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PRECEDENT IN ENGLISH LAW

by

RUPERT CROSS and J. W. HARRIS

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Whether a decision of the full court of Divorce and Matrimonial Causes is binding on a judge of first instance is perhaps a somewhat knotty point, but the fact that *Simonin* v. *Mallac* had been impliedly treated as good law by the Court of Appeal and the treatment accorded to it in the House of Lords in *Ross-Smith* v. *Ross-Smith* were enough to induce Sir Jocelyn Simon P to treat himself as bound by it in *Padolecchia* v. *Padolecchia*.[12] We thus have an illustration of the third feature of the English doctrine of precedent mentioned on p. 5. However anomalous a decision of a superior court may be (and the treatment accorded to *Simonin* v. *Mallac* was judicially described as 'the perpetuation of error'),[13] once it has received the blessing of an appellate court, it binds all courts below that court in the hierarchy.

Until recently it was widely supposed that the mere refusal by an appeal committee of the House of Lords of leave to appeal rendered a decision more authoritative. The House emphatically corrected this 'erroneous impression' in *Wilson* v. *Colchester Justices*.[14] There were many reasons why leave might be refused other than approval of the decision. Grant or refusal of leave is in no way to be taken as implying disapproval or approval of the decision and judgments of the court below.

3. COMPARISON WITH FRANCE

Although there are important differences between them, the French legal system may be taken as typical of those of western Europe for the purposes of the present discussion.

From the standpoint of strict legal theory, French law is not based on case-law (*la jurisprudence*) at all. The Civil and Penal Codes are theoretically complete in the sense that they (and other statutory provisions) are supposed to cover every situation with which the ordinary courts are concerned. It can still be argued that, strictly speaking, case-law is not a source of law in France because a judge is not obliged to consider it when coming to a decision. Art. 5 of the Civil Code forbids his laying down general rules when stating a decision, and it would be possible for a French appellate court to set aside a ruling founded exclusively on a past decision on the ground that the ruling lacked an adequate legal

[12] [1967] 3 All ER 863.
[13] *Garthwaite* v. *Garthwaite* [1964] P 356 at 391 *per* Diplock LJ.
[14] (1985) AC 750.

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basis.[15] None the less, there is a substantial body of case-law dealing with the construction of the Codes and the solution of problems on which they are in fact silent. Moreover, there is no code governing the *droit administratif* of the Counseil d'État, which is not numbered among the ordinary courts, and it is mainly based on case-law.

From the practical point of view one of the most significant differences between English and French case-law lies in the fact that the French judge does not regard himself as absolutely bound by the decision of any court in a single previous instance. He endeavours to ascertain the trend of recent decisions on a particular point. To quote a distinguished French legal writer: 'The practice of the courts does not become a source of law until it is definitely fixed by the repetition of precedents which are in agreement on a single point.'[16] Although it has been suggested that statements of this nature do something less than justice to the influence of an occasional single decision on the development of French law,[17] there can be little doubt that a French judge would not have shared Lord Campbell's inhibitions about differing from *R.* v. *Millis*.

Three of the principal reasons for the difference between the French and English approaches to the doctrine of precedent are that the need for certainty in the law was formerly felt more keenly by the English judge than most of the judges on the Continent, the highly centralized nature of the hierarchy of the English courts, and the difference in the position of the judges in the two countries.

The need for certainty

The first point has been stressed by Dr Goodhart. The continental judge has no doubt always wanted the law to be certain as much as the English judge, but he has felt the need less keenly because of

[15] David and De Vrees, *The French Legal System*, 115.

[16] Lambert, 'Case-method in Canada', 39 *Yale LJ* 1 at 14. A helpful account of the operation of precedent in France together with examples of the judgments of French courts is given by Lawson, 'Negligence in Civil Law', 231–5. See also Esmein, *Revue trimestrielle de droit civile* (1902), i. 5; *Encyclopédie Dalloz*, iii. 17; 'Le Droit privé français', by Ripert, i. 9; O. Kahn-Freund, C. Lévy, and B. Rudden, *A Source-book of French Law* (2nd edn.), pt. 1. In Spain it seems that 2 decisions of the Supreme Court constitute a 'doctrina' binding on inferior courts, though the Supreme Court may later alter the 'doctrina' (Neville Brown, 'The Sources of Spanish Law', 5 *Inst. Comp. LQ* (1956), 367.)

[17] Gutteridge, *Comparative Law*, 90.

the background of rules provided first by Roman law and codified custom, and later by the codes of the Napoleonic era. These resulted in a large measure of certainty in European law. Roman law was never 'received' in England, and we have never had a code in the sense of a written statement of the entirety of the law. 'English justice, if it were not to remain fluid and unstable, required a strong cement. This was found in the common-law doctrine of precedent with its essential and peculiar emphasis on rigidity and certainty.'[18]

The hierarchy of the courts

The French judicial system is based on the division of the country into districts. So far as civil cases are concerned, each district has a court of first instance and a court of appeal. The district courts of first instance are not bound by their own previous decisions or those of any other district court of first instance, nor are such courts of first instance bound by the previous decisions of their own appellate court or that of any other district. The district appellate courts are not bound by their own past decisions or those of any other district court of appeal. There is a right of appeal on points of law from the district appellate court to the *Cour de Cassation* in Paris. In theory, this body is not bound by any previous decision of its own, and the district courts are not bound to follow an individual decision of the *Cour de Cassation* in a previous case. So far as the actual litigation under consideration by the *Cour de Cassation* is concerned, that court may remit it for re-hearing by an appellate court of a district near to that from which the appeal came. If the case should be brought before the *Cour de Cassation* again, it is only since 1967 that the Court has had power finally to dispose of the case instead of remitting it to yet another district court of appeal with a binding direction concerning the manner in which it was to be decided.

The more serious criminal cases are tried by a district assize court from which there is no appeal apart from the possibility of an application to the *Cour de Cassation* on a question of law which may result in an order for a new trial.

With a system of courts as decentralized as that which has just been sketched, it would have been difficult for France to have evolved a doctrine of precedent as rigid in every respect as our

[18] 'Precedent in English and Continental Law', *LQR* 50 (1934), 40 at 62.

own. Even if the *Cour de Cassation* had come to treat itself and the district courts as absolutely bound by each of its past decisions, there would almost inevitably have been considerable flexibility at the level of the district courts of appeal. It would have been too much to expect anything approximating to the uniformity of decision demanded of the English judges. French law owes its uniformity to the various codes in which it is declared and to *la doctrine*—the opinions of jurists—rather than to *la jurisprudence*.

The different position of the judges

The French judge occupies a very different position from that of his English counterpart. In the first place, there are fewer judges of our superior courts than there are members of the French judiciary. Secondly, the French judiciary is not, like ours, recruited from the Bar but from the civil service, and thirdly, many French judges are relatively young and inexperienced men. They go into the Ministry of Justice with the intention of taking up a judicial career and become junior judges in small district courts after what is little more than a period of training. The result is that the judiciary tends to be considered as less important in France than in England, and, although it is difficult to assess the significance of these matters, it is generally, and probably rightly, assumed that they help to explain the greater regard which is paid to case-law in this country than that which is paid to it on the Continent. Still more important is the fact that the judges have been the architects of English law.

> The common law is a monument to the judicial activity of the common law judge. He, not the legislator or the scholar, created the common law. He still enjoys the prestige of that accomplishment.[19]

Further reasons for the difference

Allowance must also be made for the difference in the structure of the judgments of English and French courts to be mentioned on p. 49 and for the vast number of cases decided by the *Cour de Cassation*. A rule that a single precedent should be binding would be unlikely to develop when it was difficult to discover a precise *ratio decidendi* and it is not always easy to extract a precise *ratio* from a French judgment. A rule that one single decision of an appellate court should suffice to constitute a binding precedent is

[19] von Mehren, *The Civil Law System*, 839.

hardly likely to develop in a jurisdiction in which there are numerous appeals. The House of Lords only hears some 30 appeals from the English courts each year, but some 10,000 cases are dealt with annually by the different chambers of the *Cour de Cassation*.

Notwithstanding the great theoretical difference between the English and French approaches to case-law, and the total absence of rules of precedent in France, the two systems have more in common than might be supposed. In the first place, French judges and writers pay the greatest respect to the past decisions of the *Cour de Cassation*.[20]

Secondly, the manner in which the English judges interpret the *ratio decidendi* of a case tends to assimilate their attitude towards a legal problem to that of their French counterparts. In *Wells* v. *Hopwood*,[21] for example, the Court of King's Bench had to decide whether a vessel had been 'stranded' within the meaning of a charter party. A number of previous decisions had some bearing on this point, and Lord Tenterden CJ dealt with them in the following terms:

> Several of the cases hitherto decided on this subject are very near to each other, and not easily distinguishable. But it appears to me that a general principle and rule of law may, although perhaps not explicitly laid down in any of them, be fairly collected from the greater number.[22]

Lord Tenterden proceeded to formulate a principle on the basis of which he solved the problem before him. This is a common type of judicial reasoning in England, and further reference will be made to it in due course. It means that several cases dealing with the same point may have to be read together in order to determine the proposition of law for which any one is authoritative at a given time. It would be wrong to say that, in deciding case *D*, an English High Court judge of first instance considers cases *A* and *B*, decided by the Court of Appeal, together with case *C*, decided by another High Court judge of first instance, in order to see whether

[20] 'On peut dire sans paradoxe que la cour de cassation a plus de respect pour les arrêts de ses chambres réunies que pour la loi elle-même, car s'il lui arrive d'altérer ou de modifier la loi sous couleur de l'interpréter, elle n'abandonne jamais la jurisprudence créée par un arrêt des chambres réunies': *Encyclopédie Dalloz*, iii. 22, para. 26. Since 1967 the description of a full session of all the chambers of the *Cour de Cassation* has been 'Assemblée Plénère'.

[21] (1832) 3 B. & Ald. 20.

[22] At 34. For a modern example, see *Unit Construction Company Ltd.* v. *Bullock* [1960] AC 351 at 368 *per* Lord Radcliffe.

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the law has become 'definitely fixed by the repetition of precedents which are in agreement on a single point'. However, his attitude towards the *ratio decidendi* of case *A* might be profoundly affected by the observations of the judges in cases *B* and *C*. English case-law is not the same as *la jurisprudence*, but it is a mistake to suppose that our judges permanently inhabit a wilderness of single instances. If, for the time being, we ignore the difference in the form in which the English and French judges express their conclusions, it seems that the divergence between the two systems is most noticeable when there is only one important decision on the point before the court, as was the case in *Beamish* v. *Beamish*. It is quite possible that a French judge of first instance would have felt himself as much bound to follow *Simonin* v. *Mallac* as did Sir Jocelyn Simon in *Padolecchia* v. *Padolecchia*, although this would be on account of the fact that *Simonin* v. *Mallac* had been followed on numerous occasions rather than on account of the fact that the decision had received the blessing of appellate courts on relatively few occasions. A further respect in which the two systems of case-law differ profoundly is due to Art. 5 of the Civil Code which prohibits a judge from laying down general rules. It is not uncommon for the judgments of English appellate courts to lay down rules, concerning the quantum of damages for example, to be followed by lower courts in the future. This could hardly happen in France. On the other hand, whilst, as we shall see, the *ratio decidendi* of a binding English case may be narrowed by subsequent distinguishing so that the rule for which it comes to be seen as authority is not as broad as its original formulation, this does not happen to the statements of the *Cour de Cassation*. The latter may, in practice, harden into rules of law as strongly tied to their formulation as statutory rules. Paradoxically, then, although Art. 5 denies the status of 'formal' sources of law to the decisions of the court, as 'material' or 'historical' sources they may, through constant repetition, acquire greater legislative effect even than decisions of the House of Lords.

4. COMPARISON WITH THE EUROPEAN COURT OF JUSTICE

Since 1 January 1973 directly applicable law of the European communities has constituted a source of English law. The implications of this development for English rules of precedent are

considered at the end of Chapter V. At this stage something will be said, for comparative purposes, about the attitude adopted by the European Court of Justice in Luxemburg to its own previous decisions.[23] The jurisprudence established by these decisions has become an increasingly important part of European Community law and, consequently, of increasing significance for lawyers in all member states.

The style of the judgments of the European Court resembles that of French superior courts considered in the last section, and, to some extent, French understanding of the status, as sources of law, of judicial rulings has been carried over. Thus, although, when a reference is made under Art. 177 of the Treaty of Rome by the court of a member state for a preliminary ruling on a point of Community law, the ruling handed down by the European Court is binding on the referring court for the case at hand, it has never been explicitly stated that such rulings are binding in other cases. Nevertheless, the view that they are so binding is implicit in some of the Court's judgments.[24]

Furthermore, under the jurisprudence of the European Court, a national court is always free to ask the European Court to reconsider its previous rulings. This was originally decided in the *Da Costa* case.[25] There a Dutch court referred to the European Court of Justice the same question of treaty interpretation it had put in an earlier case. The European Court held that it could consider the question, but in the absence of new factors simply referred the Dutch court to its earlier ruling.

It follows that the European Court of Justice does not regard itself as bound by its own previous decisions. Advocate-General Lagrange submitted that it could reconsider them in the light of new facts and arguments or simply because it thought a different conclusion appropriate.[26] The Court has exercised this freedom in a number of cases, most strikingly when it removed a much

[23] See N. Brown and F. G. Jacobs, *The Court of Justice of the European Communities* (3rd edn.), 311–18.

[24] See e.g. 66/80 *International Chemical Corporation SpA* v. *Amministrazione delle Finanze dello Stato* [1981] ECR 1191 and 112/83 *Société des Produits des Mais SA* v. *Administration des Douanes et Droits Indirects* [1988] 1 CMLR 459, both holding that an Art. 177 ruling that a Community measure is invalid is sufficient reason for all national courts to so regard it.

[25] 28–30/62 *Da Costa en Schaake NV* v. *Nederlandse Belasting Administratie* [1963] ECR 31.

[26] Ibid. 42–3.

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[27] See 4/69 *Lütticke GmbH*
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[28] 112/76 *Manzoni* v. *Fon*
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[29] T. Koopmans, 'Stare
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criticized jurisdictional hurdle it had erected as a barrier to actions for non-contractual wrongs.[27]

The practice of the European Court of Justice

Nevertheless, in practice the European Court of Justice generally adheres to precedent. It frequently repeats paragraphs from earlier cases, referring to them by name, albeit sometimes with slight changes in the wording. It is often hard to know whether such changes are accidental or are designed to indicate a shift of emphasis. Although the Court often explicitly follows one of its previous rulings, it does not discuss them in an analytical way. Nor does it make any attempt to distinguish them or explain why it is not following them, where an English court in comparable circumstances would think that course appropriate. However, there is almost always a full discussion of the relevant precedents in the Advocate-General's opinion given before the Court considers its judgment. (The Court further gives no explanation when, as is often the case, it does not follow the Advocate-General's opinion.)

It almost goes without saying that the European Court does not draw the distinction, essential to the English doctrine of precedent, between *ratio* and *obiter dictum*. The distinction has, however, been drawn by Advocate-General Warner,[28] and one judge of the Court writing extrajudicially has argued that the European Court has adopted it in practice.[29] It is most improbable that the Court would draw the distinction explicitly. For to do that would be to accept the doctrine of *stare decisis* at a theoretical level, and that, as we have seen in the case of France, is foreign to civil law jurisdictions. Further, the style of the Court's rulings does not lend itself to the articulation of the distinction. They tend to be short, certainly compared with the judgments of English appellate courts, and dogmatic in tone—with much discussion of abstract principle and less detailed examination of the facts. Another difference from English decisions is the absence of separate

[27] See 4/69 *Lütticke GmbH* v. *Commission of the EEC* [1971] ECR 325, in effect overruling on this point 25/62 *Plaumann and Co.* v. *Commission of the EEC* [1963] ECR 95.

[28] 112/76 *Manzoni* v. *Fonds National de Retraite des Ouvriets Mineurs* [1977] ECR 1647, 1662.

[29] T. Koopmans, 'Stare Decisis in European Law', in D. O'Keefe and H. G. Schermers (eds.), *Essays in European Law and Integration* (Amsterdam, 1982), 11, 22–3.

concurring and dissenting judgments. This feature of English (and United States) judicial practice often makes it extremely hard to determine the *ratio* of appellate rulings. This difficulty does not exist in the interpretation of the European Court's rulings. On the other hand, the absence of any discussion of precedent and the abstract style of the Court's judgments frequently makes for compensating problems of interpretation.

Reasons for the differences

In practice it may be that the European Court's attitude to precedent is similar to that of some superior Commonwealth and United States Courts. On the other hand, it is probably more prepared to depart from its case-law than is the House of Lords. Moreover, when it does so, the Court does not seem to consider itself under any obligation to explain its change of mind. An obvious reason for the differences is that the European Court of Justice is primarily a court in the civil law tradition. The vast majority of its thirteen members have been educated and have practised in civil law jurisdictions, where the notion of binding case-law and the *ratio obiter* distinction are unknown. Continental, and particularly French, modes of legal thought have prevailed since the period before Britain and Ireland joined the Community. The discussion in the last few pages of the French judicial system is therefore pertinent in this context.

It should also be stressed that the Court of Justice is as much a constitutional as an administrative (or other type of) court. For example, it decides disputes between the political institutions of the Community and has formulated various principles governing the relationship of the community and national legal systems. Just as the United States Supreme Court has been prepared freely to overrule its own previous decisions, so the European Court is ready to extend or (some would say) disregard precedent, when it considers this constitutionally opportune. There are some good general arguments for allowing constitutional courts (or courts like the European Court which exercise constitutional functions) more freedom to disregard precedent than ordinary private or common law courts. In the European Community context, it can also be said that the difficulties of Treaty amendment make it imperative for its provisions to be interpreted in a flexible way, which may make it right to overrule outdated decisions. Secondly, the Court's own errors cannot easily be put right. The EEC legislative process

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is cumbersome and ill-suited to correcting judicial mistakes. Furthermore, in many areas of constitutional importance, for example in its development of the doctrine of direct effect, the European Court has often behaved quite unlike the English courts: it prefers to interpret Treaty provisions in the light of their spirit rather than their text, and appears equally prepared to treat its precedents in the same way.[30]

5. CONTRAST WITH USA

Although the North American practice of giving judgment in the form of elaborate discussions of previous cases is more like the English than the continental, the United States' Supreme Court and the appellate courts in the different states do not regard themselves as absolutely bound by their past decisions. There are many instances, some American lawyers would say too many, in which the Supreme Court has overruled a previous decision.

Thanks to the change of practice in the House of Lords, the English rules of precedent may come to approximate more closely to the North American, but two reasons why the North American rules should remain more lax suggest themselves. These are the number of separate State jurisdictions in the former country and the comparative frequency with which the North American courts have to deal with momentous constitutional issues.

Numerous jurisdictions

A multiplicity of jurisdictions produces a multiplicity of law reports which has, in its turn, influenced the teaching of law and led to the production of 'restatements' on various topics. The 'case method' of instruction which, in one form or another, prevails in most North American law schools aims at finding the best solution of a problem on the footing of examples from many jurisdictions, and few schools confine their instruction to the law of any one State. The restatements are concise formulations and illustrations of legal principles based on the case-law of the entire United States and, from time to time, model codes and sets of uniform rules relating to various branches of the law are produced in a form fit for immediate adoption by the legislature. Judges who have been trained by the case method and who are familiar with the

[30] See Lord Diplock in *R.* v. *Henn & Darby* [1982] AC 850 for a discussion of the different approaches of the ECJ and English courts to interpretation.