. The Supreme Court and Statutory Interpretation

(a) The Supreme Court[1] and the Rule of Literal Interpretation[2]

To some extent the Supreme Court displays the dilemma that any Court faces if it follows the rule of literal interpretation but also takes advantage of some of the Common Law escape routes that have made the rule bearable. More recently, the English and Scottish Law Commissions have proposed an easier way out and suggested that the rule be changed drastically, if not abandoned altogether.[3] The Indian Courts are, however, bound by the rule and have made full use of the escape routes that the Common Law specifically admits.

These escape routes are of three kinds. The *first* is a recourse to the rule in *Heydon's case* (1584)[4] which allows the Court to examine the statute in its "legal historical perspective". The *second* relates to a situation where the Court uses the argument that any other interpretation would produce an absurd result.[5] The *third* is the use of well known Common Law presumptions: it will be presumed that a statute does not exclude the jurisdiction of the Courts, bind the Crown, delegate excessive power or impose unjustified fiscal or penal burdens.

These three rules are responsible for the existence of a system of interpretation which uses the rule of literal construction as a *modus operandi*.[6] The Indian Court has followed this system, making occasional changes, which are by no means insignificant.

(b) The first escape route: Heydon's case[7]

The Supreme Court has always accepted the fiction that the object of statutory interpretation is to ascertain the intention of the legislature. It has recently observed: "It is a trite saying that the object of interpreting a statute is to ascertain the intention of the legislature."[8]

The Court has also accepted the corollary to this: "(T)he first and primary rule of construction is that the intention of the legislature must be found in the words of the legislature itself."[9]

Courts do not want to go into the "real" intent of Parliament, although it has been recently suggested that they do.[10] The Supreme Court has made it clear that they will not fill gaps in a legislative enactment,[11] gather the intention of the legislature from what they failed to say,[12] or add words; but follow the natural,[13] literal,[14] and grammatical meaning.[15] But in the last two cases cited the Court

1. The most comprehensive account of the Supreme Court and statutory interpretation in G. P. Singh: *Principles of statutory interpretation* (Allahabad) 1966. This section will use in the main post-1966 references so as not to duplicate his work.
2. Rule declared by House of Lords in *Sussex Peerage Claim* (1844) *11 C.I. & F.* 85 at 143; *Saloman v. A. Saloman & Co. Ltd.* (1897) *A.C.* 22 at 38.
3. *Law Commission Report (1969 No. 21)* pr. 30; see also *Scottish Law Commission Report (1969 No. 11)*.
4. (1584) 3 [Coke] *Reports* 7a:=76 E.R. 637.
5. See for example *Shyam Kishore Devi v. Patna Mun. Corpn. A.I.R. 1966 S.C.* 1678 at pr. 8 p. 1682.
6. To the extent to which this describes the actual law, this statement is an exaggeration. But it is a fair description of the judicial process.
7. (1584) *3 Coke Rep. 7a.*
8. Per Sarkar J. in *S. Asia Industries v. Sarup Singh A.I.R. 1966 S.C.* 346 at pr. 7, 348.
9. Per Gajendragadkar J. *Kanai Lal v. Paremnidi A.I.R. 1957 S.C.* 907 at 910 col. 2.
10. Per Denning L.J. in *Mayor & St. Mellons R.D.C. v. Newport Corpn.* (1950) *2 All E.R. 1226*; on appeal note the comments of Lord Simonds *(1952) A.C.* 189 at 191. But see also the comments of the Law Commission (*infra* f.n. 3) at p. 32-37, where a different approach is suggested.
11. Per Ramaswami J. in *N.S.S. & G.R.W. v. I.T. Commr. A.I.R. 1969 S.C.* 1062 at pr. 9, 1068.
12. Per Hegde J. in *Amalgamated Electricity v. Aymer Mun. A.I.R. 1969 S.C.* 227 at pr. 14, 234.
13. Per Shelat J. in *S.S. Rly Co. v. Workers' Union A.I.R. 1969 S.C.* 513 at pr. 6 p. 518 citing from *Saloman v. A. Saloman & Co.* (1897) *A.C.* 22.
14. Per Hegde J. in *Bhagwan Das v. Paras Nath A.I.R. 1970 S.C.* 971 at pr. 7 p. 967 (on a U.P. rent control matter). For background see *Sri Bhagwan v. Ramchand A.I.R. 1965 S.C.* 1767.
15. Per Sarkar J. in *M.P. v. Vishnu Prashad A.I.R. 1966 S.C.* 1593 at pr. 3 p. 1595 (an important case on the law of property and referred to later).

1. **A R ANTULAY v R S NAYAK**
(1988) 2 SCC 602 (7 judge Bench)

...."A coordinate Bench cannot ignore a decision of another Bench in an earlier case. A larger bench can only over rule it. -A "decision" means only the reason for the previous order and not the "operative order".

Per Venkatacheliah. J

2. **BENGAL IMMUNITY V STATE OF BIHAR**
AIR 1955 SC 661 (dt. 6.9.1955)

.... 'The doctrine of stare decisis has hardly any application to an isolated and stray decision of the court very recently made and not followed".

Per Das. J
(7 judge bench)

Leading case on Art. 141:

"SC Not strictly bound by its earlier decision"

"Overruling of an earlier decision may be done if it is" manifestly wrong or erroneous and the public interest" demands reconsideration".

Per. N.H.Bhagwati. J

3. **NANDA KISHORE V STATE OF PUNJAB**
(1996) 6 SCC 614

"SC is not merely interpreter of the law as existing but much beyond that. The court as a wing of the state is by itself a source of law. The law is what the court says it is".

Per Punchi. J

4. **DHANAWANTRI DEV v UOI**
(1996) c scc 44,47)
(3 Judge Bench)

Only essence of the decision and its ratio is binding and not every observation found therein.

Per C Ramaswamy. J

5. **SARWAN SINGH v UOI**(1995) 4 SCC 546

"Normally, even an obiter dictum is expected to be obeyed and followed"

Per Ahmadi. C.J.
(5 judge bench)

6 **MUNICIPAL COMMITTEE v HAZARA SINGH**
(1975) 1 SCC 794

"Even obiter dictum of SC should be accepted as binding".

Per Krishan Iyer. J
(3 judge bench)

7. **WORKMEN v DHARMAPAL PREMACHAND**
AIR 1966 SC 182; (1965) 1 LLJ, 668

"Any statement not warranted by facts, is to be treated as obiter observation:

per P.B. Gajendragadkar. C.J

(A Good Case for goodheart's "Material Facts")

8. **AHMEDABAD ST XAVIER'S COLLEGE SOCIETY**

"The advisory opinion of SC under Art 143 is not binding, although it is of great weight. The law declared on the same issue in a subsequent contested case by the SC would have a binding effect.

Per H.R Khanna. J
(9 judge bench)

earliest times the judges of the king's courts have been a small and compact body of legal experts. They have worked together in harmony, imposing their own views of law and justice upon the whole realm, and establishing thereby a single homogeneous system of common law, with little interference either from local custom or from legislation. The centralisation and concentration of the administration of justice in the royal courts gave to the royal judges a power and prestige which would have been unattainable in any other system. The authority of precedents was great in England because of the power, the skill, and the professional reputation of the judges who made them. In England the bench has always given law to the bar; in Rome it was the other way about, for in Rome there was no permanent body of professional judges capable of doing the work that has been done for centuries in England by the royal courts (*c*).

In recent years the value of the doctrine of precedent has been much debated. Some comments have already been made upon the subject in this and the previous chapter, but a few more general observations will not be out of place. It is necessary to point out that the phrase "the doctrine of precedent" has two meanings. In the first, which may be called the loose meaning, the phrase means merely that precedents are reported, may be cited, and will probably be followed by the courts. This was the doctrine that prevailed in England until the nineteenth century, and it is still the only sense in which a doctrine of precedent prevails on the Continent. In the second, the strict meaning, the phrase means that precedents not only have great authority but must (in certain circumstances) be followed. This was the rule developed during the nineteenth century and completed in some respects during the twentieth. Most of the arguments advanced by supporters

(*c*) During the Middle Ages, although cases were reported in the Year Books, there were considerable variations between different MSS., and it was hardly possible to cite precedents by name. However, the law was developed by the judges through the accumulation of tradition, expressed, for instance, in the practice of upholding certain types of writ. With the invention of printing, reports became standardised, and it became the practice to cite not only from the more or less contemporaneous reports but also from the Year Books, which were now available in standard printed editions. The modern theory that precedents are absolutely binding was hardly settled before the nineteenth century. See T. Ellis Lewis, "The History of Judicial Precedent" (1930) 46 L.Q.R. 207, 341; (1931) 47 *ibid.* 411; (1932) 48 *ibid.* 230.

of "the doctrine of precedent", such as Holdsworth, will be found to support the doctrine in the loose rather than in the strict meaning, while those who attack it (such as Dr. A. L. Goodhart) attack it in its strict and never in its loose meaning. Thus the two sides are less at variance than would appear on the surface. The real issue is whether the doctrine of precedent should be maintained in its strict sense or whether we should revert to the loose sense. There is no dissatisfaction with the practice of citing cases and of attaching weight to them; the dissatisfaction is with the present practice of treating precedents as absolutely binding.

In favour of the present practice it is said that the practice is necessary to secure the certainty of the law, predictability of decisions being more important than approximation to an ideal; any very unsatisfactory decision can be reversed for the future by statute. To this it may be replied that pressure on Parliamentary time is so great that statutory amendment of the common law on an adequate scale is not to be looked for; also our experience of statutory amendment in the past has not been happy. When Parliament has intervened to rectify the errors of the common law it has almost always done so not by clean reversal, but by introducing exceptions to the common-law rule, or at best by repealing the common-law rule subject to exceptions and qualifications. What is needed, it is submitted, is a power in the judges to set right their own mistakes. Such a power does exist at the moment in some degree, for a High Court judge may refuse to follow another High Court judge, a higher court may overrule a decision in an inferior court, and any court may restrictively distinguish an obnoxious precedent. But the process of overruling is not in itself an adequate solution, for it is possible only for a higher court, and thus involves the litigant in considerable expense. The power of restrictive distinguishing is also unsatisfactory because it leaves the "distinguished" decision standing, and thus in many cases introduces unnecessary refinements and even illogicalities into the law. Also, the necessity for distinguishing sometimes leads to extraordinary mental gymnastics, as where a court distinguishes a precedent by supposing facts in the precedent that were not stated in the report.

It may be repeated that the present rules do not always promote the certainty of legal administration that is claimed for them, for it depends very much upon the strength of the particular judge whether he will restrictively distinguish a decision that is technically binding upon him.

As a compromise between the two opposing views, it is submitted that the strict doctrine should be retained in so far as it binds a court to follow the decisions of superior courts, but that courts should cease to be bound by decisions of courts of co-ordinate jurisdiction. In other words, the Court of Appeal and House of Lords should be given the power possessed by High Court judges to refuse to follow their own previous decisions (*d*).

According to the older theory the common law is customary, not case law. This doctrine may be expressed by saying that according to it all precedents are declaratory merely, and do not make the law. Hale for example says in his *History of the Common Law*:—

" It is true the decisions of courts of justice, though by virtue of the laws of this realm they do bind as a law between the parties thereto, as to the particular case in question, till reversed by error or attaint, yet they do not make a law properly so called: for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times " (*e*).

On this view, any proposition of law laid down by a court, however novel it may appear, is in reality only an affirmation of an already existing rule. In the Court of Chancery this declaratory theory never prevailed, nor indeed could it, having regard to the known history of the system of equity administered by that court.

(*d*) On the whole question see Goodhart, " Precedent in English and Continental Law " (1934) 50 L.Q.R. 40 (and in book form); Holdsworth, " Case Law," *ibid.* 180; Goodhart, " Case Law: A Short Replication," *ibid.* 196; Allen, " Case Law: An Unwarrantable Intervention " (1935) 51 L.Q.R. 333; Holdsworth, " Precedents in the Eighteenth Century," *ibid.* 441; Lord Macmillan, *ibid.* 587; Cross, *op. cit.* 194–197, 251–258.

(*e*) Hale, *History of the Common Law* (1820 ed.), 89.

There could be no pretence that the principles of equity were founded either in custom or legislation, for it was a perfectly obvious fact that they had their origin in judicial decisions. The judgments of each Chancellor made law for himself and his successors.

" It must not be forgotten ", says Sir George Jessel, " that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented " (*f*).

But the declaratory theory is equally inapplicable to common law. It is clear that judges do more at times than apply existing rules: sometimes they widen and extend a rule of law; sometimes they devise a rule by analogy with an existing rule; and sometimes again they create an entirely new principle. Courts then have the power of developing the law at the same time that they administer it (*g*).

Judicial decisions may be distinguished as authoritative and persuasive. An authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. It depends for its influence upon its own merits, not upon any legal claim which it has to recognition. In other words, authoritative precedents are *legal* sources of law, while persuasive precedents are merely *historical*.

The authoritative precedents recognised by English law are the decisions of the superior courts of justice in England, within limits shortly to be stated. Among persuasive precedents are the following:—

(*f*) *Re Hallet* (1879) 13 Ch.D. at p. 710.

(*g*) For further discussion of the declaratory theory of the judicial function see Dickinson, " The Law Behind Law " (1929) 29 Col.L.Rev. 113, 285; Cross, *Precedent in English Law*, 21–30.

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(1) Foreign judgments, and more especially those of American courts (*h*).

(2) The decisions of superior courts in other portions of the Commonwealth of Nations, and of countries until recently belonging thereto, for example, Irish courts (*i*).

(3) The judgments of the Privy Council when sitting as the final court of appeal from other members and parts of the Commonwealth (*j*).

(4) Judicial *dicta*, that is to say, statements of law which go beyond the occasion, and lay down a rule that is irrelevant to the purpose in hand, or is stated by way of analogy merely, or is regarded by a later court as being unduly wide.

Persuasive efficacy, similar in kind though much less in degree to the instances enumerated, is attributed by our courts to the civil law and to the opinions of the commentators upon it; also to English and American textbooks of the better sort, and articles in legal periodicals.

The distinction between authoritative and persuasive precedents is rendered somewhat difficult by the fact that the same precedent may be authoritative in one court and persuasive only in another. Thus a decision of the Court of Appeal is authoritative for the High Court but persuasive only for the House of Lords.

The Judicial Committee of the Privy Council does not recognise any precedents except as persuasive, and may even rehear questions affecting property rights (*k*).

Sir John Salmond attempted to solve this apparent contradiction by distinguishing between persuasive precedents and those that, though authoritative, are so only conditionally. He thought that whereas a foreign judgment is never more than persuasive

(*h*) *Castro* v. *R.* (1881) 6 App.Cas. 249; *Scaramanga* v. *Stamp* (1880) 5 C.P.D. 303; *Cory* v. *Burr* (1882) 9 Q.B.D. 469; *M'Alister* (or *Donoghue*) v. *Stevenson* [1932] A.C. 598, 617–618; *Haynes* v. *Harwood* [1935] 1 K.B. 156–157, 163, 167. But see *Re Missouri* (1888) 42 Ch.D. 330; *Fender* v. *Mildmay* [1938] A.C. 25.

(*i*) *Re Parsons* (1890) 45 Ch.D. 62: "Decisions of the Irish Courts, though entitled to the highest respect, are not binding on English judges."

(*j*) In *Leask* v. *Scott* (1877) 2 Q.B.D. 376 at p. 380, it is said by the Court of Appeal, speaking of such a decision: "We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it."

(*k*) *Re Transferred Civil Servants (Ireland) Compensation* [1929] A.C. 242; *Mercantile Bank of India* v. *Central Bank of India* [1938] A.C. 287; W. E. Raney, "The Finality of Privy Council Decisions" (1926) 4 Can. Bar Rev. 307.

for English courts, a decision of the Court of Appeal is always authoritative. For lower courts, and for the Court of Appeal itself, the authority is absolute; for the House of Lords the authority is only conditional. A conditionally authoritative precedent was defined by the learned author as follows: "In all ordinary cases it is binding, but there is one special case in which its authority may be lawfully denied. It may be overruled or dissented from, when it is not merely wrong, but so clearly and seriously wrong that its reversal is demanded in the interests of the sound administration of justice. Otherwise it must be followed, even though the court which follows it is persuaded that it is erroneous or unreasonable".

The value of the distinction is doubtful. First, a decision of the Privy Council, the composition of which may be practically the same as the House of Lords, may have a weight greater than that of many a High Court decision; yet the first, according to this classification, is merely persuasive while the second has conditional authority. In fact the courts of this country may attach much more importance to the first than to the second. But further, the distinction hardly represents with accuracy the practice of the courts. For while higher courts often pronounce themselves reluctant to overrule long-standing decisions of lower courts, their attitude is that they *ought not* to do so rather than that they *cannot*.

Where in fact a precedent is disregarded, this may take two forms. The court to which it is cited may either overrule it, or merely refuse to follow it. Overruling is an act of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. A refusal to follow a precedent, on the other hand, is an act of co-ordinate, not of superior, jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good

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law. In the meantime the matter remains at large, and the law uncertain.

As we have seen, the theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are *res judicatae* (*l*), or accounts that have been settled (*m*) in the meantime (*n*). A repealed statute, on the contrary, remains valid and applicable as to matters arising before the date of its repeal (*o*).

27. Circumstances destroying or weakening the binding force of precedent

We have seen that a precedent that is overruled is deprived of all authority. It will be convenient now to consider the various ways in which a precedent may lose all or much of its binding force.

(1) *Abrogated decisions.* A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court. *Reversal* occurs when the same decision is taken on appeal and is reversed by the appellate court. *Overruling* occurs when the higher court declares in another case that the precedent case was wrongly decided and so is not to be followed.

Since overruling is the act of a superior authority, a case is not overruled merely because there exists some later opposing precedent of the same court or a court of co-ordinate jurisdiction. In such circumstances a court is free to follow either precedent;

(*l*) *Thomson* v. *St. Catharine's College, Cambridge* [1919] A.C. 468. *Cf. Derrick* v. *Williams* [1939] 2 All E.R. 559; 160 L.T. 589; 55 T.L.R. 676.

(*m*) *Henderson* v. *Folkestone Waterworks Co.* (1885) 1 T.L.R. 329. This is because of the rule that money paid under a mistake of law cannot be recovered back. Lord Coleridge's denial in the instant case that there was a mistake of law cannot be supported.

(*n*) In the United States it has been held that where a statute is first held void and later valid, the statute does not apply to transactions entered into before the later decision: see Freeman, "Retroactive Operation of Decisions" (1918) 18 Col.L.Rev. 230; Cardozo, *Nature of the Judicial Process*, 147. *Cf.* as to the prohibition of *ex post facto* penal legislation, *State* v. *Longino* (1915) 109 Miss. 125; 67 So. 902.

(*o*) Interpretation Act, 1889, s. 38.

whereas when a case is overruled in the full sense of the word the courts become bound by the overruling case not merely to disregard the overruled case but to decide the law in the precisely opposite way.

Overruling need not be express, but may be implied. The doctrine of implied overruling is a comparatively recent development. Until the 1940's the practice of the Court of Appeal was to follow its own previous decision even though it was manifestly inconsistent with a later decision of the House of Lords, provided that it had not been expressly overruled (*p*). Lord Wright, in a case in the House of Lords, questioned the correctness of this attitude, and in *Young's Case* the Court of Appeal announced the acceptance of a new principle. This is that the Court of Appeal is not bound by its previous decision if, though not expressly overruled, it cannot "stand with" a subsequent decision of the House of Lords (*q*).

The law so laid down for precedents in the Court of Appeal applies equally to precedents in the Court of Criminal Appeal (*r*) and Divisional Court (*s*), which cease to be binding upon the courts concerned if impliedly overruled in the Lords. Even a lower court could refuse to follow a decision of one of these courts which has been robbed of its authority in this way (*t*).

(2) *(Perhaps) affirmation or reversal on a different ground.* It sometimes happens that a decision is affirmed or reversed on appeal on a different point. As an example, suppose that a case is decided in the Court of Appeal on ground A, and then goes on appeal to the House of Lords, which decides it on ground B, nothing being said upon A. What, in such circumstances, is the authority of the decision on ground A in the Court of Appeal?

(*p*) *e.g., Consett, etc., Society* v. *Consett Iron Co.* [1922] 2 Ch. 135 (C.A.).

(*q*) [1944] K.B. 718 at 729 (C.A.). *Cf. Fitzsimmons* v. *Ford Motor Co.* [1946] 1 All E.R. 429 (C.A.).

(*r*) *R.* v. *Porter* [1949] 2 K.B. 128 at 132–133 (C.C.A.).

(*s*) *Younghusband* v. *Luftig* [1949] 2 K.B. 354 at 360.

(*t*) *Colman* v. *Croft* [1947] K.B. 95. See also *Cackett (orse Trice)* v. *Cackett* [1950] P. 253, deciding that where a decision of the C.A. is based on the interpretation of a precedent which the House of Lords later holds to have been mistaken, although the House expresses no opinion on the point covered by the C.A., the decision of the C.A. is deprived of binding authority even for the High Court. The liberty of the High Court in such circumstances is also deducible *a fortiori* from *R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 K.B. 711 at 721, where the D.C. held itself not bound by a decision of the C.A. arrived at in ignorance of a prior decision of the Lords, *i.e., per incuriam*. See later on the *per incuriam* rule.

Is the decision binding on the High Court, and on the Court of Appeal itself in subsequent cases?

The question cannot be positively answered. Jessel, M.R., in one case (*u*) said that where the judgment of the lower court is affirmed on different grounds, it is deprived of all authority, giving as his reason the opinion that such conduct on the part of the appellate court showed that the appellate court did not agree with the grounds given below. In other words, the higher court relieved itself of the disagreeable necessity of overruling the court below by finding another ground on which the judgment below could be supported. Although this is sometimes a correct reading of the state of mind of the higher court, it is not so always. The higher court may, for example, shift the ground of its decision because it thinks that this is the easiest way to decide the case, the point decided in the court below being of some complexity. It is certainly possible to find cases in the reports where judgments affirmed on a different point have been regarded as authoritative for what they decided (*v*).

It is the same with cases reversed on another point. Such a case, as decided in the lower court, is not necessarily deprived of its significance as a judicial determination of the law (*w*), on the other hand, the reversal, though on another point, may shake the authority of the point that was decided. It is submitted that the true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force it might otherwise have had; but it remains an authority which may be followed by a court that thinks the particular point to have been rightly decided.

(3) *Ignorance of statute.* A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, *i.e.*, delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*infra*, § 28), and for the Court of Appeal it was given as the leading

(*u*) *Hack* v. *London Provident Building Society* (1883) 23 Ch.D. 103 at 112.

(*v*) *e.g.*, *Griffiths* v. *Fleming* [1909] 1 K.B. 805 at 814; *Hanlon* v. *Port of Liverpool Stevedoring Co.* [1937] 4 All E.R. 39 at 42.

(*w*) In *Curtis Moffat Ltd.* v. *Wheeler* [1929] 2 Ch. 224 at 234, Maugham J. treated himself as bound by a C.A. decision which had been reversed by the H.L. on another ground, in spite of a doubt expressed by Lord Cairns L.C. in the H.L. as to the decision in the C.A. To the same effect *Re Boyer* [1935] Ch. 382 at 386.

example of a decision *per incuriam* which would not be binding on the court (*x*). The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute (*y*). Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such *incuria* as to vitiate the decision (*z*). Even a lower court can impugn a precedent on such grounds.

The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force (*a*).

(4) *Inconsistency with earlier decision of higher court.* It is clear law that a precedent loses its binding force if the court that decided it overlooked an inconsistent decision of a higher court. If, for example, the Court of Appeal decides a case in ignorance of a decision of the House of Lords which went the other way, the decision of the Court of Appeal is *per incuriam*, and is not binding either on itself (*b*) or on lower courts (*c*); on the contrary, it is the decision of the House of Lords that is binding. The same rule applies to precedents in other courts, such as the Divisional Court (*d*).

(5) *Inconsistency between earlier decisions of the same rank.* A court is not bound by its own previous decisions that are in conflict with one another. This rule has been laid down in the Court of Appeal (*e*), Court of Criminal Appeal (*f*) and Divisional

(*x*) *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. at 729 (C.A.).

(*y*) *Cf. Lancaster Motor Co. (London) Ltd.* v. *Bremith Ltd.* [1941] 1 K.B. 675 at 678 (C.A.), *per* Sir Wilfrid Greene M.R.; this was, however, a case of a precedent *sub silentio* (see later).

(*z*) *Cf. per* Denning L.J. in *Gower* v. *Gower* [1950] 1 All E.R. 804 at 806 (C.A.).

(*a*) *Young's Case*, *loc. cit.*; *cf. Royal Crown Derby Porcelain Co. Ltd.* v. *Russell* [1949] 2 K.B. 417 (C.A.).

(*b*) *Young's Case* [1944] K.B. at 729.

(*c*) *R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 K.B. 711 at 721.

(*d*) *Younghusband* v. *Luftig* [1949] 2 K.B. at 361.

(*e*) It is one of the exceptions recognised in *Young's Case* [1944] K.B. at 726, 729. For earlier authorities see Winder in (1940) 56 L.Q.R. 457.

(*f*) *R.* v. *Power* [1919] 1 K.B. 572 (C.C.A.).

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Court (*g*), and it obviously applies also to the House of Lords. There may at first sight seem to be a difficulty here: how can a situation of conflict occur, if the court is bound by its own decisions? At least two answers may be given. First, the conflicting decisions may come from a time before the binding force of precedent was recognised. Secondly, and more commonly, the conflict may have arisen through inadvertence, because the earlier case was not cited in the later. Owing to the vast number of precedents, and the heterogeneous ways in which they are reported—or are not reported—it is only too easy for counsel to miss a relevant authority. Whenever a relevant prior decision is not cited before the court, or mentioned in the judgments, it must be assumed that the court acts in ignorance or forgetfulness of it. If the new decision is in conflict with the old, it is given *per incuriam* and is not binding on a later court.

Although the later court is not bound by the decision so given *per incuriam*, this does not mean that it is bound by the *first* case. Perhaps in strict logic the first case should be binding, since it should never have been departed from, and was only departed from *per incuriam*. However, this is not the rule. The rule is that where there are previous inconsistent decisions of its own, the court is free to follow either. It can follow the earlier, but equally, if it thinks fit, it can follow the later. This rule has been laid down for the Court of Appeal (*h*), and it is submitted that it applies also to other courts (*i*). It will be seen, therefore, that this exception to the binding force of precedent belongs both to the category of abrogation by subsequent facts and to the category of what is here called inherent vice. The earlier case

(*g*) *R.* v. *de Gray* [1900] 1 Q.B. 521; *Younghusband* v. *Luftig* [1949] 2 K.B. 354 at 361–362. The rule may explain the cavalier treatment accorded to the precedent in *R.* v. *Fulham, etc., Rent Tribunal, ex p. Zarek* [1951] 2 K.B. 1.

(*h*) *Young's Case*, at p. 726, 729.

(*i*) For the Divisional Court see the authorities assembled by Winder in 9 M.L.R. 270–273. The behaviour of the court is, however, by no means uniform. In *Markham* v. *Markham* [1946] 2 All E.R. 737 at 741, the D.C. held itself bound to follow the later of two inconsistent decisions. In *Wurzal* v. *Dowker* [1954] 1 Q.B. 52, commented upon in (1953) 69 L.Q.R. 316, where the same point of precedent arose, the D.C. held itself bound to follow the earlier of two inconsistent decisions. In both cases the court seems to have acted against its inclinations.

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can be disregarded because of the subsequent inconsistent decision on the same level of authority, and the later case can be disregarded because of its inherent vice of ignoring the earlier case.

Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic court itself. The lower court may refuse to follow the later decision on the ground that it was arrived at *per incuriam*, or it may follow such decision on the ground that it is the latest authority. Which of these two courses the court adopts depends, or should depend, upon its own view of what the law ought to be. However, it takes a somewhat bold judge to disregard a precedent handed down by a court of higher standing on the ground that the decision was *per incuriam* (*j*).

(6) *Precedents sub silentio or not fully argued.* The previous exceptions to the binding force of precedent can all be summed up as cases where the authority of the precedent either is swept away by subsequent higher or equal authority or is undermined by inconsistency with previous higher or equal authority. We now come to the more subtle attack upon the authority of a precedent involved in saying that the decision was arrived at *sub silentio*.

A decision passes *sub silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the

(*j*) It can rather easily happen as between a High Court judge and the Divisional Court (see *Savory* v. *Bayley* (1922) 38 T.L.R. 619; *Lemon* v. *Lardeur* [1946] K.B. 613 at 616 (C.A.)), and as between the Divisional Court and Court of Appeal (*R.* v. *Northumberland Compensation Appeal Tribunal* [1951] 1 K.B. 711 at 721). But few High Court judges would have had the daring to treat a C.A. precedent as Devlin J. did in *Armstrong* v. *Strain* [1951] 1 T.L.R. 856 at 864 (affd. on other grounds [1952] 1 K.B. 232 (C.A.)). The point happened to be one on which Devlin J. had a pronounced opinion, having written an article on it in the L.Q.R. before being elevated to the Bench.

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case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*.

A good illustration is *Gerard* v. *Worth of Paris, Ltd.* (*k*). There, a discharged employee of a company, who had obtained damages against the company for wrongful dismissal, applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of the priority of the claimant's debt, and, on this argument being heard, the Court of Appeal granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal (*l*), the court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed *sub silentio* by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided " without argument, without reference to the crucial words of the rule, and without any citation of authority ", it was not binding and would not be followed.

The rule that a precedent *sub silentio* is not authoritative goes back at least to 1661 (*m*), when counsel said: " An hundred precedents *sub silentio* are not material "; and Twisden, J., agreed: " Precedents *sub silentio* and without argument are of no moment ". This rule has ever since been followed (*n*). But

(*k*) [1936] 2 All E.R. 905 (C.A.).

(*l*) *Lancaster Motor Co.* v. *Bremith Ltd.* [1941] 1 K.B. 675 at 677 (C.A.).

(*m*) *R.* v. *Warner (Ward)* 1 Keb. 66, 1 Lev. 8.

(*n*) *O'Shea* v. *O'Shea and Parnell* (1890) 15 P.D. 59 at 64 (C.A.) (point deliberately withheld from court, the parties not wishing it to be raised); *Ankin* v. *L.N.E. Ry.* [1930] 1 K.B. 527 at 537; *Lindsey C.C.* v. *Marshall* [1937] A.C. 97 at 125; *Yelland* v. *Powell Duffryn Collieries* [1941] 1 All E.R. 278 at 295 (a stage of the case not reported in [1941] 1 K.B. 154); notes by D. W. Logan (1940) 3 M.L.R. 225; Williams (1944) 7 M.L.R. 136, n. 43; Tylor (1947) 10 M.L.R. 398 (but see, for a different interpretation of the particular decision, Marsh in (1952) 68 L.Q.R. 235); Allen, *Law in the Making* (7th ed.) 333; Warnbaugh, *The Study of Cases*, 26. Nearly every decision *sub silentio* can be regarded, from another point of view, as a decision *per incuriam*, because the failure of counsel to argue the point will generally mean that relevant cases or statutes are not brought to the attention of the court. See *Lancaster Motor Co.* v. *Bremith Ltd.* [1941] 1 K.B. 675 at 678 (C.A.); *Bradley-Hole* v. *Cusen* [1953] 1 Q.B. 300 at 305 (C.A.).

the court before whom the precedent is cited may be reluctant to hold that its predecessor failed to consider a point directly raised in the case before it (*o*), and this reluctance will be particularly pronounced if the *sub silentio* attack is levelled against not one case but a series (*p*).

We now turn to the wider question whether a precedent is deprived of its authoritative force by the fact that it was not argued, or not fully argued, by the losing party. If one looks at this question merely with the eye of common sense, the answer to it is clear. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. Where a judgment is given without the losing party having been represented, there is no assurance that all the relevant considerations have been brought to the notice of the court, and consequently the decision ought not to be regarded as possessing absolute authority, even if it does not fall within the *sub silentio* rule.

This opinion is adopted in the Court of Criminal Appeal, which will reconsider a decision that was not argued on both sides (*q*); presumably, it will also reconsider a decision that, although argued by the winner, was not argued by the loser. The Divisional Court follows the same rule (*r*). In the Court of Appeal, however, the position is somewhat doubtful, because the exception was not specifically mentioned in the judgment in *Young's Case*, which attempted a rather full statement of the law relating to precedents in the Court of Appeal (*s*).

If there is a general exception for unargued cases, the *sub silentio* rule turns out to be merely a particular application of a wider principle.

(*o*) *Gibson* v. *South American Stores Ltd.* [1950] Ch. 177 at 196–197 (C.A.).

(*p*) *Young* v. *Sealey* [1949] 1 All E.R. 92 at 108; *cf. Read* v. *Lyons* [1945] K.B. 216 at 247 (C.A.). Yet see *Re Pratt* [1950] 2 All E.R. 540 at 547; on appeal [1951] Ch. 225 at 234 (C.A.).

(*q*) *R.* v. *Ettridge* [1909] 2 K.B. at 27 (C.C.A.); *R.* v. *Norman* [1924] 2 K.B. at 322 (C.C.A.). *Cf. R.* v. *Neal* [1949] 2 K.B. 590 at 597, 599.

(*r*) This appears from *Edwards* v. *Jones*, in both the All E.R. and L.R. versions. It also appears from the All E.R. report of *Nicholas* v. *Penny* [1950] 2 All E.R. at 91; but Lord Goddard altered his judgment for the *Law Reports* so as to leave the question open ([1950] 2 K.B. 466).

(*s*) For the proposition that a case is not deprived of binding authority merely because it is contended that it was inadequately argued having regard to the complexity of the issues involved, or because of a deficiency of parties, see *Morelle Ltd.* v. *Wakeling* [1955] 2 Q.B. 379 (C.A.).

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A precedent is not destroyed merely because it was badly argued, inadequately considered, and fallaciously reasoned. Thus a rather arbitrary line has to be drawn between total absence of argument on a particular point, which vitiates the precedent, and inadequate argument, which is a ground for impugning the precedent only if it is absolutely binding and indistinguishable. There appears to be an exception if the court in deciding the precedent expressly intimated that the matter had not been fully argued or considered (*t*).

(7) *Decisions of equally divided courts.* Where an appellate court is equally divided, the practice is to dismiss the appeal, on the principle *semper praesumitur pro negante*. In such circumstances the rule adopted in the House of Lords is that the decision appealed from becomes the decision in the House (*u*). With other courts, however, the position is less clear. In *The Vera Cruz* (*v*) it was said that the Court of Appeal was not bound by a previous decision of an evenly divided Court of Appeal. Yet in *Hart* v. *The Riversdale Mill Co. Ltd.* (*w*) Scrutton L.J. considered the Court of Appeal bound by the decision of an evenly divided Court of Exchequer Chamber, whose decisions are of co-equal authority with those of the Court of Appeal. This principle was not followed, however, in *Galloway* v. *Galloway* (*x*), where the Court of Appeal refused to treat as binding the decision in a previous case where that Court was evenly divided (*y*).

This kind of problem is in fact rare, since it is now the invariable practice of the House of Lords to sit with an uneven number of members; and this is also the general practice of other appellate courts.

(8) *Erroneous decisions.* We have seen that decisions contrary to statute or to previous higher judicial authority are without binding force. Decisions may also err by being founded on wrong principles or by conflicting with fundamental principles of common

(*t*) *Re a Solicitor* [1944] K.B. 427.
(*u*) *Beamish* v. *Beamish* (1861) 9 H.L.C. 274.
(*v*) (1880) 9 P.D. 96.
(*w*) [1928] 1 K.B. 176.
(*x*) [1954] P. 342.
(*y*) See the controversy between Megarry and Williams in 70 L.Q.R. 318, 469, 471; and see Cross *op. cit.* 91–97.

law. Here, logic would suggest that courts should be free to disregard such decisions. Practical considerations, however, may require that perfection be sacrificed to certainty. Where the decision has stood for some length of time and been regarded as establishing the law, people will have acted in reliance on it, dealt with property and made contracts on the strength of it, and in general made it a basis of expectations and a ground of mutual dealings. In such circumstances it is better that the decision, though founded in error, should stand. *Communis error facit jus.*

Indeed Sir John Salmond considered that a conditionally binding precedent could only be overruled if it was plainly wrong. Judicial practice, however, is less clear. The position appears to be that in some instances courts will refuse to overrule decisions which they consider to be wrong but which have stood the test of time (*z*). So for example courts have shrunk from overruling well-established precedents affecting proprietary rights or affording particular defences to a criminal charge (*a*). On the other hand they may overrule erroneous decisions of long standing which involve injustice to the citizen (*b*) or which concern an area of law such as taxation, where it is important for the citizen that the courts should establish what the correct law is (*c*).

So far we have considered courts overruling or refusing to overrule wrong decisions of lower courts, *i.e.*, decisions of persuasive authority. What, however, is the position with decisions of higher courts, *i.e.*, decisions of binding authority? The rule that courts are bound by decisions of higher courts and in some instances by their own decisions suggests that such decisions, even though wrong, must stand as authority until overruled by yet higher authority. An erroneous decision of the House of Lords on this principle can only be corrected by statute. In *London Transport Executive* v. *Betts* (*d*), however, Lord Denning in a dissenting judgment considered that the House could disregard a prior

(*z*) *Pugh* v. *Golden Valley Ry.* (1880) 15 Ch.D. 330; *Poakes* v. *Beer* (1884) 9 App.Cas. 630; *Rees Smith* v. *Rees Smith* [1963] A.C. 260.
(*a*) *e.g.*, *Vane* v. *Yiannopoullos* [1965] A.C. 486.
(*b*) *Brownsea Haven* v. *Poole Corp.* [1958] Ch. 574.
(*c*) *The Public Trustee* v. *I.R.C.* [1960] A.C. 398; *The Governors of the Campbell College Belfast* v. *The Commissioner of Valuation for Northern Ireland* [1964] 2 All E.R. 705.
(*d*) [1959] A.C. 213.

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decision of its own which conflicted with fundamental principles of common law. In *Scruttons Ltd.* v. *Midland Silicones Ltd.* (*e*) the House of Lords by a majority of four to one disregarded their own previous decision in *Elder, Dempster & Co.* v. *Paterson Zochonis & Co.* (*f*). Two of the majority distinguished the prior case on its special facts and based their decision on the obscurity of the *ratio decidendi* in that case. Two of their Lordships, however, considered that they were free to question previous decisions of their own House if out of line with other authorities or established principles. This may well mark a relaxation in the strict rule that the House of Lords is bound by its own decisions (*g*).

28. The hierarchy of authority

The general rule is that a court is bound by the decisions of all courts higher than itself. A High Court judge cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow judgments of the House of Lords. A corollary of the rule is that courts are bound only by decisions of higher courts and not by those of lower or equal rank. A High Court judge is not bound by a previous High Court decision, though he will normally follow it on the principle of judicial comity, in order to avoid conflicts of authority and to secure certainty and uniformity in the administration of justice. If he refuses to follow it, he cannot overrule it; both decisions stand and the resulting antinomy must wait for a higher court to settle.

To this general rule there are several qualifications. First, courts of inferior jurisdiction do not create binding decisions even for courts lower in rank. Thus the magistrates' courts are not bound by decisions of courts of quarter sessions, even though appeal lies from the former to the latter. The county court registrar is not forced to follow previous decisions of the county court judge, even though appeal lies from the registrar to the judge. Courts of inferior jurisdiction are bound only by decisions of courts of superior jurisdiction, *e.g.*, the High Court, Court of Appeal and House of Lords.

(*e*) [1962] A.C. 446.
(*f*) [1924] A.C. 522.
(*g*) For discussion of this case see Dworkin (1962) M.L.R. 163. See also on the whole of this topic Cross, "Stare Decisis in Contemporary England" (1966) 82 L.Q.R. 203.

Secondly, several courts have established that they are bound by their own decisions. The House of Lords, the Court of Appeal, the Court of Criminal Appeal and the Divisional Court of the High Court regard themselves as bound by their own decisions.

These auto-limitations raise problems in legal theory related as we have seen to the similar problem concerning the power of Parliament to bind its successors. How is it logically possible for a court which is not bound by its own decisions to impose this sort of limitation on itself? We know that in fact these rules operate as normally as any other legal rules and that no logical paradox seems to arise. Nevertheless, the theoretical problem remains: where a decision of a court lays down that the court is bound by its own decisions, that decision itself can only be mandatory if there is already a rule that the court is so bound; if there is no such rule, the court remains at liberty to disregard the decision.

Some theorists have argued that since precedent cannot logically lift itself up by its own bootstraps, the limiting rules are not strictly rules at all, but are mere statements of practice (*h*). When, for instance, in 1898 (*i*) the House of Lords held that it was bound by its own decisions, the House was merely announcing how it intended to act for the future. If tomorrow the House of Lords held that it was free to disregard its own decisions, this would be a mere change of practice and not an alteration of law. It is still open, therefore, to the House to change its mind, for the original decision did not and cannot prevent a change of this sort. The same holds true of the Court of Appeal, the Court of Criminal Appeal and the Divisional Court.

As against this we may argue that this contention would extend to all the rules regarding precedent. We regard it as a rule of law that the High Court is bound by the Court of Appeal, but no decision of the latter tribunal could logically establish such a rule; for the High Court would only be bound by the decision if there was already a rule that the High Court is bound by decisions of the Court of Appeal. Equally no decision of the High Court

(*h*) Williams in 70 L.Q.R. 471. Cross, *op. cit.*, 246–250 appears to incline to this view. See discussion by Simpson in "The *Ratio Decidendi* of a Case and of the Doctrine of Binding Precedent" in *Oxford Essays in Jurisprudence* (ed. Guest), 148.
(*i*) In *London Street Tramways* v. *L.C.C.* [1898] A.C. 375.

Now by practice statement in 1966 H.L. is not bound by its own decision

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that the court had general jurisdiction to grant the relief in question? In *Penn-Texas Corporation* v. *Murat Anstalt and Others* [No. 2] (*z*) the plaintiff, a foreign company, applied for an order that an English company should produce certain documents. The court held that there was power in the court to order a limited company to produce documents but only if they were specially identified, and since this was not the case no order was made. Subsequently the plaintiff remedied the defect and applied again. At this point the English company wished to contend that the court had no such general power as was previously decided, but was met by the argument that this had already been decided in the first application and was *res judicata*. The Court of Appeal, to which both applications were finally taken, rejected the plaintiff's contention on this point, Lord Denning holding that the earlier finding was in the event unnecessary to the decision, as could be shown by the fact that it was unappealable. The fact that it was unappealable, however, because the English company was successful in the first application and therefore had no order against which to appeal, would hardly seem to render the finding unnecessary to the decision; for without that finding the earlier court could hardly have proceeded to make its final decision. Nor surely should the fact that the English company had no appeal against the Court of Appeal's finding allow them to reopen the matter in the Court of Appeal. On the other hand it would be illogical and unfortunate if in the second application the company had no right of appeal to a higher court simply because this particular point had been decided against them in earlier proceedings in which they were generally successful (*a*). In this type of case perhaps a compromise would be to regard both proceedings as part of one continuing action, so that the general finding in the first application would be conclusive in the second, but only in courts of lower or equal status and not in higher tribunals to which an appeal should still lie.

As against persons not parties to the suit, the only part of a case which is conclusive (with the exception of cases relating to status) is the general rule of law for which it is authority. This

(*z*) [1964] 2 Q.B. 647.

(*a*) The decision might for instance have been merely that of a master in chambers.

rule or proposition, the *ratio decidendi*, may be described roughly as the rule of law applied by and acted on by the court, or the rule which the court regarded as governing the case.

One of the essential features of the doctrine of precedent in the common law is that rules of law are developed in the very process of application. This means that they are created by judges and not by teachers and other academic lawyers, however learned they may be. It also means that they are created by judges only when acting as judges, *i.e.*, when deciding cases and not for example when giving lectures or other addresses; statements made by judges in their extra-judicial capacity, like other extra-judicial opinions, are without binding authority. For the fundamental notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides.

In the course of his judgment, however, a judge may let fall various observations not precisely relevant to the issue before him. He may for instance illustrate his general reasoning by reference to hypothetical situations and the law which he considers to apply to them. Here of course, since the issue is not one that arises between the parties, full argument by counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to his actual decision. Or again, having decided the case on one point, the judge may feel it unnecessary to pronounce on the other points raised by the parties, but he may nevertheless want to indicate how he would have decided these points if necessary. Here again we are not given the judge's final decision on a live issue, so that once more it would be unwise to endow it with as much authority as the actual decision. These observations by the way, *obiter dicta*, are without binding authority, but are nonetheless important: not only do they help to rationalise the law but they serve to suggest solutions to problems not yet decided by the courts. Indeed *dicta* of the House of Lords or of judges who were masters of their fields, like Lord Blackburn, may often in practice enjoy greater prestige than the *rationes* of lesser judges (*b*).

(*b*) In *Triefus & Co. Ltd.* v. *Post Office* [1957] 2 Q.B. 352 the Court of Appeal held that Lord Mansfield's observation to the effect that the acceptance of parcels for transmission through the post does not give rise to a contract between the sender and the Postmaster-General, was clearly *obiter*, but it had been accepted since 1778 as good law, was therefore entitled to the highest respect, and would be followed.

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The *ratio decidendi*, as opposed to *obiter dicta*, is the rule acted on by the court in the case. But since the common law practice is that courts should explain and justify their decisions, we normally find the rule which is applied actually stated in the judgment of the court. Later courts, however, are not content to be completely fettered by their predecessors, and wisely so: for the development of the common law has been an empirical one proceeding step by step. When a court first states a new rule it cannot have before it all possible situations which the rule as stated might cover, and there may well be situations to which it would be quite undesirable that it should apply. If such a situation should come before a later court, that court might well take the view that the original rule had been too widely stated and must be restricted in application. Or again the original court when stating a rule is neither concerned nor obliged to formulate all possible exceptions to it. Such exceptions must be dealt with as and when they arise, by later courts. In *Bridges* v. *Hawkesworth* (*c*) for example, where a customer found some money on the floor of a shop the court applied the rule of " finders-keepers " and awarded possession of the money to him rather than to the shopkeeper. In *South Staffordshire Water Company* v. *Sharman* (*d*) where the defendant found two gold rings in a mud pool owned and occupied by the plaintiffs, the court refused to apply the rule expressed in the earlier case. The ground of this refusal was that in that case the money had been found in a public part of the shop, whereas in the present case the pool was not open to the public. We can look at this argument either as a way of narrowing the rule in *Bridges* v. *Hawkesworth* to cases where the property is found in places to which the public have access, or as a method of creating an exception to that general rule with regard to property found on land in someone's occupation (*e*).

But while this freedom to distinguish previous decisions makes the operation of precedent more flexible, it has given rise to the view that the *ratio decidendi* of a case is in fact what later cases

(*c*) (1851) 21 L.J.Q.B. 75.

(*d*) [1896] 2 Q.B. 44.

(*e*) No emphasis was laid in *Bridges* v. *Hawkesworth* itself on the fact that the money was found in a public part of the shop. Lord Russell's stressing of this factor in *Sharman's* case, however, was not a misunderstanding of the earlier case but a way of distinguishing it. See Harris " The Concept of Possession in English Law " in *Oxford Essays in Jurisprudence* (ed. Guest), 69 at 92.

consider it to be, because it is always possible that a later court may hold that the rule stated and acted on by the judge in a case is wider than necessary for the decision. Now if we use the term *ratio decidendi* to refer to the proposition of law for which a case is authority, then there is no doubt that this view is correct. Cases cannot be looked at in isolation but must be interpreted in the light of later authority which may have widened, restricted, distinguished or explained them; and a case which was once authority for proposition X may end up being authority for some much narrower rule of law. If on the other hand we use the term *ratio* to refer not to the rule for which the case is authority but the rule which the court applied, then it is misleading to suggest that the *ratio* of a case is what later cases hold it to be. This would lead to the absurd conclusion that no case could have a *ratio* till later courts had pronounced on it, that it would be logically impossible for a later court to misunderstand the *ratio* of an earlier case, and that a case's *ratio* could change over the years—or even that the same case could have at the same time conflicting *rationes* if there were different judicial interpretations of what it decided (*f*). For the sake of clarity it is preferable to retain the term *ratio* for the rule acted on by the court while remembering that though this will never change, the law itself and the rule for which the case is authority may. If we think of the rule of law as a line on a graph, then the case itself is like a point through which that line is drawn.

While it is fairly simple to describe what is meant by the term *ratio decidendi*, it is far less easy to explain how to determine the *ratio* of any particular case. Though we know that it is the rule the judge acted on, we cannot always tell for certain what that rule was. In some cases all we are presented with is an order or judgment unsupported by reasons of any sort. In others we are furnished with lengthy judgments in which may be embedded several different propositions, all of which support the decision. Another difficulty is that any general rule of law must *ex hypothesi* relate to a whole class of facts similar to those involved in the case itself: but just what this class is will depend on how widely we

(*f*) See Simpson, *op. cit.* 169. According to Montrose in (1953) *Annual Law Review of the University of Western Australia* 319, the term *ratio decidendi* bears both meanings. Until a case has been subsequently interpreted, of course, there will in fact be no difference between the two.

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abstract the facts in question. The facts in *Donoghue* v. *Stevenson* could be described in considerable particularity by stating that the defendant manufactured a ginger-beer bottle, let it go out on the market with the remains of a snail inside and in such circumstances that there was no likelihood of intermediate inspection, that the bottle was sold by a retailer to a customer, and that the customer's friend drank some of the ginger beer and became ill as a result. Or one could state the facts extremely widely by saying that the defendant acted in such a way that anyone in his position could have anticipated that another person would suffer harm as a result and that such a person did suffer harm (*g*). At what level are we to abstract the facts?

Various methods of determining the *ratio* have been advanced. The " reversal " test of Professor Wambaugh suggested that we should take the proposition of law put forward by the judge, reverse or negate it, and then see if its reversal would have altered the actual decision (*h*). If so, then the proposition is the *ratio* or part of it; if the reversal would have made no difference, it is not. In other words the *ratio* is a general rule without which the case would have been decided otherwise. This test, however, will not help us in cases where no proposition of law is given and where all that is contained in the reports is a statement of the facts together with the order that was made. Nor is it very helpful where a court gives several reasons for its decision. In such cases we could reverse each reason separately and the decision would remain unaltered, since it could still rest on the other grounds. Logically it might seem that the first reason, therefore, is the *ratio* and the rest mere *obiter dicta*. Quite often, in fact, where a case is argued on several grounds the judge will decide it on one of these and merely indicate his views on the remaining points, so that here his first proposition of law alone will constitute the *ratio*. Sometimes, however, he will declare that he is deciding the case on more than one ground, and here each proposition on which he bases the decision will qualify as a *ratio* (*i*).

(*g*) Dias, *op. cit.* 53–54, discusses the different levels at which the facts in this famous case can be abstracted.

(*h*) Wambaugh *Study of Cases* (2nd ed.), 17–18.

(*i*) Where he does this, both reasons are *rationes* according to the House of Lords in *Jacobs* v. *L.C.C.* [1950] A.C. 361. For judicial discussion of when a judge makes the second reason a *ratio* and when a mere *dictum* see *Behrens* v. *Bertram Mills Circus Ltd.* [1957] 2 Q.B. 1 at 25.

Another test is that suggested by Dr. Goodhart (*j*). According to this the *ratio* is to be determined by ascertaining the facts treated as material by the judge together with his decision on those facts. This test directs us away from what judges say towards what in fact they do, and indeed it is the only way of deriving a *ratio* in cases where no judgment is given. Where a judgment is given, however, it is from this that we must discover which facts the judge deemed material and which not. Goodhart's essay, in which he advances this test, catalogues various types of fact which may be assumed, in the absence of anything in the judgment to the contrary, to be immaterial—facts which he terms impliedly immaterial. The " material facts " test is also valuable in stressing that propositions of law are only authoritative in so far as they are relevant to facts in issue in a case: a judicial statement of law therefore must be read in the light of the facts of the case (*k*). Further, it is valuable in pointing out that we cannot always rely on the judge's reasoning in a case since this may be patently at fault. This is especially likely to be so in cases where the judge backs up his decision with arguments of policy and justice. The only shortcoming of Goodhart's test is that while it provides a very useful method of ascertaining the *ratio decidendi* of a case, this does not appear to be quite the same method as that in current use in practice. For in practice the courts seem to pay more attention to the judge's own formulation of the rule of law than Dr. Goodhart's test would allow; the courts look at this, it seems, not just to discover the material facts but to discover the rule which the judge thought himself to be applying. On the other hand it is true that any such rule must be evaluated in the light of the facts considered by the court to be material.

We have already seen that rules of law based on hypothetical facts are mere *dicta*. Cases may, however, be decided on assumed

(*j*) Goodhart, *Essays in Jurisprudence and the Common Law*, 1.

(*k*) And of course in the light of the issues raised in the pleadings. For the importance of this see a note in 69 L.Q.R. 317 on the case of *Dann* v. *Hamilton* [1939] 1 K.B. 509, in which a passenger in a car sued the driver for damages suffered in an accident caused by the driver's intoxication. The defendant's plea of *volenti non fit injuria* was rejected. It was later suggested that the defendant could have succeeded on contributory negligence, but the judge in the case pointed out in the note cited that this defence was never pleaded and could not therefore arise.

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facts. It is open to the parties in a civil action to have a point of law decided as a preliminary matter, and here the only facts are hypothetical ones. This was the case in *Donoghue* v. *Stevenson* (*l*), which faced the courts with the question whether, given the facts alleged by the plaintiff, the defendant owed her any duty of care in negligence. Or again the court may give a ruling in law without disposing of all the facts. It may for instance decide that the plaintiff is entitled to judgment whether the facts are A or B without deciding which they are. Again the court may deal first with the law and enunciate a certain rule, but then find that on the facts this rule does not apply because the defendant comes within an exception to it. This happened in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* (*m*), where the House of Lords held that if a person gives advice to another in the course of business or professional affairs in such circumstances that a reasonable man would know that this advice is being relied on, then there is a duty, even in the absence of any contractual relationship, to take reasonable care that the advice is good; but that in the present case the defendant had no such duty because he had disclaimed responsibility for his advice. Finally there are cases where several points are raised, success on any one of which will decide the case in favour of one party. Suppose the court decides one point in favour of the plaintiff and the other in favour of the defendant, but gives judgment for the defendant since success on any point means success for him (*n*). In this case the decision on the first point was strictly unnecessary to the decision and had no part in the court's arriving at it. All these cases, where the court deals with the law without first finding the facts, differ from the normal situation where rule of law is enunciated and applied to the facts as found. In these cases the facts are assumed and in some the actual facts are found to operate to take the case out of the rule as stated by the court, so that in a sense the rules stated are not necessary for the decision. To regard them as *obiter dicta* however, would be unrealistic and

(*l*) [1932] A.C. 562. See the discussion in Cross, *op. cit.* at 54–59, 80–86.

(*m*) [1964] A.C. 465. The same could be said of *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130. In fact the first formulation of a rule has often been made in a case in which the rule itself was not applied. Perhaps it was this very fact that emboldened the court to propound the rule.

(*n*) As for instance in *Perry* v. *Kendrick's Transport* [1956] 1 W.L.R. 85.

contrary to current practice. The rule in *Donoghue* v. *Stevenson* is certainly regarded as *ratio* not *dictum*, and there is every reason to believe that the rule laid down in *Hedley Byrne's* case will be accorded the same status (*o*).

Where there are several different judgments, as in a case on appeal, the *ratio* must be ascertained from the judgments of those in favour of the final decision. A dissenting judgment, valuable and important though it may be, cannot count as part of the *ratio*, for it played no part in the court's reaching their decision. It may happen in an appeal court that all the judges concur in the decision but each one gives different reasons for it. In such a case one can only follow the advice of Lord Dunedin, who said that if it is not clear what the *ratio decidendi* was, then it is no part of a later tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it (*p*).

30. Judicial reasoning (*q*)

We have seen that according to the declaratory theory of law it is no part of a judge's function to create rules of law: his only task is to apply already established rules. In deciding a case, therefore, all that he need do is to ascertain the relevant rule and apply it to the facts of the case. On this view judicial reasoning assumes a fairly simple syllogistic form of the following pattern:

1. All fact situations of type A entail legal consequence B.
2. This is a fact situation of type A.
3. Therefore the legal consequence is B.

It is true that this form of argument is used by lawyers both in and outside courts in all those numerous instances where the law is perfectly clear; and we have seen that these are far more

(*o*) See Stevens "*Hedley Byrne* v. *Heller*: Judicial Creativity and Doctrinal Possibility," (1964) 27 M.L.R. 121. Yet in the *Penn-Texas* case Lord Denning regarded the ruling in *Penn-Texas* (No. 1) that the court had jurisdiction to order a company to produce specified documents as not necessary to the decision and so not binding precedent. *Supra*, p. 176.

(*p*) In *The Mostyn* [1928] A.C. 57 at 73.

(*q*) On judicial reasoning generally see Cardozo, *The Nature of the Judicial Process*; Lloyd, *Introduction to Jurisprudence* (2nd ed.), Chap. 10; Levi, *Introduction to Legal Reasoning*; Jensen, *The Nature of Legal Argument*; Wasserstrom, *The Judicial Decision*; Cross, *Precedent in English Law*, Chap. 6; Guest, "Logic in the Law", *Oxford Essays in Jurisprudence* (ed. Guest), 176.

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common than the American realist would allow. For in the vast majority of cases the rule of law that applies is obvious and clear enough to allow us simply to subsume the facts of the case under the rule and draw the consequence automatically.

In the rarer case, however, where the law is not clear beyond doubt, this mechanical type of reasoning will not suffice, because in order for it to suffice it is necessary that both of the premises be clear. But in the uncertain case where the court has to break new ground, this will not be so. It may be that the first premise is unclear: there may be no well-established rule that situations of type A entail consequence B in this context, so that the court's main task will be to try and work out just what this rule should be. In *Rylands* v. *Fletcher* (*r*) for instance there was no rule already in existence to the effect that if a person accumulates on his land anything likely to do harm if it escapes, then he is liable if it escapes and causes damage; and the court's problem in that case was to develop just such a rule. Once this is done, we have our first premise and may be able to apply the syllogism automatically, but in cases creating new law the chief difficulty is to establish the premises of the syllogism: the court must decide whether fact situations of type A *do* entail consequence B.

It may be, however, that though the first premise is clear, the second is not. While the general rule may be well established, it may not be certain whether the facts of the present case bring it within the rule. We have already considered examples of this with reference to statutory interpretation. A statute may lay down a clear rule concerning driving without insurance, but the case before the court may raise the question whether what this defendant did—steering a car on tow—counts as driving within the rule. This type of uncertainty can arise equally well with common law rules. The common law provides for instance that if a wild animal escapes and does damage, then the person in control of the animal is liable. The case of *M'Quaker* v. *Goddard* (*s*) however posed the problem whether a camel qualified as a wild animal for the purposes of the rule; *Behrens* v. *Bertram Mills Circus Ltd.* (*t*) turned partly on whether a trained circus elephant came within the rule. In such

(*r*) (1868) L.R. 3 H.L. 330.
(*s*) [1940] 1 K.B. 687.
(*t*) [1957] 2 Q.B. 1.

cases the court's problem is to establish the second premise, to decide whether this particular fact situation is of type A.

Since courts cannot use deductive reasoning to solve such problems, what sort of reasoning do they use? In other words how does a judge arrive at a decision in such a case? The fact that his reasoning is not purely deductive may tempt us to imagine it to be inductive. Inductive reasoning takes the following form:

1. A_1 A_2 A_3 . . . A_n is B,
2. Therefore all A is B,

(Or 2A. Therefore this $A-A_{n+1}-$ is B).

It is a process, then, whereby we argue from the observed to the unobserved, concluding that some quality found to reside in all observed members of a class must therefore reside in all members of it. Unlike deduction it may lead to erroneous conclusions, for later evidence may show that the quality does not extend to the unobserved members; in other words the generalisation may be wrong.

It is true that judicial reasoning may to some extent resemble induction. In *Rylands* v. *Fletcher* for example we can see the court starting from the fact that there were rules regarding the escape of cattle and various other things and ending by positing a rule for all things whose escape is liable to cause damage. Still this is hardly a true case of induction. A true case of inductive reasoning would exist if for example a non-lawyer, having discovered a rule about the escape of cattle, a rule for fire, and rules for various other things, went on to infer that in English law there is a strict rule regarding all things whose escape might cause harm. But notice here that further evidence about English law might show his conclusion to be wrong. In a case like *Rylands* v. *Fletcher* itself, however, there is no such possibility that further evidence may show the rule developed to be wrong; for here the court was not *inferring* that English law contains such a rule; it was *deciding* that English law *shall* contain this rule.

What then does a judge look at in order to decide a case not already covered by an existing rule of law? *Ex hypothesi* there is no binding authority to provide him with a clear solution. Nevertheless one of the most important factors to be taken into account will be the existing law. For judicial lawmaking differs from legislation in that whereas the latter starts with a clean slate and can

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frame whatever rules policy suggests, the former works within the framework of existing law, which, though not dictating the answer, may nonetheless limit the range of answers which the judge can give.

Existing law will be relevant to the decision in various different ways. In deciding a novel point, a court may find it helpful to consider persuasive authorities in the shape of foreign decisions which may show how other jurisdictions have solved the problem in question. More important perhaps are decisions of the domestic law on closely related topics. *Donoghue* v. *Stevenson* (*u*) had decided that a manufacturer owes a duty of care to the ultimate consumer. In *Malfroot* v. *Noxal* (*v*) the question was whether a repairer owed a duty of care to third parties who might be injured as a result of negligent repair work. Clearly the two cases are different, yet close enough for the court to proceed by analogy to apply the rule concerning manufacturer's liability to the case of repairers. In this way, the courts by framing similar rules for analogous cases, promote consistency and uniformity in law and develop in fact broad principles which serve as the underlying basis of the various particular rules.

Arriving at a decision by analogy with existing rules provides a fairly obvious example of the way in which existing law is taken into account. There is, however, another way in which existing law may be relevant to the decision. A decision in one branch of law is not an isolated fact but is something that may have repercussions on other parts of the law. Consideration for example of the problem whether a party can be estopped by a promise as opposed to a statement of fact will raise questions beyond the boundaries of estoppel itself, because of the effect that the acceptance of estoppel in such cases would have on the doctrine of consideration in contract. The question whether there should be liability for negligent statements cannot be divorced entirely from a consideration of the law of deceit, since the existence of liability in negligence may entirely obviate the necessity of a tort of deceit. A decision in a civil action for conversion may have fundamental effects on the law of larceny.

This is an aspect of the role played in law by legal concepts. For practical and theoretical purposes it proves useful to divide

(*u*) [1932] A.C. 598.

(*v*) (1935) 51 T.L.R. 551.

and sub-divide the law into various branches, such as the law of property, the criminal law and so on. These, however, far from being entirely unrelated, are connected at various points by concepts, which occur and figure in several of the different branches. Thus the concept of " possession " plays an important role in the law of property, in landlord and tenant, in the law of larceny and in the torts of trespass, detinue and conversion. Indeed it is by using and developing such concepts that lawyers can analyse and organise what would otherwise be a bewildering mass of disparate rules and regulations into some sort of rational system and order. Not unnaturally then, if a case with a novel point involves a certain legal concept, the judge may consider the meaning of this concept and its application in various fields of law.

But, as Professor Lloyd has pointed out, concepts are good servants but bad masters (*w*). Out of rules, originally designed to fit social needs, have grown concepts, which then proceed to take on a life of their own to the detriment of legal development. The resulting " jurisprudence of concepts " produces a slot-machine approach to law whereby new points posing questions of social policy are decided, not by reference to the underlying social situation, but by reference to the meaning and definition of the legal concepts involved. For example, the question whether a member should be able to sue his trade union involved important social questions concerning the relations between a member and his union. What would be the effect of any decision on this question on labour relations and on the trade union movement? What does justice require in terms of fairness to and protection of the individual? Lawyers, however, are inclined to approach the problem from a conceptual standpoint arguing that since in law an unincorporated association is merely a group of individuals all parties to a contract, then to allow a member to sue his union would be tantamount to allowing a man to sue himself. This formalistic *a priori* approach confines the law in a strait-jacket instead of permitting it to expand to meet the new needs and requirements of changing society.

Courts, then, should look in such cases, not only at existing law and legal concepts, but at the broader underlying issues of policy; and in fact judges can be seen paying increasing attention

(*w*) Lloyd, *The Idea of Law*, 298 *et seq.*

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to such matters as the possible effect of a decision one way or the other on commerce, on industry, on labour relations, on society in general. When considering whether or not to impose liability for negligent statements, the courts have discussed the effect of such an imposition on professions whose business consists largely in giving advice. When faced with such problems as whether a company largely controlled by enemy shareholders has enemy character, courts have been less concerned with the legal doctrine that a company is a separate person from its members than with the practical results of allowing such companies to continue their operations in time of war (*x*). But while this more empirical approach is to be welcomed, two comments may be made. First, judicial inquiry into the general effects of a proposed decision tends itself to be of a fairly speculative nature; unlike the Supreme Court of the United States, which will consider factual evidence on such matters, English courts confine themselves to drawing conclusions from common sense and their own knowledge about such matters. Secondly, it should not be forgotten that one social need may be the need for a reasonably logical, *i.e.*, consistent system of law. Too much regard for policy and too little for legal consistency may result in a confusing and illogical complex of contrary decisions; and while it is true that " the life of the law has not been logic, it has been experience " (*y*) and that we should not wish it otherwise, nevertheless we should remember that " no system of law can be workable if it has not got logic at the root of it " (*z*).

Cases involving novel points of law, then, cases of first impression, have to be decided by reference to several things. The judge must look at existing law on related topics, at the practical social results of any decision he makes, and at the requirements of fairness and justice. Sometimes these will all point to the same conclusion. At others each will pull in a different direction; and here the judge can only weigh one factor against another and decide between them. The rationality of the judicial process in such cases consists in fact of explicitly and consciously weighing the pros and cons in order to arrive at a conclusion.

(*x*) See *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.* (*Gt. Britain*) *Ltd.* [1916] 2 A.C. 307.
(*y*) Holmes, *The Common Law*, 1.
(*z*) Per Lord Devlin in *Hedley Byrne & Co.* v. *Heller* [1964] A.C. 465 at 516.

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