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## DETERMINING THE RATIO DECIDENDI OF A CASE

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IN discussing the nature of a precedent in English law Sir John Salmond says:

"A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large."<sup>1</sup>

The rule is stated as follows by Professor John Chipman Gray:

"It must be observed that at the Common Law not every opinion expressed by a judge forms a Judicial Precedent. In order that an opinion may have the weight of a precedent, two things must concur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*."<sup>2</sup>

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<sup>1</sup> SALMOND, JURISPRUDENCE (7th ed. 1924) 201.

<sup>2</sup> GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) 261. Cf. 2 AUSTIN, JURISPRUDENCE (5th ed. 1885) 627: "It follows from what has preceded, that law made judicially must be found in the general *grounds* (or must be found in the general *reasons*) of judicial decisions or resolutions of specific or particular cases: that is to say, in such *grounds*, or such *reasons*, as detached or abstracted from the specific peculiarities of the decided or resolved cases. Since no two cases are precisely alike, the decision of a specific 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, and cannot serve as a rule or guide of conduct.

The general reasons or principles of a judicial decision (as thus abstracted from any peculiarities of the case) are commonly styled, by writers on jurisprudence, the *ratio decidendi*."

Both the learned authors, on reaching this point of safety, stop. Having explained to the student that it is necessary to find the *ratio decidendi* of the case, they make no further attempt to state any rules by which it can be determined. It is true that Salmond says that we must distinguish between the concrete decision and the abstract *ratio decidendi*, and Gray states that the opinion must be a necessary one, but these are only vague generalizations. Whether it is possible to progress along this comparatively untrodden way in a search for more concrete rules of interpretation will be discussed in this paper.<sup>3</sup>

The initial difficulty with which we are faced is the phrase "*ratio decidendi*" itself. With the possible exception of the legal term "malice," it is the most misleading expression in English law, for the reason which the judge gives for his decision is never the binding part of the precedent. The logic of the argument, the analysis of prior cases, the statement of the historical background may all be demonstrably incorrect in a judgment, but the case remain a precedent nevertheless. It would not be difficult to cite a large number of leading cases, both ancient and modern, in which one or more of the reasons given for the decision can be proved to be wrong; but in spite of this these cases contain valid and definite principles which are as binding as if the reasoning on which they are based were correct.

In *Priestley v. Fowler*<sup>4</sup> the famous or infamous doctrine of common employment was first laid down. Of this case it has been well said, "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase."<sup>5</sup> Yet the case is still law in England (although limited in effect by the Employers Liability Act of 1880) in spite of the fact that the two reasons on which Lord Abinger based his judgment are palpably incorrect. The first reason is that any other rule would be "absurd." This argument is always a dangerous one upon which to base a judgment and in this instance, it is, unfortunately, the rule in *Priestly v. Fowler* which has proved to be not only

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ALLEN, *LAW IN THE MAKING* (2d ed. 1930) 155: "Any judgment of any Court is authoritative only as to that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true *ratio decidendi* was."

<sup>3</sup> WAMBAUGH, *STUDY OF CASES* (2d ed. 1894) is perhaps the leading authority on this subject. On page 29 the learned author gives "The Four Keys to the Discovery of the Doctrine of a Case." They are: (1) the court must decide the very case before it; (2) the court must decide the case in accordance with a general doctrine; (3) the words used by the court are not necessarily the doctrine of the case; (4) the doctrine of the case must be a doctrine that is in the mind of the court.

<sup>4</sup> 3 M. & W. 1 (1837).

<sup>5</sup> Cited in KENNY, *CASES ON THE LAW OF TORT* (5th ed. 1928) 90.

absurd but also unjust. The second reason given by Lord Abinger is that by his contract of service a servant impliedly consents to run the risk of working with negligent fellow-servants. In fact, of course, a servant does not consent to run the risk; the implication was invented by the judge himself.

In *Hochster v. Delatour*<sup>6</sup> the defendant engaged the plaintiff on April 12 to enter his service on June 1, but on May 11 he wrote to him that his services would not be needed, thus renouncing the agreement. On May 22 the plaintiff brought an action, and the court held that he was not premature in doing so. Lord Campbell, C.J., said: "It is surely much more rational . . . that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue."<sup>7</sup> But, as Professor Corbin has pointed out, even though this statement is entirely correct, "it does not follow therefrom that the plaintiff should be allowed to sue *before the date fixed for performance* by the defendant".<sup>8</sup> It is clear that, after repudiation, the other party need not perform his part nor remain ready and willing to perform it, but why should he be given the immediate right to sue for damages which will only arise when the threatened breach actually occurs? Lord Campbell's *non sequitur* has not, however, prevented *Hochster v. Delatour* from becoming a leading case in the law of contract, for although the reasoning of the judgment may be at fault, we have no difficulty in finding in it a general rule which will apply to similar cases.

For that matter, by what may seem a strange method to those who do not understand the theory of the Common Law, it is precisely some of those cases which have been decided on incorrect premises or reasoning which have become the most important in the law. New principles, of which their authors were unconscious or which they have misunderstood, have been established by these judgments. Paradoxical as it may sound, the law has frequently owed more to its weak judges than it has to its strong ones. A bad reason may often make good law. Street has put this clearly in his *Foundations of Legal Liability*:

"The dissenting opinion of Coleridge, J., in *Lumley v. Gye* (1853), like the dissenting opinions of Cockburn, C.J., in *Collen v. Wright* (1857), and of Grose, J., in *Pasley v. Freeman* (1789), is exceedingly instructive, for it brings into clear relief the fact that the decision of the majority embodied a radical extension of legal doctrine, not to say an actual departure from former precedents. Nothing better illustrates the process by

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<sup>6</sup> 2 E. & B. 678 (1853).

<sup>7</sup> *Ibid.* 688.

<sup>8</sup> ANSON, LAW OF CONTRACT (Corbin's 2d ed. 1924) 464.

which the law grows. That situation which to one judge seems to be only a new instance falling under a principle previously recognized, will to another seem to be so entirely new as not to fall under such principle. It will not infrequently be found that the judge of greatest legal acumen, the greatest analyzer, is the very one who resists innovation and extension. This, indeed, is one of the pitfalls of much learning."<sup>9</sup>

Our modern law of torts has been developed to a considerable extent by a series of bad arguments, and our property law is in many instances founded on incorrect history. To state this is not, however, to question the authority of that law. It is clear therefore, that the first rule for discovering the *ratio decidendi* of a case is that it must not be sought in the reasons on which the judge has based his decision.

This view is in conflict with two often-quoted dicta which, by force of repetition, have almost become maxims of the law: "The reason of a resolution is more to be considered than the resolution itself," by Holt, C.J.,<sup>10</sup> and "The reason and spirit of cases make law; not the letter of particular precedents," by Lord Mansfield, C.J.<sup>11</sup> But, however true these dicta may have been of the law at the time they were pronounced, it is clear, as Professor Allen has shown,<sup>12</sup> that they are not in accord with the modern English doctrine of precedent.

Having stated its reasons for reaching a certain conclusion, the court frequently sums up the result in a general statement of the law on the point at issue. Can we find the principle of the case in this proposition of law, this comprehensive expression of the rule involved, which students underline with such enthusiasm in their casebooks? Thus in the chapter on Judgments in Halsbury's *The Laws of England*, the rule is given as follows:

"It may be laid down as a general rule that that part alone of a decision of a court of law is binding upon courts of co-ordinate jurisdiction and inferior courts which consists of the enunciation of the reason or principle upon which the question before the court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the *ratio decidendi*."<sup>13</sup>

Professor Morgan of the Harvard Law School, in his valuable book *The Study of Law*, says:

"Those portions of the opinion setting forth the rules of law applied by the court, the application of which was required

<sup>9</sup> 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) 343.

<sup>10</sup> *Cage v. Acton*, 12 Mod. 288, 294 (1796).

<sup>11</sup> *Fisher v. Prince*, 3 Burr. 1363, 1364 (1762).

<sup>12</sup> ALLEN, *op. cit. supra* note 2, at 150.

<sup>13</sup> 18 HALSBURY, LAWS OF ENGLAND 210.

for the determination of the issues presented, are to be considered as decision and as primary authority in later cases in the same jurisdiction."<sup>14</sup>

If these statements are to be understood in their literal sense, it is respectfully submitted that the words are misleading, for 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. There may be no rule of law set forth in the opinion,<sup>15</sup> or the rule when stated may be too wide or too narrow. In appellate courts, the rules of law set forth by the different judges may have no relation to each other. Nevertheless each of these cases contains a principle which can be discovered on proper analysis.

So also a case may be a precedent, involving an important principle of law, although the court has given judgment without delivering an opinion. At the present time, although occasionally an appellate court will affirm without opinion a case which involves an interesting point, we rarely find a case of any importance in which an opinion has not been written. In the past, however, especially during the Year Book period, we find a great number of cases in which there were no opinions and in which the principle therefore must be sought elsewhere.

Of more frequent occurrence in recent cases is the practice of delivering an opinion, but at the same time being careful not to state any general principle of law. In the recent case of *Oliver v. Saddler & Co.*<sup>16</sup> the House of Lords was faced with a doubtful and difficult question in the law of torts. It is obvious that their lordships were anxious to guard themselves against laying down any general principles; they therefore devoted themselves almost entirely to the facts. The reporter is equally cautious, for in the headnote he uses the phrases, "in the special circumstances of the case," and "on the facts." Nevertheless, the case is an important precedent which, in the future, will have to be cited in every book on the law of torts.

Again, a case may contain a definite principle, although the expression of it in the opinion may not be strictly accurate. In

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<sup>14</sup> MORGAN, *THE STUDY OF LAW* (1926) 109. In his examination, on the same page, of the judgments in *Dickinson v. Dodds*, 2 Ch. D. 463 (1876), Professor Morgan adopts an entirely different method. He says, "This case then may be said to be a decision upon three propositions which are nowhere specifically phrased in it, and to contain only dicta as to three propositions which may be quoted in the exact language of Lord Justice Mellish."

<sup>15</sup> In this paper it is convenient to follow the American practice of distinguishing between the opinion, in which the judge states his reasons for the judgment he is about to give, and the judgment itself. This distinction in terms is not infrequently made in the House of Lords.

<sup>16</sup> [1929] A. C. 584. See note on this case (1930) 46 L. Q. REV. 2.

*Rex v. Fenton*<sup>17</sup> the prisoner caused the death of a man by wantonly throwing a large stone down a mine. In his charge to the jury Tindal, C.J., said:

"If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter."<sup>18</sup>

The principle of the case was correct, although the statement of it was too wide, as was held in the later case of *Regina v. Franklin*.<sup>19</sup> In that case the prisoner threw a box belonging to a refreshment stall keeper into the sea, thereby killing a swimmer. The point at issue was whether, apart from the question of negligence, the prisoner was guilty of manslaughter, his act having been a wrongful one. Field, J., said:

"We do not think the case cited by the counsel for the prosecution is binding upon us in the facts of this case, and, therefore, the civil wrong against the refreshment-stall keeper is immaterial to this charge of manslaughter."<sup>20</sup>

A striking example of an overstatement of the principle involved in a case may be found in *Riggs v. Palmer*.<sup>21</sup> The court held that a legatee, who had murdered his testator, could not take under the will, because no one shall be permitted "to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."<sup>22</sup> It would, of course, be possible to give a large number of situations in which this statement would be wrong or doubtful. Would it

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<sup>17</sup> 1 Lew. C. C. 179 (1830).

<sup>18</sup> *Ibid.*

<sup>19</sup> 15 Cox C. C. 163 (1883).

<sup>20</sup> *Ibid.* 165. I have purposely borrowed these two examples from Professor Joseph F. Francis' article, *Three Cases on Possession—Some Further Observations* (1928) 14 ST. LOUIS L. REV. 11, 16, n. 24a, in which he criticizes very courteously my article *Three Cases on Possession* (1928) 3 C.A.M.B. L. J. 195. He, following Professor Oliphant, suggests that the important thing in a case is, "what is in fact *done* by the judges apart from what they have *said*." He objects to my suggestion that in *Bridges v. Hawkesworth*, 21 L. J. N. S. 75 (1851), the fact that the notes were found in a shop could not be part of the *ratio decidendi* because the judge had stated that the place where the notes were found was not a material fact. Professor Francis says at page 16, "So I should say that it is not what Patteson, J., said or failed to say that determines what the *Bridges* case decides." To support his contention, the learned author advances the indisputable proposition that a judge's statement of law does not necessarily contain the true *ratio decidendi* of the case. This, however, does not in any way conflict with my view that, in determining the principle of a case, we are bound by the judge's statement of the material facts on which he has based his judgment.

<sup>21</sup> 115 N. Y. 506, 22 N. E. 188 (1889).

<sup>22</sup> *Ibid.* 511, 22 N. E. at 190.

apply, for example, if the legatee had negligently killed the testator in a motor accident? The principle of *Lickbarrow v. Mason* is universally accepted, but the statement of Ashhurst, J., "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it"<sup>23</sup> is too wide, and has encouraged much vain litigation. As Lord Lindley remarked, "Such a doctrine is far too wide . . . it cannot be relied upon without considerable qualification."<sup>24</sup>

On the other hand the rule of law may be stated in too narrow a form. In *Barwick v. English Joint Stock Bank*<sup>25</sup> the defendant's bank manager fraudulently induced the plaintiff to accept a valueless guarantee. In delivering the judgment of the court, Willes, J., said:

"The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."<sup>26</sup>

It was generally believed that this statement of the law was correct until, forty-five years later, the House of Lords in *Lloyd v. Grace, Smith & Co.*<sup>27</sup> held that it was too narrow. The words "and for the master's benefit" were merely descriptive of the facts in the *Barwick* case, and not a necessary part of the principle involved. The House of Lords did not disapprove of the principle of the *Barwick* case, but held that "it is . . . a mistake to qualify it by saying that it only applies when the principal has profited by the fraud."<sup>28</sup>

When we consider the appellate courts it becomes even more obvious that the principle of the case cannot necessarily be found in the rule of law enunciated, for it is not infrequent to find that, although the judges may concur in the result, they differ widely in their statements of the law. This is true in particular in England, for in an important case each judge may deliver a separate opinion. In *Hambrook v. Stokes Bros.*,<sup>29</sup> Atkin, L.J., (now Lord Atkin) concurred with Bankes, L.J., that the plaintiff had a good cause of action, but the rule of law he set forth was exceedingly wide while that of Bankes, L. J., was correspondingly narrow. The famous trilogy of conspiracy cases—*Mogul Steamship Co. v. McGregor, Gow & Co.*,<sup>30</sup> *Allan v.*

<sup>23</sup> 2 T. R. 63, 70 (1787).

<sup>24</sup> See *Farquharson Bros. & Co. v. King & Co.*, [1902] A. C. 325, 342.

<sup>25</sup> L. R. 2 Ex. 259 (1867).

<sup>26</sup> *Ibid.* 265.

<sup>27</sup> [1912] A. C. 716.

<sup>28</sup> *Ibid.* 736, per Lord Macnaghten.

<sup>29</sup> [1925] 1 K. B. 141.

<sup>30</sup> [1892] A. C. 25.

*Flood*; <sup>31</sup> *Quinn v. Leathem*<sup>32</sup>—are of peculiar difficulty because of the conflicting statements of the law in the various opinions. As Lord Sumner remarked in *Sorrell v. Smith*:

"I shall not attempt to collect or compare quotations from the opinions delivered in that [*Quinn v. Leathem*] and other cases. They are occasionally expressed in varying terms. In this matter I have not found myself qualified to offer an eirenicon or even an anthology."<sup>33</sup>

Nevertheless these cases cannot be ignored as precedents on the ground that the rules of law set forth cannot be reconciled.

Since, therefore, the principle of the case is not necessarily found in either the reasoning of the court or in the proposition of law set forth, we must seek some other method of determining it. Does this mean that we can ignore the opinion entirely and work out the principle for ourselves from the facts of the case and the judgment reached on those facts? This seems to be the view of a certain American school of legal thought represented by Professor Oliphant. According to him it is what the judge does and not what he says that matters. He writes:

"But there is a constant factor in the cases which is susceptible of sound and satisfying study. The predictable element in it all is what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions, but which way they decide cases, will be the dominant subject matter of any truly scientific study of law."<sup>34</sup>

Undoubtedly this theory has the attractiveness of simplicity. No longer will we have to analyze the sometimes lengthy and difficult opinions of the judges; all that we are concerned with are the facts and the conclusion. The judge who writes an opinion will be wasting both his own time and ours, for it is not what he says but what he does that matters. We can ignore the vocal behaviour of the judge, which sometimes fills many pages, and concentrate upon his nonvocal behaviour which occupies but a few lines.<sup>35</sup>

<sup>31</sup> [1898] A. C. 1.

<sup>32</sup> [1901] A. C. 495.

<sup>33</sup> [1925] A. C. 700, 734.

<sup>34</sup> Oliphant, *A Return to Stare Decisis* (1927) HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 76. This address is reprinted in (1928) 14 A. B. A. J. 71, 159.

<sup>35</sup> Oliphant, *op. cit. supra* note 34, at 82, 14 A. B. A. J. at 161: "Why has not our study of cases in the past yielded the results now sought? The attempt has been made to show that this is largely due to the fact that we have focused our attention too largely on the *vocal behavior* of judges in deciding cases. A study with more stress on their *nonvocal behavior*, *i.e.*, what the judges actually do when stimulated by the facts of the case before them, is the approach indispensable to exploiting scientifically the wealth of material in the cases."

Unfortunately I believe that there is a fallacy in Professor Oliphant's argument which will prevent our following this convenient course. The fallacy lies in suggesting that the facts of a case are a constant factor, that the judge's conclusion is based upon the fixed premise of a given set of facts. We do not have to be philosophers to realize that facts are not constant but relative. The crucial question is "What facts are we talking about?" The same set of facts may look entirely different to two different persons. The judge founds his conclusions upon a group of facts selected by him as material from among a larger mass of facts, some of which might seem significant to a layman, but which, to a lawyer, are irrelevant. 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 analyzing 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. A congeries of facts is presented to him; he chooses those which he considers material and rejects those which are immaterial, and then bases his conclusion upon the material ones. To ignore his choice is to miss the whole point of the case. Our system of precedent becomes meaningless if we say that we will accept his conclusion but not his view of the facts. His conclusion is based on the material facts as he sees them, and we cannot add or subtract from them by proving that other facts existed in the case. It is, therefore, essential to know what the judge has said about his choice of the facts, for what he does has a meaning for us only when considered in relation to what he has said. A divorce of the conclusion from the material facts on which that conclusion is based is illogical, and must lead to arbitrary and unsound results.

The first and most essential step in the determination of the principle of a case is, therefore, to ascertain the material facts on which the judge has based his conclusion. Are there any rules which will help us in isolating these material facts? It is obvious that none can be found which will invariably give us the desired result, for if this were possible then the interpretation of cases, which is one of the most difficult of the arts, would be comparatively easy. The following tentative suggestions may, however, prove of some aid to the student faced with his first case-book.

If there is no opinion, or if the opinion does not contain a statement of the facts, then we must assume that all the facts given in the report are material except those which on their face are not. Thus the facts of person, time, place, kind, and amount are presumably immaterial unless stated to be material.

As a rule the law is the same for all persons, at all times, and at all places within the jurisdiction of the court. For the purposes of the law a contract made between *A* and *B* in Liverpool on Monday involving the sale of a book worth £10 is identical with a similar contract made between *C* and *D* in London on Friday involving the sale of a painting worth £100,000.

Where there is an opinion but the facts are not stated in it we must examine the report with great care, for the reporter may have left out an essential point. It is for this reason in particular that it is useful to compare the various reports of the same case if there is any doubt as to the principle involved in it. The well known case of *Williams v. Carwardine* has troubled generations of law students because the report usually referred to is the one in 4 Barnewall and Adolphus at page 621. The facts, as given there, merely show that the defendant offered a reward for certain information and that the plaintiff gave the information for motives unconnected with the reward. It is not stated that the plaintiff knew of the offer. But in the report of the case in 5 Carrington and Payne the following colloquy is given at page 574: "

"Denman, C.J.—Was any doubt suggested as to whether the plaintiff knew of the handbill at the time of her making the disclosure?

Curwood (for the defendant). She must have known of it, as it was placarded all over Hereford, the place at which she lived."

By omitting a material fact, *viz.*, knowledge of the offer of the reward, the report in Barnewall and Adolphus makes nonsense of the case.<sup>36</sup> This is not infrequent in those cases in which the facts are stated by the reporter, for, either owing to a misunderstanding of the point involved or a zeal for compression, he may have left out an essential fact. At the present time, however, the absence of an opinion, or of an opinion which states the facts, is so infrequent that it is unnecessary to discuss this situation at greater length.

If there is an opinion which gives the facts, the first point to notice is that we cannot go behind the opinion to show that the facts appear to be different in the record. We are bound by the judge's statement of the facts even though it is patent that he has mistated them, for it is on the facts as he, perhaps incorrectly, has seen them that he has based his judgment. The difficulty in the much discussed revocation-of-offer case, *Dickinson v. Dodds*,<sup>37</sup> is due chiefly to the fact that the reporter in his in-

<sup>36</sup> In MILES AND BRIERLY, *CASES ON THE LAW OF CONTRACT* (1923) 6, n. 1, this point is made by the learned editors.

<sup>37</sup> 2 Ch. D. 463 (1876).

troductory statement says, "The plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allen,"<sup>38</sup> while, when we turn to the judgments, we find that James, L.J., says:

"In this case, beyond all question the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer.' This is evident from the plaintiff's own statement in the bill."<sup>39</sup>

Mellish, L.J., states the facts as follows:

"Then Dickinson is informed by Berry that the property has been sold by Dodds to Allen. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it."<sup>40</sup>

If we take the reporter's facts, the conclusion reached in *Dickinson v. Dodds* is astonishing; if we accept, as we are bound to do, the facts as given in the judgments the conclusion seems a reasonable one.

Two other cases illustrate this point in an interesting manner. In *Smith v. London and South Western Ry.*, Kelly, C.B., Channel, B., and Blackburn, J., each assumed as a fact "that no reasonable man would have foreseen that the fire would get to the plaintiff's cottage."<sup>41</sup> We lose the whole point of their judgments if we attempt to explain them by showing that a reasonable man should have foreseen that the fire might reach the cottage.<sup>42</sup> Similarly in *In Re Polemis and Furness, Withy & Co.*<sup>43</sup> the Court of Appeal was bound by the arbitrators' finding of fact that a reasonable man would not have anticipated that a plank falling into the hold of a steamer filled with petrol vapour might cause an explosion. This finding of fact is probably incorrect, but we cannot ignore it if we are to determine the true principle of the judgments based on it. As has already been said, if we are not bound by the facts as stated by the judge

<sup>38</sup> *Ibid.* 464.

<sup>39</sup> *Ibid.* 472. As we do not have the plaintiff's bill, it is obvious that it is impossible to dispute the statement of facts given by James, L.J., even though it is in conflict with that of the reporter.

<sup>40</sup> *Ibid.* 474.

<sup>41</sup> L. R. 6 C. P. 14, 20 (1870). This case is discussed at considerable length in my article *The Unforeseeable Consequences of a Negligent Act* (1930) 39 YALE L. J. 449.

<sup>42</sup> This is what a number of learned American writers have attempted to do. See article cited *supra* note 41. For a similar explanation of the Smith case see Green, *The Palsgraf Case* (1930) 30 Col. L. Rev. 789, 792, n. 5a.

<sup>43</sup> [1921] 3 K. B. 560. See article cited *supra* note 41.

it would be wholly illogical to be bound by his conclusion on those facts.

Moreover, such a course would be most inconvenient, for it would then become necessary when citing an important case to go through the record so as to be certain that the facts as given by the court were correct. In view of the vast number of precedents existing on almost any disputed point of law the task of the common law lawyer is sufficiently difficult at the present time; if he must also consult the record in every case to determine the actual facts his work will be overwhelming. The emphasis which American law libraries are now placing on collecting the whole records in the leading cases may prove to be a dangerous one, for such collections tend to encourage a practice which is inconvenient in operation and disastrous in theory.

Although it is comparatively rare to find any real conflict between the facts given in the opinion and those in the record, it is of frequent occurrence to find that the facts in the opinion fail to include some of the facts in the record. Under these circumstances there are two possible explanations of the omission: (1) the fact was considered by the court but was found to be immaterial, or (2) the fact in the record was not considered by the court as it was not called to its attention by counsel or was for some other reason overlooked. Which of the two explanations is the correct one will depend upon the circumstances of the particular case. If counsel have referred to the fact in the course of their arguments this is strong evidence that the fact has not been overlooked but has been purposely omitted. For this reason the practice in the Law Reports of giving a short summary of counsel's speeches is of particular value. But if it is clear that a certain fact, however material it may have been, was not considered by the court, then the case is not a precedent in future cases in which a similar fact appears. Thus in the leading case of *Dunlop Tyre Co. v. Selfridge & Co.*<sup>44</sup> no mention was made by either the judges or counsel of the possible fact that a trust had been created, and Professor Corbin has argued with great force that this case cannot, therefore, be held to be a precedent in any future case in which the fact of a trusteeship is shown to exist.<sup>45</sup> In *Fisher v. Oldham Corporation* McCardie, J., in discussing the *ratio decidendi* of *Bradford Corporation v. Webster*<sup>46</sup> said:

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<sup>44</sup> [1915] A. C. 847.

<sup>45</sup> Corbin, *Contracts for the Benefit of Third Parties* (1930) 46 L. Q. REV. 12. It may, perhaps, be queried whether the creation of a trust is a question of fact or of law; the answer is that if a set of facts is such that by the application of the appropriate rule of law X is constituted a trustee, then X's trusteeship is itself a fact.

<sup>46</sup> [1920] 2 K. B. 135.

"It is obvious, however, that the point which I am dealing with might there have been raised by the defendants. But, *mirabile dictu*, no such point was even mentioned to the learned Judge . . . The learned Judge, therefore, never even considered the point that is now before me for decision."<sup>47</sup>

It must be noted however, that the burden of showing that a fact has been overlooked is a heavy one, for as a rule a material fact does not escape the attention of counsel and of the court.<sup>48</sup>

Having, as a first step, determined all the facts of the case as seen by the judge, it is then necessary to discover which of these facts he has found material for his judgment. This is far more difficult than the first step, for the judge may fail to label his facts. It is only the strong judge, one who is clear in his own mind as to the grounds for his decision,<sup>49</sup> who invariably says, "on facts A and B and on them alone I reach conclusion X." Too often the cautious judge will include in his opinion facts which are not essential to his judgment, leaving it for future generations to determine whether or not these facts constitute a part of the *ratio decidendi*. The following guides may,

<sup>47</sup> 46 T. L. R. 390 (1930).

<sup>48</sup> An interesting example is the recent case of *Vidler v. Sasun*, *The Times*, October 16, 1929. This was an action for breach of promise of marriage, the alleged promise having been made by the defendant whilst a convict in prison. The objection that a convict cannot make a contract was not taken until the case reached the Court of Appeal, when that Court held that the point had been raised too late. As the attention of the trial judge was not called to the fact that there was a statute on the subject the case cannot be considered a precedent on this point.

An even more striking example is *Rex v. Kynaston*, [1927] W. N. 53, in which a doctor was fined for a contravention of the Dangerous Drugs Act (1925), although the Act had not as yet come into operation. See note (1927) 43 L. Q. Rev. 155.

In *London Street Tramways Co. v. London County Council*, [1898] A. C. 375, 380, when discussing the question whether the House of Lords was bound by its own prior judgments, the Earl of Halsbury, L.C., said: "It is said that this House might have omitted to notice an Act of Parliament, or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a very manifest one—namely, that that would be a mistake of fact. If the House were under the impression that there was an Act when there was not such an Act as was suggested, of course they would not be bound, when the fact was ascertained that there was not such an Act or that the Act had been repealed, to proceed upon the hypothesis that the Act existed."

<sup>49</sup> It was Jessel, M.R., who said, "I may be wrong, but I never have any doubts." An astounding example of an uncertain judgment is Lord Hatherley's opinion in *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, 752 (1877). Of this Atkin, L.J., said, in *The Mostyn*, [1927] P. 25, 37, that he was unable to determine whether Lord Hatherley "was concurring in the appeal being allowed, or the appeal being dismissed, or whether he was concurring in the opinion given by Lord Cairns."

however, be followed in distinguishing between material and immaterial facts.

(1) As was stated above in discussing the principle of a case in which there is no opinion, the facts of person, time, place, kind, and amount are presumably immaterial. This is true to an even greater extent when there is an opinion, for if these facts are held to be material particular emphasis will naturally be placed upon them.

(2) All facts which the court specifically states are immaterial must be considered so. In *People v. Vandewater*<sup>50</sup> the defendant, who was charged with maintaining a public nuisance, kept an illicit drinking place. There was proof that the house was actually disorderly as the evidence showed that persons became intoxicated on the premises and left them in that condition. The majority of the New York Court of Appeals, speaking by Lehman, J., held that the fact that acts of annoyance and disturbance had occurred was immaterial. The learned judge said:

"It is the disorderly character of the illicit drinking place which constitutes the offense to the public decency. That offense arises from the nature of the acts habitually done upon the premises and the injury to the morals and health of the community which must naturally flow therefrom, apart from the annoyance or disturbance of those persons who might be in the neighborhood."<sup>51</sup>

This case strikingly illustrates the distinction between the view that a case is authority for a proposition based on all its facts, and the view that it is authority for a proposition based on those facts only which were seen by the court as material. If we adopt the first view, then the majority judgment is only a dictum, not binding in any future case in which the facts do not show actual disorder. Under the second view the court has specifically stated that the fact of disorder is immaterial. The case is, therefore, a binding precedent in all future cases in which either orderly or disorderly illicit drinking places are kept. The case can be analyzed as follows:

*Facts of the Case*

- Fact I. *D* maintained an illicit drinking place.
- Fact II. This illicit place was noisy and disorderly.
- Conclusion. *D* is guilty of maintaining a nuisance.

*Material Facts as seen by the Court*

- Fact I. *D* maintained an illicit drinking place.
- Conclusion. *D* is guilty of maintaining a nuisance.

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<sup>50</sup> 250 N. Y. 83, 164 N. E. 864 (1928).

<sup>51</sup> *Ibid.* 96, 164 N. E. at 868.

By specifically holding that Fact II was immaterial, the court succeeded in creating a broad principle instead of a narrow one.

(3) All facts which the court impliedly treats as immaterial must be considered immaterial. The difficulty in these cases is to determine whether a court has or has not considered the fact immaterial. Evidence of this implication is found when the court, after having stated the facts generally, then proceeds to choose a smaller number of facts on which it bases its conclusion. The omitted facts are presumably held to be immaterial. In *Rylands v. Fletcher*<sup>52</sup> the defendant employed an independent contractor to make a reservoir on his land. Owing to the contractor's negligence in not filling up some disused mining shafts, the water escaped and flooded the plaintiff's mine. The defendant was held liable. Is the principle of the case that a man who builds a reservoir on his land is liable for the negligence of an independent contractor? Why then is the case invariably cited as laying down the broader doctrine of "absolute liability"? The answer is found in the opinions. After stating the facts as above, the judges thereafter ignored the fact of the contractor's negligence, and based their conclusions on the fact that an artificial reservoir had been constructed. The negligence of the contractor was, therefore, impliedly held to be an immaterial fact. The case can be analyzed as follows:

*Facts of the Case*

- Fact I. *D* had a reservoir built on his land.
- Fact II. The contractor who built it was negligent.
- Fact III. Water escaped and injured *P*.
- Conclusion. *D* is liable to *P*

*Material Facts as Seen by the Court*

- Facts I. *D* had a reservoir built on his land.
- Fact III. Water escaped and injured *P*.
- Conclusion. *D* is liable to *P*.

By the omission of Fact II, the doctrine of "absolute liability" was established.

It is obvious from the above cases that it is essential to determine what facts have been held to be immaterial, for the principle of a case depends as much on exclusion as it does on inclusion. It is under these circumstances that 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. His reason may be in-

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<sup>52</sup> L. R. 3 H. L. 330 (1868).

correct and his statement of the law too wide, but they will indicate to us on what facts he reached his conclusion.

Occasionally, however, we may be misled into believing that a judge has impliedly treated a fact as immaterial when he has not intended to do so. Perhaps the most striking example of this can be found in *Sheffield v. London Joint Stock Bank*.<sup>53</sup> The plaintiff's agent deposited certain negotiable bonds with a money-lender to secure an advance. The money-lender pledged them with the defendant bank for a larger amount, and when he later became bankrupt the bank claimed to hold the bonds as security for all of his debt. In his judgment Lord Halsbury, L.C., said that if the bank had reason to think that the securities "might belong to somebody else, I think they were bound to inquire."<sup>54</sup> Lord Bramwell said, "They [the bank] must have known—I might say, certainly have believed—that the property was not Mozley's [the money-lender] . . . It seems to me, then, that they cannot hold this property except for what the appellant authorized it to be pledged."<sup>55</sup> Lord Macnaghten's opinion reads: "The banks knew that the person who dealt with them as owner was not acting by right of ownership. They took for granted that he had authority, but for some reason or other they did not choose to inquire what that authority was."<sup>56</sup> From these statements it would seem that the material facts of the case were:

- Fact I. *S* pledged certain negotiable securities with *M*.
- Fact II. *M* without authority pledged the securities for a larger sum with the bank.
- Fact III. The bank knew or had reason to think that *M* was not the owner of the securities.
- Fact IV. The bank failed to inquire what *M*'s authority was.
- Conclusion: *S* was entitled to the return of his securities on tendering the amount of the advance made to him by *M*.<sup>57</sup>

Three years later in *Simmons v. London Joint Stock Bank*<sup>58</sup> the facts were as follows. The plaintiff's broker fraudulently

<sup>53</sup> 13 App. Cas. 333 (1888).

<sup>54</sup> *Ibid.* 341.

<sup>55</sup> *Ibid.* 346.

<sup>56</sup> *Ibid.* 348.

<sup>57</sup> In his preliminary statement of the facts the reporter said: "In this House, as will be seen from the judgments, their Lordships, being of opinion that the banks either actually knew, or had reason to believe, that the securities did or might belong not to Mozley but to his customers, held that the banks were bound to inquire into the extent of Mozley's authority to pledge the securities." *Ibid.* 334.

<sup>58</sup> [1891] 1 Ch. 270.

pledged with the defendant bank negotiable securities belonging to the plaintiff. The bank knew or had reason to think that the broker was not the owner of the bonds. It made no inquiries as to what his authority was. It is hardly surprising that the trial judge and the Court of Appeal held that they were bound to find for the plaintiff on the authority of the *Sheffield* case, the material facts in both cases being identical. But when the *Simmons* case reached the House of Lords the decision of the Court of Appeal was reversed,<sup>59</sup> their lordships pointing out, with some indignation on the part of Lord Halsbury, L.C., that, "the inferences derived from the business carried on by the money-lender in *Lord Sheffield's Case*, were peculiar to that case. . . ." <sup>60</sup> The fact that Mozley was a money-lender was the all-important one, for his occupation should have given the bank notice that he had only a limited authority to raise money on his client's securities. Unfortunately this material fact was so little stressed in the judgments that its existence completely escaped the notice of a strong Court of Appeal when it was considering the question of a broker's authority in the *Simmons* case. The *Sheffield* case is a warning to us to be careful before assuming that a fact is immaterial merely because it has not been emphasized.<sup>61</sup>

(4) All facts which are specifically stated to be material must be considered material. Such specific statements are usually found in cases in which the judges are afraid of laying

<sup>59</sup> *London Joint Stock Bank v. Simmons*, [1892] A. C. 201.

<sup>60</sup> *Ibid.* 211, Lord Halsbury, L.C., said: "The first observation that I would make is, that if, as I believe, it be accurate that the question is one which is to be determined upon the facts of the case, no one case can be an authority for another." *Ibid.* 208. With all respect, it is difficult to see how any question can be determined except "upon the facts of the case." The true distinction is between facts which can be generalized and those which cannot, or, as Sir John Salmond says, those which can be answered on principle or *in abstracto* and those which are concrete. SALMOND, *op. cit. supra* note 1, at 205. Thus the fact that *M*, a moneylender, deposited certain securities with the bank is necessarily unique, but the fact that banks ought to know that moneylenders have only a limited authority can be generalized. In the headnote to the *Simmons* case there is the statement that, "The decision of this House in *Earl of Sheffield v. London Joint Stock Bank* turned entirely upon the special facts of that case." The decision turned on the fact that *M* was a moneylender, the principle of the case being applicable to all similar cases in which moneylenders might be concerned.

<sup>61</sup> In the recent case of *Hole v. Garnsey*, 46 T. L. R. 312 (1930), Lord Buckmaster in the House of Lords, the Master of the Rolls, two Lords Justices in the Court of Appeal, and the judge who tried the case had no doubt that *Biddulph v. Agricultural Wholesale Society, Ltd.*, [1927] A. C. 76, had been decided on certain facts and was therefore binding in the instant case, while the other four Law Lords were equally convinced that it had been decided on other facts and was not in point.

down too broad a principle. Thus in *Heaven v. Pender*<sup>62</sup> the plaintiff, a workman employed to paint a ship, was injured because of a defective staging supplied by the defendant dock owner to the shipowner. Brett, M.R., held that the defendant was liable on the ground that:

"... whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."<sup>63</sup>

Cotton and Bowen, L.JJ., agreed with the Master of the Rolls that the defendant was liable, but the material facts on which they based their judgment were: (1) that the plaintiff was on the staging for business in which the dock owner was interested, and (2) he "must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incident to the use of the dock."<sup>64</sup> The principle of the case cannot, therefore, be extended beyond the limitation of these material facts.

(5) If the opinion does not distinguish between material and immaterial facts then all the facts set forth in the opinion must be considered material with the exception of those that on their face are immaterial. There is a presumption against wide principles of law, and the smaller the number of material facts in a case the wider will the principle be. Thus if a case like *Hambrook v. Stokes*,<sup>65</sup> in which a mother died owing to shock at seeing a motor accident which threatened her child, is decided on the fact that a bystander may recover for injury due to shock, we have a broad principle of law.<sup>66</sup> If the additional fact that the bystander was a mother is held to be material we then get a narrow principle of law.<sup>67</sup> Therefore, unless a fact is expressly or impliedly held to be immaterial, it must be considered material.

(6) Thus far we have been discussing the method of determining the principle of a case in which there is only a single opinion, or in which all the opinions are in agreement. How do we determine the principle of a case in which there are several opinions which agree as to the result but differ in the material facts on which they are based? In such an event the principle

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<sup>62</sup> 11 Q. B. D. 503 (1883).

<sup>63</sup> *Ibid.* 509.

<sup>64</sup> *Ibid.* 515.

<sup>65</sup> *Supra* note 29.

<sup>66</sup> See the judgment of Atkin, L.J., *ibid.* 152.

<sup>67</sup> See the judgment of Bankes, L.J., *ibid.* 146.

of the case is limited to the sum of all the facts held to be material by the various judges. A case involves facts *A*, *B* and *C*, and the defendant is held liable. The first judge finds that fact *A* is the only material fact; the second that *B* is material, the third that *C* is material. The principle of the case is, therefore, that on the material facts *A*, *B* and *C* the defendant is liable. If, however, two of the three judges had been in agreement that fact *A* was the only material one, and that the others were immaterial, then the case would be a precedent on this point, even though the third judge had held that facts *B* and *C* were the material ones. The method of determining the principle of a case in which there are several opinions is thus the same as that used when there is only one. Care must be taken by the student, however, to see that the material facts of each opinion are stated and analyzed accurately, for sometimes judges think that they are in agreement on the facts when they concur only in the result.<sup>63</sup>

Having established the material and the immaterial facts of the case as seen by the court, we can then proceed to state the principle of the case. It is to be found in the conclusion reached by the judge on the basis of the material facts and on the exclusion of the immaterial ones. In a certain case the court finds that facts *A*, *B* and *C* exist. It then excludes fact *A* as immaterial, and on facts *B* and *C* it reaches conclusion *X*. What is the *ratio decidendi* of this case? There are two principles: (1) In any future case in which the facts are *A*, *B* and *C*, the court must reach conclusion *X*, and (2) in any future case in which the facts are *B* and *C* the court must reach conclusion *X*. In the second case the absence of fact *A* does not affect the result, for fact *A* has been held to be immaterial. The court, therefore, creates a principle when it determines which are the material and which are the immaterial facts on which it bases its decision.

It follows that a conclusion based on a fact the existence of which has not been determined by the court, cannot establish a principle. We then have what is called a dictum. If, therefore, a judge in the course of his opinion suggests a hypothetical fact, and then states what conclusion he would reach if that fact existed, he is not creating a principle. The difficulty which is sometimes found in determining whether a statement is a dictum or not is due to uncertainty as to whether the judge is treating a fact as hypothetical or real. When a judge says, "In this case, as the facts are so and so, I reach conclusion *X*," this is not a dictum, even though the judge has been incorrect

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<sup>63</sup> Cf. the various judgments in *Great Western Ry. v. Owners of S. S. Mostyn*, [1928] A. C. 57. See note (1928) 44 L. Q. Rev. 138 on this point.

in his statement of the facts. But if the judge says, "If the facts in this case were so and so then I would reach conclusion X," this is a dictum, even though the facts are as given. The second point frequently arises when a case involves two different sets of facts. Having determined the first set of facts and reached a conclusion on them, the judge may not desire to take up the time necessarily involved in determining the second set. Any views he may express as to the undetermined second set are accordingly dicta. If, however, the judge does determine both sets, as he is at liberty to do, and reaches a conclusion on both, then the case creates two principles and neither is a dictum. Thus the famous case of *National Sailors' and Firemen's Union v. Reed*,<sup>69</sup> in which Astbury, J., declared the General Strike of 1926 to be illegal, involved two sets of facts, and the learned judge reached a conclusion on each.<sup>70</sup> It is submitted that it is incorrect to say that either one of the conclusions involved a dictum because the one preceded the other or because the one was based on broad grounds and the other on narrow ones.<sup>71</sup> On the other hand, if in a case the judge holds that a certain fact prevents a cause of action from arising, then his further finding that there would have been a cause of action except for this fact is an obiter dictum. By excluding the preventive fact the situation becomes hypothetical, and the conclusion based on such hypothetical facts can only be a dictum.<sup>72</sup>

Having established the principle of a case, and excluded all dicta, the final step is to determine whether or not it is a binding precedent for some succeeding case in which the facts are prima facie similar. This involves a double analysis. We must first state the material facts in the precedent case and then attempt to find those which are material in the second one. If these are identical, then the first case is a binding precedent for the second, and the court must reach the same conclusion as it did in the first one. If the first case lacks any material fact or contains any additional ones not found in the second, then it is not a direct precedent.<sup>73</sup> Thus, in *Nichols v. Mars-*

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<sup>69</sup> [1926] 1 Ch. 536.

<sup>70</sup> The first set of facts included the fact of the General Strike. The second set excluded the General Strike, but included the fact that the internal rules of the union were violated.

<sup>71</sup> For conflicting views on this point see note by Sir Frederick Pollock (1926) 42 L. Q. REV. 289, and note (1926) 42 L. Q. REV. 296.

<sup>72</sup> In *Lynn v. Bamber*, [1930] 2 K. B. 72, McCardie, J., held that unconcealed fraud was a good reply to a plea of the Statutes of Limitation. As, however, he found that there was no fraud in the case before him, it is submitted that his statement as to the Statutes of Limitation was a dictum. On this point see note (1930) 46 L. Q. REV. 261.

<sup>73</sup> It may, however, carry great weight as an analogy. Thus, if it has

land<sup>74</sup> the material facts were similar to those in *Rylands v. Fletcher*<sup>75</sup> except for the additional fact that the water escaped owing to a violent storm. If the court had found that this additional fact was not a material one, then the rule in *Rylands v. Fletcher* would have applied. But as it found that it was a material one, it was able to reach a different conclusion.

Before summarizing the rules suggested above, two possible criticisms must be considered. It may be said that a doctrine which finds the principle of a case in its material facts leaves us with hardly any general legal principles, for facts are infinitely various. It is true that facts are infinitely various, but the material facts which are usually found in a particular legal relationship are strictly limited. Thus the fact that there must be consideration in a simple contract is a single material fact although the kinds of consideration are unlimited. Again, if *A* builds a reservoir on Blackacre and *B* builds one on Whiteacre, the owners, builders, reservoirs and fields are different. But the material fact that a person has built a reservoir on his land is in each case the same. Of course a court can always avoid a precedent by finding that an additional fact is material, but if it does so without reason the result leads to confusion in the law. Such an argument assumes, moreover, that courts are disingenuous and arbitrary. Whatever may have been true in the past, it is clear that at the present day English courts do not attempt to circumvent the law in this way.

The second criticism may be stated as follows: If we are bound by the facts as seen by the judge, may not this enable him deliberately or by inadvertence to decide a case which was not before him by basing his decision upon facts stated by him as real and material but actually non-existent? Can his conclusion in such a case be anything more than a dictum? Can a judge, by making a mistake give himself authority to decide what is in effect a hypothetical case? The answer to this interesting question is that the whole doctrine of precedent is based on the theory that as a general rule judges do not make mistakes either of fact or of law. In an exceptional case a

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been held in a case that a legatee who has murdered his testator cannot take under the will, this will be an analogy of some weight in a future case in which the legatee has committed manslaughter. It is important to note that when a case is used merely as an analogy, and not as a direct binding precedent, the reasoning by which the court reached its judgment carries greater weight than the conclusion itself. The second court, being free to reach its own conclusion, will only adopt the reasoning of the first court if it considers it to be correct and desirable. In such analogous precedents the *ratio decidendi* of the case can with some truth be described as the reason of the case.

<sup>74</sup>L. R. 10 Ex. 255 (1875).

<sup>75</sup>*Supra* note 52.

judge may in error base his conclusion on a non-existent fact, but it is better to suffer this mistake, which may prove of benefit to the law as a whole, however painful its results may have been to the individual litigant, than to throw doubt on every precedent on which our law is based.

### *Conclusion*

The rules for finding the principle of a case can, therefore, be summarized as follows:

(1) The principle of a case is not found in the reasons given in the opinion.

(2) The principle is not found in the rule of law set forth in the opinion.

(3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision.

(4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.

(5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion.

The rules for finding what facts are material and what facts are immaterial as seen by the judge are as follows.

(1) All facts of person, time, place, kind and amount are immaterial unless stated to be material.

(2) If there is no opinion, or the opinion gives no facts, then all other facts in the record must be treated as material.

(3) If there is an opinion, then the facts as stated in the opinion are conclusive and cannot be contradicted from the record.

(4) If the opinion omits a fact which appears in the record this may be due either to (a) oversight, or (b) an implied finding that the fact is immaterial. The second will be assumed to be the case in the absence of other evidence.

(5) All facts which the judge specifically states are immaterial must be considered immaterial.

(6) All facts which the judge impliedly treats as immaterial must be considered immaterial.

(7) All facts which the judge specifically states to be material must be considered material.

(8) If the opinion does not distinguish between material and immaterial facts then all the facts set forth must be considered material.

(9) If in a 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 all the facts held material by the various judges.

(10) A conclusion based on a hypothetical fact is a dictum. By hypothetical fact is meant any fact the existence of which has not been determined or accepted by the judge.