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THE RATIO DECIDENDI OF A CASE

PROFESSOR MONTROSE and Mr. Simpson have now on four occasions expressed views concerning the *ratio decidendi* of a case.[1] I would have hesitated to intervene in this gladiatorial combat if it had not been for the fact that both of them referred at considerable length to my article "Determining the *Ratio Decidendi* of a Case."[2] It is not my purpose to discuss in the present article the points on which they seem to disagree because I am not certain that I have always understood their arguments. I am concerned with a narrower and more personal matter. Both of the learned writers are in agreement that the conclusions reached in my article are unsatisfactory. Professor Montrose does so on the ground that they conflict with the "classical" theory which he accepts as being correct, while Mr. Simpson is of the opinion that my theory is substantially the same as the "classical" one which he regards as open to criticism.

The learned writers are not in accord concerning either the existence or the nature of the "classical" theory, but they are in happy agreement concerning the content of my doctrine relating to the binding precedent. Unfortunately, from my standpoint, they both state my theory in a form which I find it impossible to recognise, as it omits what I regard as the essential point of my thesis. For some reason, which I find it difficult to understand, both the learned writers, instead of referring to my article directly, are content to quote a single sentence, taken out of its context, from Dr. Glanville Williams' valuable book *Learning the Law*. Thus in his first article[3] Professor Montrose says that "Glanville Williams accurately summarises Goodhart's thesis in the following sentence:

[1] J. L. Montrose, "*Ratio Decidendi* and the House of Lords" (1957) 20 M.L.R. 124; A. W. B. Simpson, "The *Ratio Decidendi* of a Case" (1957) 20 M.L.R. 413; J. L. Montrose, "The *Ratio Decidendi* of a Case" (1957) 20 M.L.R. 587; A. W. B. Simpson, "The *Ratio Decidendi* of a Case" (1958) 21 M.L.R. 155.
[2] *Essays in Jurisprudence and the Common Law*, pp. 1–26 (1931).
[3] p. 125.

'The *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon': *Learning the Law*, 3rd ed., 1950, p. 57." This single sentence is also accepted by Mr. Simpson as a correct statement of my view. As I do not agree that, taken by itself, this gives an accurate summary of my thesis, it may perhaps clarify matters if I state as briefly as possible what I did say in my article.

I began by pointing out that although nearly all the books on jurisprudence, from the time of Austin onward, had stated that it was necessary to distinguish between the general principle of a case, which constitutes the *ratio decidendi*, and the concrete decision, few attempts have been made to state any rules by which these general principles can be determined. The phrase "*ratio decidendi*" is misleading because the reason which the judge gives for his decision is not binding and may not correctly represent the principle. I cited a large number of cases in which the reasons given for the decisions were obviously wrong or were based on a misunderstanding of legal history, but nevertheless the principles established by these cases were valid and binding.[4] Moreover, there were numerous cases in which no reasons were given, but this did not affect their authority as a precedent. *Oliver* v. *Saddler and Co.*[5] is a modern illustration of this. Secondly,[6] it is not the rule of law *set forth* by the court, or the rule *enunciated*, as Halsbury puts it, which necessarily constitutes the principle of the case. Here again, there may be no rule of law pronounced in the judgment, or the rule when stated may be too wide or too narrow. In the appellate courts the various judges may set forth different rules of law, but nevertheless each of these cases must contain a principle which is binding in future cases. Thirdly,[7] the *ratio* cannot be found in the facts of the case together with the decision reached on those facts. At the time when I wrote my article there was an influential American school of thought which held that "Not the judges' opinions, but which way they decide cases, will be the dominant subject-matter of any truly scientific study of law."[8] This is an attractive theory because under it, as I said,[9] "We can ignore the *vocal behaviour* of the judge, which sometimes fills many pages, and concentrate upon his *non-vocal* behaviour, which occupies but a few lines." I pointed out that, unfortunately, this theory is based on the fallacy that the facts of a case are a constant factor, and that the judge's conclusion is based upon the fixed premise of a given set of facts. The crucial question, however, always is "What facts are we talking about?"

[4] pp. 2–4.
[5] [1929] A.C. 584.
[6] pp. 5–8.
[7] pp. 9–10.
[8] Professor Oliphant, "A Return to *Stare Decisis*," *American Bar Association Journal* (1927, Vol. XIV, p. 71).
[9] p. 9.

Having rejected these three methods of establishing the *ratio decidendi*, I suggested that the principle of the case could be found by determining (a) the facts treated by the judge as material, and (b) his decision as based on them. I stated this as follows [10]: "The judge, therefore, reaches a conclusion upon the facts *as he sees them*. It is on these facts that he bases his judgment, and not on any others. It follows that our task in analysing a case is not to state the facts and the conclusion, but to state the material facts as seen by the judge and his conclusion based on them. *It is by his choice of the material facts that the judge creates law.*" I was careful to italicise the words I considered to be of particular importance. I then suggested various rules which would be of help in determining these material facts. Of these the most important is the rule that [11] "the reasons given by the judge in his opinion, or his statement of the rule of law which he is following, are of peculiar importance, for they may furnish us with a guide for determining which facts he considered material and which immaterial."

Finally [12] I suggested that if in an appellate case there are several opinions which agree as to the result but differ as to the material facts, then the principle of the case is limited so as to fit the sum of the facts held material by the various judges, or by the majority of them. This summary of my theory must make it clear that I placed all my emphasis on the material facts as seen by the judge, and not on the material facts as seen by anyone else. With this explanation as an introduction we can now turn to the debate between Professor Montrose and Mr. Simpson.

In his first article Professor Montrose, after pointing out that in my theory the *ratio decidendi* of a case is not to be found in the rule of law stated by the judge, holds that this is in conflict with the "classical" view which regards the *ratio* as "the principle of law propounded by the judge as the basis of his decision." He then says [13]:

> "The 'classical view' may be regarded as true even though the principle stated by the judge is subsequently held to be too broadly expressed as a binding rule of law. There is abundant authority for reading a judgment *secundum subjectum materiam*. The important question is whether the proposition propounded by the judge may, so far as its binding character is concerned, be entirely ignored. That it can be so rejected is, *pace* Paton, the thesis of Goodhart."

With great respect, this statement of my thesis is, as I have already pointed out, based on a misconception. My view is that the principle stated by the judge may not by itself state the binding rule of law, but I made it abundantly clear that it cannot be "entirely

[10] p. 10.
[11] p. 18.
[12] p. 26.
[13] p. 125, n. 6.

ignored " because it may constitute an essential step in determining what are the material facts as seen by the judge. A striking illustration of my thesis can be found in *Donoghue* v. *Stevenson*.[14] Lord Atkin stated the broad principle of law as follows[15]: " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." This statement of the general principle cannot in my view be accepted as a binding rule of law, as has been shown in a number of subsequent cases where it has not been applied.[16] On the other hand, it cannot be ignored, for it is of the greatest importance in furnishing a key to the determination of the material facts as stated thereafter by Lord Atkin.[17] It is in this statement of the material facts and the conclusion based on them that the *ratio decidendi* of the case can be found.

Mr. Simpson begins his note[18] by stating that the Goodhart theory " . . . is said by Professor Montrose to be accurately summed up by the proposition that the *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon." Perhaps some confusion might have been avoided if Mr. Simpson, instead of relying on Professor Montrose's interpretation of Dr. Glanville Williams' brief summary of my thesis, had referred to the thesis itself. Mr. Simpson, as I understand it, argues that where the judge does explicity state a principle of law, this constitutes the *ratio decidendi* under the classical theory, and that my theory is indistinguishable from it. I must confess that I have found some difficulty in following the argument by which this conclusion is reached. He says that[19] " a rule of law will always be found to contain two parts; the first specifies a number of facts and the second specifies the legal result or conclusion which ought to follow whenever these facts are found to co-exist." I assume that this means that Lord Atkin's statement concerning the duty of care to one's neighbour can be translated to read, " The defendant has failed to take reasonable care to avoid injuring the plaintiff in a foreseeable manner. He must therefore pay damages for the injury he has caused." Mr. Simpson then continues:

> " When, therefore, a judge states a rule of law, and treats it as applicable to the case before him, the applicability must

[14] [1932] A.C. 562.

[15] p. 580.

[16] See cases cited in Salmond on *Torts*, 12th ed., § 121.

[17] Lord Atkin said at p. 599: " If your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

[18] p. 413.

[19] p. 414.

> depend upon his finding that the *material* facts of that case correspond precisely to the facts specified in that rule, and, this being so, that the conclusion or result specified in that rule ought to follow."

It is here that I find great difficulty in following the argument, because, although it is true that the judge's statement of law must be assumed to relate to the material facts of the case, it does not follow from this that it corresponds precisely to them. For one thing, it may be far wider than the material facts themselves.

Mr. Simpson continues by saying [20]:

> "It seems therefore that Professor Goodhart, having said that the proposition of law propounded by the judge may be ignored in determining the *ratio decidendi*, and having advanced weighty arguments tending to show that such propositions make unsatisfactory *rationes decidendi*, fails to see that his own arguments make it obligatory that such a proposition should not be ignored. His own theory is just as much open to the same criticism as he and others have directed against the classical theory—criticism to which there has been as yet no satisfactory reply."

I am not certain which theory Mr. Simpson considers to be "the classical theory," but I assume that he is referring to the one which regards the statement of law to be the binding principle of the case. I do not know who the "others" are who have criticised this theory, but my criticisms were (a) that every case must contain an ascertainable principle of law, even though there may be no opinion delivered by the judge. This point is ignored by the "statement" theory. (b) That the statement of law may be too wide or too narrow. Neither of these criticisms is applicable to my theory, based as it is on the material facts of the case as seen by the judge, however subject it may be to other possible criticisms not referred to by Mr. Simpson.

In his second article Professor Montrose begins [21] by pointing out again that he accepts as accurate Dr. Glanville Williams' summary of my theory, but he fails to mention that this single sentence is part of a whole chapter in which it is made clear that the material facts are those seen by the judge. He then adds to the difficulty of the problem by stating [22] that "the terminology whereby '*ratio decidendi*' signifies the rule propounded by the judges should not be allowed to be used to beg the question whether such a rule is of binding authority." If this is the sense in which *ratio decidendi* is used by Professor Montrose, then the whole discussion seems to be meaningless, because when other writers discuss the question whether the rule of law stated by the judges constitutes the *ratio decidendi* of a case they are discussing whether or not this

[20] p. 415.
[21] p. 587, n. 5.
[22] p. 588.

statement is of binding authority in future cases. If *ratio decidendi* means nothing more than the rule propounded by the judges, then it is a singularly unhelpful and unnecessary phrase. The point at issue is whether these rules, thus propounded, are to be regarded as binding, *i.e.*, do they constitute the *ratio decidendi* of the case?

Professor Montrose then says [23]:

> "It is convenient here to indicate the nature of my agreement with Simpson in his criticism of Goodhart. Goodhart's article asserts in the first part that the judge's actual reasoning may be ignored in determining what is the rule of law established by the case. In the second part, however, he asserts that the later judge must take into account the precedent judge's statement of what facts are to be considered material. But the judge's statement of what facts are to be considered material is part of his actual reasoning. Where a judge does not explicitly pronounce the rule upon which he bases his decision, but explicitly says what facts he considers material, then we may have an implicit *ratio decidendi* which, according to Goodhart's second part, must be followed, though from the first part of his article one is led to believe that he does not consider any *ratio decidendi* as binding."

There is no conflict between the first part of my article and the second part. When Professor Montrose says that "from the first part of his article one is led to believe that he does not consider any *ratio decidendi* as binding" it is obvious that he must be using the phrase in a novel sense which I find it difficult to understand. My whole article would be meaningless if I did not consider any *ratio decidendi* to be binding. The whole point of my article was based on the proposition that every case must contain a binding principle, but that this binding principle is not necessarily to be found in the statement of the law made by the judge.

On the other hand, I am in agreement with Professor Montrose in rejecting Mr. Simpson's view that the "classical" theory is not distinguishable from mine. He points out that Mr. Simpson's thesis is based on the argument [24] "that when a judge pronounces a rule of law as the basis of his decision, he enunciates the material facts of the case. Since this is not true, it follows that there is a distinction between the rule of law which a judge may happen to propound, and a rule constructed from the material facts of the case and the decision on them, though, of course, in some cases the pronouncement may coincide with the construction."

In his reply, Mr. Simpson, after pointing out [25] that Professor Montrose defines the phrase *ratio decidendi* in an unusual way, discusses the question whether there is a distinction between the classical and the English theory of precedent, and what Professor

[23] p. 592.
[24] p. 593.
[25] p. 155.

Stone thought of this in his book *The Province and Function of Law*. As I am doubtful whether it can be said with any truth that there is a definite classical theory or a precise English theory as so little has been written on this subject in the past, I am not certain that this discussion is of much value. It is of interest, however, to note that the learned writers seem to have reconstructed Stone's views almost as thoroughly as they have done mine. Thus Mr. Simpson says [26]:

> "On p. 593 (1957) 20 M.L.R. I see that according to Professor Montrose, Stone [27] pointed out that the Goodhart theory is one which says 'that the rule of law for which a case is of binding authority *is not one which is pronounced, explicitly* or implicity, *by the judge in the precedent case*, but which is constructed by later judges.' [28] I find this hard to reconcile with his statement a few lines further up that Stone 'nowhere refers' to the classical theory."

I am not concerned with the question whether Stone did or did not refer to the classical theory, but I cannot find in Stone's book the statement that according to my theory the rule of law for which a case is of binding authority is constructed by later judges. It would be surprising if he had said so, because it is in direct conflict with my view that the principle is based on the material facts, determined expressly or implicitly, by the judge or judges in the precedent case. It certainly does not follow from this that the principle of the precedent case "is constructed by later judges" whose function it is to interpret and not to construct. Similarly, judges must interpret statutes, but it would be misleading to say that they are therefore constructing them. To take a non-legal analogy, a critic who interprets a poem cannot be described as constructing it although other critics may disagree with his interpretation, just as judges in subsequent cases may disagree concerning the rule of law established by the precedent one.

As so many references are made to Stone in these articles it may clarify the discussion if I point out the actual grounds on which he criticised my "ingenious view." He does so in a note,[29] because "since even its learned author could not claim that his rules describe the actual uniform operation of English courts a full consideration is not here called for." As there is no actual *uniform* operation of English courts concerning the application of precedents it would seem to follow that all theories on this point, including those expressed by Professor Stone, must be invalid. I did not purport to establish any fixed rules which must be followed by the courts, for any such attempt would be as pointless as it would be egotistical. I was merely trying to give a guide to the method

[26] p. 159, n. 21.
[27] *Op. cit.*, p. 187.
[28] My italics.
[29] p. 187, n. 219.

which I believe most English courts follow when attempting to determine the *ratio decidendi* of a doubtful case.

Stone then says: "Further his rules for determining the 'material' facts are artificial and, in part indeterminate, requiring guesses as to what facts the courts tacitly took as material. They would thus leave the *ratio* in many, if not in most, appellate cases a matter for variable judgment even if they were accepted." If it were possible to devise a method by which all precedents would become determinate, then the difficulties of interpretation would disappear, but I believe that this is a vain hope. It is not a valid criticism of a system, therefore, to say that some precedents will always remain indeterminate. This is due to the subject-matter itself, and not to the system which is applied to it. Guesswork must always play a part in legal interpretation: this is what makes the law so interesting.

I am not certain what is covered by Professor Stone's sentence which reads: "Reasons given and propositions of law formulated in further decisions are, for instance, no less influential, even if they are no more conclusive than the facts." If this means that further decisions are frequently required before the scope of a principle is finally determined, then I am in complete agreement with it, but this does not mean that each case ought not to be analysed as precisely as possible. When we take one step we may not be certain how far this will ultimately lead us, but it is useful to know in what direction we are headed. Paton's metaphor is a sound one [30]: "One case, so to speak, plots a point on the graph of tort, but to draw the curve of the law we need a series of points."

Perhaps I may finally point out that the present debate illustrates my thesis concerning the essential importance of establishing the material facts on which a conclusion may be based, because much of the confusion in these articles could have been avoided if there had been more precision in the various references. These may be described as the material facts under discussion.

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[30] Paton, *A Text-Book of Jurisprudence* (1951), 2nd ed., p. 161.

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