THE RATIO DECIDENDI OF A CASE

IN his comment [1] on my article [2] dealing with some aspects of the doctrine of precedent Simpson makes one point which I consider valid, but overlooks a number of considerations which arise from a more thorough analysis of the doctrine of precedent than was possible for either of us in our short notes.[3] The valid point is concerned with Goodhart's article "Determining the *Ratio Decidendi* of a Case.[4] Simpson accepts as the Goodhart theory the proposition that "the *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon." [5] He points out that there is an opposed theory, which may be conveniently called the "classical theory," which is that "the ratio is 'the principle of law which the judge considered necessary to his decision.'" [6] Simpson avers that "the rule stated by the judge ought, therefore, upon the basis of Professor Goodhart's arguments, to be treated as the *ratio decidendi*." What I regard as valid in this statement is the suggestion of an inconsistency in the reasoning of Goodhart in his article. But this inconsistency does not appear until one realises that there are two separate theses in Goodhart's article, one of which is not referred to by Simpson. On the other hand, once Simpson's terminology is examined carefully it will be seen that some of the propositions he asserts cannot be supported: (a) Goodhart's theory of "*ratio decidendi*" does not lead him to accept the judge's explicitly stated rule as the *ratio decidendi*, though it does lead him to accept the judge's inexplicitly stated rule; (b) the classical theory is distinguishable from Goodhart's theory; (c) Stone has not criticised the classical theory of precedent, but a theory which is assumed by Goodhart as the premiss leading to Goodhart's own particularisation.

The two phrases which particularly call for consideration in Simpson's note are (i) *ratio decidendi*, (ii) facts of the case. It is my submission that with regard to these phrases Simpson has failed to note their ambiguity.

Two important meanings of the phrase "*ratio decidendi*" to

[1] (1957) 20 M.L.R. p. 413.
[2] (1957) 20 M.L.R. p. 124.
[3] Some fuller analysis is to be found in my articles: "The Language of and a Notion for the Doctrine of Precedent," 2 West Aust.L.R. at pp. 329 and 504; "Law Making and Law Applying," (1956) South African L.J. 187.
[4] 40 Yale L.J. (1930) reprinted in Goodhart, *Essays in Jurisprudence and the Common Law*, p. 1, and in Vanderbilt, *Studying Law*, p. 493.
[5] This is Glanville Williams' summary in *Learning the Law* (3rd ed.), p. 57, which I accepted as accurate.
[6] The appellation "classical theory" for this theory is Paton's (*Jurisprudence*, 1st ed., p. 159). It is the "classical" theory of some English judges, but not of English jurists.

be found in a survey of its use are the following.[7] (1) The phrase sometimes signifies the rule of law propounded by the judge as the basis of his ultimate decision of the case. This is the meaning often given to the phrase by judges, following Lord Campbell in *Att.-Gen.* v. *Windsor*.[8] The full significance of this concept requires fuller elaboration than I can give in this note. The concept, for example, embraces both the explicit formulation by the judge of a proposition, and the implicit formulation. In my submission Goodhart's thesis is but a variation of Austin's statement as to how an implicit *ratio decidendi* is determined.[9] (2) The phrase is sometimes used to mean the rule of law for which a case is of binding authority. This is the meaning attributed to the phrase by Salmond and a number of other jurists who have followed him.[10] It is the meaning explicitly adopted by Goodhart in his article, and implicitly by Simpson in his note.

Since both usages exist both meanings are "correct." I find somewhat misleading Simpson's description of my article as being one which "contrasts two views as to the correct definition of the *ratio decidendi* of a case." The word "definition" is ambiguous: the analysts no longer insist that it must refer to the meaning of a name. That strange error ignored the existence of the phrase "real definition." I do not think Simpson fully brings out how the ambiguity of the phrase leads to difficulties in the theory of precedent. 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. The

[7] A fuller examination of the use of the phrase "*ratio decidendi*" is to be found in 2 West Aust.L.R. at pp. 305 and 319.

[8] (1860) 8 H.L.C. at p. 391. The rule "propounded and acted upon in giving judgment." For recent examples of this judicial usage, illustrating both the terminology and acceptance of the classical theory see *Wood* v. *Wood* [1957] 2 All E.R. *per* Lord Evershed M.R. at pp. 19H, 20I and 21E, and *Behrens* v. *Bertram Mills, Ltd.* [1957] 1 All E.R. *per* Devlin J. at 594A. See also *Midland Ry.* v. *Western Australia* [1956] 3 All E.R. *per* Lord Cohen at p. 277I.

[9] "The general reasons or principles of a judicial decision (. . . abstracted from any peculiarities of the case) are commonly styled, by writers on jurisprudence, the *ratio decidendi*." *Lectures in Jurisprudence* (1873 ed.), p. 648. I have not been able to trace the "writers on jurisprudence." Presumably they are those studied by Austin in Germany. Austin's account of the process of "detaching" general grounds from specific peculiarities is worded in one place in such a way as to be capable of referring not to a process of generalisation, but to the enunciation of an *obiter dictum*. "Since no two cases are precisely alike, the decision of a particular case may partly turn upon reasons which are suggested to the judge by its specific peculiarities or differences. And that part of the decision which turns on those differences (or that part of the decision which consists of those special reasons) cannot serve as a precedent for subsequent decisions." This is not an accurate account of the doctrine of precedent: it is precisely the "special reason" which, generalised, is the basis of subsequent decisions. The dicta which ignore the "peculiarities" of the case are not authoritative, since the peculiarities will serve to "distinguish" the later case from the precedent. But everything turns upon the meaning of "peculiarity."

[10] "The underlying principle . . . which forms its authoritative element is . . . the *ratio decidendi* . . . which alone has the force of law." Salmond, *Jurisprudence*, 3rd ed. (1910), p. 175, cited Goodhart, *Essays*, p. 1; Stone, *Province and Function of the Law*, p. 187.

terminology whereby *ratio decidendi* signifies the rule which is of binding authority should not be allowed, as Goodhart pointed out, to beg the question of how the rule is determined. I prefer to use the phrase with the first meaning. The second usage is one of those mixed fact-law concepts, which are convenient for describing the conclusions, but not the bases, of legal reasoning.[11] It involves a concept to which nothing real may be related: and leads to the assumption that there is always a rule of law for which a case is of binding authority. It is the proposition contained in this assumption which is the subject of Stone's criticism, not the classical theory. Using the phrase "*ratio decidendi*" to mean the rule of law propounded by the judge, the two contrasted theories are thus formulated. The classical theory is that the *ratio decidendi* of a case is binding on later judges. Goodhart's theory is that what is binding on later judges is a rule which may be logically constructed by a later judge from the material facts found by the earlier judge and from his decision of the precedent case. Simpson's thesis is that the explicit *ratio decidendi* of a case *must* coincide with the rule so logically constructed.[12]

The ambiguity of the phrase "facts of the case" is concerned with the distinction between words which refer to *classes* of facts and words which refer to particular facts.[13] The brute facts of the world [14] deal with individual men and women, particular things and unique events, but we are able to communicate with each other about them, and to deal with them ourselves, by the process of classification yielding our common nouns, our verbs, our concepts. Rules of law specify in their antecedents *classes* of facts—if any person fraudulently and without a claim of right made in good faith takes and carries away anything—cases are concerned with specific actualities—Bill Sykes animated at a particular time by a particular desire threatening a particular person. Simpson does

[11] The logic of such concepts has still to be fully surveyed. A beginning was made by Hohfeld. Stone's fallacy of circuitous reference deals with the subject. Corbin, in commenting on the definition of a contract as "a promise enforceable at law," deals with it also. He says: "Such a definition as this does not inform us as to what kind of facts will be operative to create legal rights and duties: it merely gives as a mode of describing such operative facts after we have found by other means that they do have legal operation." *Contracts* (one volume edition) 1952, p. 5. Stoljar's programme for fruitful concepts in law deals with but one aspect of the subject. He says, quite rightly: "For we must define our premises by way of concepts from which straightforward inferences can be made; and the corollary is that we must avoid such concepts which do not permit us to make deductions." "Logical Status of a Legal Principle," (1953) 20 Chicago L.R. p. 193. He also rightly adds that, "In brief, the argument is that we must choose *descriptive* concepts. . . . The reason is that a descriptive concept actually describes certain facts and situations." But being too much under the influence of the Ryle-Ayer-Williams school he contrasts descriptive concepts only with "*emotional* (or ethical) concepts . . . (which) merely label our attitudes *to* certain facts or situations." They need to be contrasted with a much wider range of concepts: and the value of equating emotional concepts with ethical concepts is doubtful.

[12] (1957) 20 M.L.R. p. 414.

[13] See more fully (1956) S.A.L.J. pp. 188 *et seq.*

[14] See (1954) 70 L.Q.R. p. 533.

not clearly distinguish these meanings when he says: "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. . . . When, therefore, a judge states a rule of law, and treats it as applicable to the case before him, the applicability must depend upon his finding that the *material* facts of that case correspond precisely to the *facts* specified in the rule." The notion of material facts of a case corresponding with facts of a rule is one which calls for analysis. Without such analysis there is ignored the whole difficulty of the process of determining under which "class-fact" concepts the particular facts of a case fall. The logical difficulties of this process form the subject-matter of Stone's analysis of the theory of precedent in relation to fallacies of the logical form.[15] The logical construction of a rule of law from the material facts of a case is a process of generalisation. Austin speaks of "general reasons . . . abstracted from the specific peculiarities of the decided . . . cases." Goodhart's distinction of material and immaterial facts is unconsciously based on the difference between "general reasons" and "specific peculiarities." He says: "The facts of person, time, place, kind or amount are presumably immaterial," but there are no such presumptions. What is true is that, in generalising, these qualities are omitted when they merely serve to distinguish between different members of the same class. But the relativity of classification to purpose is a commonplace of logical thought.

We can now more profitably consider the three propositions of Simpson's which I seek to controvert. The first is that Goodhart's arguments lead him to accept the rule of law which the judge in the precedent case has relied on as binding on later judges. This thesis depends on the contention that: "When . . . a judge states a rule of law, and treats it as applicable to the case before him, the applicability must depend upon his finding that the material facts of that case correspond precisely to the facts specified in that rule . . . it both contains the court's conclusion and the court's finding as to the material facts of the case." The fallacy in this is clear once it is realised that "application" of a rule to "facts" is the converse process to that of generalisation from particular fact to "class fact." An historical situation is a combination of particular facts. Many different general propositions "apply" to it: one can theoretically construct many different rules which will apply to the facts of a case. There is no logical reason why the specific proposition that the judge applies should be the one chosen. Each particular fact may be classified under a series of broader concepts, like the series in biological classification through species, genus, family and order. Moreover, the rule applies to a combination of particular facts even though it does not embody the

[15] *The English Judicial Achievement in Relation to Social Change and Fallacies of the Legal Form*, Chap. 7: III in *The Province and Function of the Law*.

concepts relevant to each of them: a rule referring to one class fact applies to any combination of particular facts which contains a member of the class. Thus, any one or more of the particular facts serves as a starting point for different theoretical rules.

If we look at the facts of *Donoghue* v. *Stevenson*, for example, we see that the allegation of the dead snail in the ginger beer bottle was considered material. But we may ask was this an instance of a harmful drink, or a harmful thing for human consumption, or a harmful thing for personal use, or a thing capable of any kind of harm? One of Lord Atkin's generalisations refers, in the widest terms, to any kind of harm, but this did not make it impossible for it to be argued in *Grant* v. *Australian Knitting Mills* [16] that the principle of *Donoghue* v. *Stevenson* was restricted to the manufacture of food. Again, the opaque character of the ginger beer bottle cannot be determined to be significant by any process of logic. One of Lord Atkin's generalisations makes no reference to that fact and was, of course, applicable to the facts. It must be borne in mind, moreover, that it is well-established doctrine that the "material facts" of a case are not to be found solely by reference to the rule explicitly formulated by the judge as the basis of his decision. It must not be assumed that because a judge propounds a rule which does not incorporate a particular fact then that fact has been considered by him to be immaterial. A judgment has to be read *secundum subjectam materiam*. If the speeches in *Donoghue* v. *Stevenson* had made no reference, in the discussion of "law," to the opaqueness of the ginger beer bottle, nevertheless later judges would have been entitled to regard that fact as material, and to limit a general doctrine of liability to a consumer for negligent manufacture by the qualification of absence of intermediate inspection. But both a qualified and an unqualified doctrine of liability apply to the facts of *Donoghue* v. *Stevenson*.[17]

The recent case of *Alsey Steam Fishing Co.* v. *Hillman* [18] serves as another example of the distinction between a judge's statement of a rule of law and his finding of material facts. Willmer J. decided the case on the authority of *The Stonedale (No. 1)* [19] saying:

[16] [1936] A.C. 85. Action against a manufacturer of clothing for dermatitis contracted as the result of wearing his products.

[17] Stone makes a similar analysis of *Donoghue* v. *Stevenson* for the purpose of showing that there is no single general proposition uniquely related to the facts of a case: *Province and Function of Law*, p. 187. He does not, in his theoretical analysis, note the distinction between "class facts" and particular facts, though his analysis of the case presupposes it. His logical reasoning is based on the applicability to a combination of facts of a rule referring to one or more of them. "If there are ten facts, as many general propositions will explain the decision as there are possible combinations of those facts." A fuller theoretical analysis of the process of applying law and facts will be found in my "Law Making and Law Applying" (1956) South African L.J., p. 157, particularly at pp. 189 *et seq.*

[18] [1957] 1 All E.R. 97.

[19] [1956] A.C. 1.

"The decision of the House of Lords in that case is directly in point here." In *The Stonedale* shipowners sought a declaration that they could limit their liability under section 503 of the Merchant Shipping Act, 1894, in respect of a claim brought by the Manchester Shipping Canal Company under the statute governing the canal for the expenses of raising their barge which had sunk in the canal as a result of improper navigation. The declaration was refused. Many rules could be constructed from the "material facts" of the case as "explanations" of the refusal. One rule, for instance, would say that section 503 did not apply to claims by the Manchester Shipping Canal Company under the canal statute. What Willmer J. did, however, was to turn to the "leading speech, with which all the other members of the House agreed, delivered by Viscount Simonds" in the House of Lords. He noted the passage, dealing with the terms of section 503 which dealt with liability of shipowners in respect of loss caused by improper navigation of their ships, which said: "The relief given to shipowners is in respect of their liability to damages and nothing else." He went on to show that this principle was the basis of the refusal by the Lords to give a declaration in respect of a claim which was not one for damages for negligence. This principle, he said, was binding on him, and he applied it to the facts of *Hillman's* case. In that case the shipowner sought to limit his liability to the owner of a tug which was sunk by the improper navigation of the ship while on tow. The tugowner brought an action based on tort to which it was held section 503 applied. He also brought an action based on the towage contract to which it was held section 503 did not apply. The rule of law propounded by the House of Lords in *The Stonedale* was the interpretation placed on section 503. The "material facts" of the case were many; it would be unhelpful to say that they were merely the instance of the negative concept of "not giving rise to a claim to liability in damages for loss by reason of improper navigation of a ship." To define "material facts" as those referred to by the judge in pronouncing a rule of law is to argue in a circle and to reduce Simpson's thesis to a tautology. It is also to depart from the meaning which Goodhart placed on his user of the phrase.

This analysis of *Hillman's* case corresponds with that made by Lord Evershed M.R. in *Wood* v. *Wood* [19a] of the case of *Bragg* v. *Bragg*.[20]

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

[19a] [1957] 2 All E.R. at pp. 21I to 22G.
[20] [1925] P. 20.

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.[20a]

The second thesis I controvert is that the classical theory is not distinguishable from Goodhart's theory. Both this thesis and the first depend on the same argument, *viz.*, 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.

The last thesis to be controverted is that Stone's criticism in *The Province and Function of Law* is directed against the classical theory. It is not. His criticism is indeed directed against what he calls "The English theory of precedent," which he finds formulated by Goodhart, Gray and Salmond.[21] He nowhere criticises the classical theory, since he nowhere refers to it. The theory he criticises is one which, he says, "imports that the particular decision is explained by a *ratio decidendi*, or a general principle of which the particular decision is an application, and which is 'required' or 'necessary' to explain that particular decision."[22] His criticisms are not applicable to an explicit *ratio decidendi* for that is a specific actualisation of one of the possibilities whose logical existence makes the legal category of *ratio decidendi* (in the second sense of the term) one of indeterminate reference.[23] Moreover, they are not fully applicable even to an implicit *ratio decidendi*, for attention to the actual reasoning of the judge negates many of the possibilities which are logically demonstrable.

My final disagreement with Simpson is concerned with his description of my article as contrasting the classical theory with the Goodhart theory. This is to contrast a genus not with another genus but with a species of another genus. Goodhart's theory, as indeed I indicated, and Stone points out, is but one of the class of theories which assert that the rule of law for which a case is of binding authority is not one which is pronounced, explicitly or implicitly, by the judge in the precedent case, but which is constructed by later judges. This latter theory has been for some

[20a] I use *ratio decidendi* with the first of the meanings set out above, *viz.*, in the sense of the rule propounded by the judge.

[21] p. 187, n. 218. Not one of the three authors is English.

[22] Stone, *Province and Function of Law*, p. 187.

[23] Of course his criticism may apply to the vagueness of legal language with its consequences of multiple reference, circuitous reference, etc.

time dominant in English juristic theory. I have contended that it does not correspond with current judicial practice. Support for this juristic doctrine may, however, be found in some recent dicta as well as in past practice.[24] In my earlier article I contrasted the two general theories. My present purpose is to indicate that there is a substantial difference between the theory which says the actual reasoning of a judge is binding, and one which says it may be ignored! This may be very well illustrated by reference to the doctrine of *Tulk* v. *Moxhay*. The rule in *Tulk* v. *Moxhay* cannot be found in the case itself[25]: it is the product of later judicial construction. The principle on which the case was decided was the doctrine of notice: an injunction was decreed against the defendant because he had taken the land with notice of the restrictive covenant he proposed to ignore. But in the course of judicial development the courts evolved as the doctrine, which is still called the doctrine of *Tulk* v. *Moxhay*, one which based the right to an injunction on a number of facts, other than that of notice, which were discerned as being present in the leading case. In this way they arrived at the requirements that the covenant must be negative, that there had to be a dominant and servient tenement, and that there had to be annexation of the covenant to the lands.[26] This was, indeed, to explain *Tulk* v. *Moxhay* by reference to facts which no one in the case had regarded as material.[27] Thus, the development of the rule in *Tulk* v. *Moxhay* does support the theory that the actual reasoning of a judge can be ignored, though it does not support Goodhart's theory that a later court is affected only by what the earlier judge thought were the material facts. It is clear, moreover, that though there may be still room for discussion as to which theory correctly describes English law today, there is a great difference between the classical theory of precedent and the theory which permits cases to be

[24] The best known dictum opposed to the "classical" theory is that of Jessel M.R. in *Osborne to Rowlett* (1880) 13 Ch.D. at p. 785: "It is not sufficient that a case should have been decided upon a principle if that principle itself is not a right principle . . . and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle." An interesting dictum of Denning L.J. impliedly asserting that a case may still be "explained" by reference to some principle other than that upon which it was decided is in *Jess B. Woodcock & Son, Ltd.* v. *Hobbs* [1955] 1 All E.R. at p. 448 H: "Counsel for the plaintiff company said that those three cases were to be explained as cases of collusion: but they were not put on that ground and I do not think it is the correct explanation. . . . The true explanation is, I think, the ground taken by the judges."

[25] (1848) 2 Ph. 774.

[26] It is now law that a purchaser can snap his fingers at a covenant of whose existence he was fully aware. Notice is only material insofar as a purchaser of a legal estate without notice of a restrictive covenant cannot be bound by it (in the absence of registration).

[27] Such a procedure is castigated by Hamson. "It is making nonsense of case law to hold that the 'true reason,' so far from being the expressed *ratio*, was some principle to which nobody on the case adverted." (1937) 53 L.Q.R. at p. 123. This statement was made in reply to a comment by Landon (1936) 52 L.Q.R. 478.

explained by principles other than those propounded by the judge. According to the classical theory the purchaser of an equitable estate would not be bound by a restrictive covenant of which he had no notice: it is only because the classical theory has not been applied to the case of *Tulk* v. *Moxhay* that he is bound.[28]

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[28] There is no actual "decision" to this effect: but there is the established juristic view. See Cheshire, *Modern Real Property* (8th ed.), p. 299. In view of the uncertainty inherent in the doctrine of precedent I would not be surprised by a contrary decision.

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