THE LANGUAGE OF, AND A NOTATION FOR, THE DOCTRINE OF PRECEDENT.

I.

THE LANGUAGE OF THE DOCTRINE

The doctrine of precedent is of basic and essential importance both for the study and the administration of law; yet there has been comparatively little judicial or juristic discussion of the subject. In England almost all of the mechanics of law-making and law-applying through cases has been completely neglected; Goodhart's article, *Determining the Ratio Decidendi of a Case,* is a notable contribution to the latter topic, but it first appeared in the Yale Law Journal.[1] No practitioner's book on the subject has been published,[2] and though it is discussed in books on jurisprudence no separate treatise has appeared.[3] In recent years considerably more attention has been directed by the courts to the doctrine of precedent. The extent to which courts of co-ordinate jurisdiction are bound by earlier decisions has been expressly considered in a number of cases,[4] and there has been some judicial consideration of the nature and binding force of a ratio decidendi.[5] Nevertheless a notable change in doctrine, the effect of which has been to render Goodhart's main proposition

1 See (1930) 40 Yale L.J. 161. It was subsequently republished in England in the author's *Essays in Jurisprudence and the Common Law* (hereinafter cited as *Essays*), and in America it has also been reprinted in Vanderbilt's *Studying Law,* 493-528.

2 Rain's *Science of Legal Judgment* can hardly be termed a practitioner's book; it was published in 1854, and it has not since been either reprinted or edited. In the United States the subject is included in practitioners' works such as Brambrugh, *Legal Reasoning and Briefing;* Elliott, *Work of the Advocate;* and Cooley, *Brief Making and the Use of Law Books.*

3 Stone's *Recent Trends in English Precedent* is a publication of chapters from his larger work, *The Province and Function of Law.*

4 *Young v. Bristol Aeroplane Co. Ltd.,* [1944] K.B. 718, was the first of a cluster of cases. *Police Authority for Huddersfield v. Watson,* [1947] K.B. 842, applied a similar rule to Divisional Courts. The Court of Criminal Appeal provided a refreshing contrast when determining in *R. v. Taylor,* [1950] 2 K.B. 368, that it was not bound by earlier decisions of the same Court.

5 *The Mostyn,* [1928] A.C. 57, contained a noteworthy discussion by Lord Dunedin (at 73). A cluster of recent dicta are those of Denning L.J. in *Korner v. Witkowitzer,* [1950] 2 K.B. 128, at 158; Asquith L.J. in *Pearson v. Lambeth Corporation,* [1950] 2 K.B. 353, at 361; and Lord Simonds in *Jacobs v. London County Council,* [1950] A.C. 361, at 369. Lord Simonds' dictum was applied by Slade J. in *Rama Corporation Ltd. v. Proved Tin & General Investments, Ltd.,* [1952] 1 All E.R. 554, at 558.

untenable, has been largely the result of an unconscious judicial development.

A feature which is partly the result and partly the cause both of the lack of discussion of the doctrine and of the consequent uncertainty and confusion in the doctrine itself, is the absence of a precise and accurate terminology for dealing with the subject. All the terms at present in use are ambiguous—decision, opinion, judgment, ratio decidendi, reasons, obiter dictum—and these ambiguities often lead both to logical error and to a lack of appreciation of the actual matters in issue. I propose in the first part of this article to examine some of the senses in which these terms are employed and to show how confusion has resulted from the diversity of meanings. This inquiry does not purport to be an exhaustive treatment of the 'logic' of the judicial process. It will not even deal fully with all the terminological problems; for example, I shall omit consideration of the nature of the content of a 'rule of law.' This is an important topic in the doctrine of precedent, for the term 'ratio decidendi' is often used to denote a rule of law of some kind, and examination is required of the linguistic usage which characterises what is really a 'rule fragment' as a rule of law.[6] The delimitation of the terms I have chosen is, however, an essential prerequisite to any examination of the doctrine of precedent. No fruitful discussion is possible while the denotation of ratio decidendi or obiter dictum remains obscure. On the other hand, of course, real problems cannot be solved by merely terminological examinations. What such an examination may do is to enable the nature of problems to be clearly stated.

Lord Asquith has also considered the matter extra-judicially in a lecture to the Society of Public Teachers of Law—*Some Aspects of the Work of the Court of Appeal*, (1950) 1 J. Soc. Public Teachers of Law (n.s.) 350, at 358.

[6] The phrase 'rule fragment' is that employed by Hexner in his *Studies in Legal Terminology*, 15. The notion is discussed by Jethro Brown in Excursus E to his *Austinian Theory of Law*, where he points out that the alleged absence of a 'sanction' from a 'rule of law' may generally be explained by reference to the fact that the alleged 'rule' is but a part of the entire rule, the sanction required to complete it being found elsewhere. An example is to be found in the Larceny Act 1916 (6 & 7 Geo. 5, c. 50); s. 1 contains a definition of stealing, but s. 2 contains the sanction. The Rule in *Shelley's Case* is but a rule fragment. The doctrine of common employment was a rule fragment, an exception from a wider doctrine of employer's liability. The device of distinguishing cases and limiting wide principles by the creation of exceptions is an important aspect of the doctrine of precedent. Another important use of the term 'rule of law' is that whereby the negative statement that an alleged rule of law does not exist is positively described as being itself a rule of law.

Preliminary examples of ambiguity.

It has been wisely pointed out that the plurality of meanings of words should be distinguished from 'real ambiguity', where a "form of words actually conveys different meanings to different persons."[7] It is also true that "terminology matters little . . . , if the variance of usage is not the cause or effect of uncertainty and error."[8] Accordingly I consider it advisable to preface a systematic examination of the various terms with three examples of the difficulties created by ambiguity, even though exposition would be easier after the terms themselves had been discussed.

In *Jacobs v. London County Council*[9] Lord Simonds said, " . . . there is, in my opinion, no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also." While, as will be subsequently shown, the phrases obiter dictum, reason, decision are in isolation ambiguous, there is no doubt as to what is the proposition laid down by Lord Simonds. By 'decision' he means the ultimate order made by the court, for the plaintiff or for the defendant, and by 'reason' he means some rule or principle of law.[10] He avers that where a judge supports his

7 See Schiller, *Logic for Use*, 8 and 57. He says, "*In principle* all words . . . have an indefinite *plurality* of meanings. In the misleading phraseology of traditional logic they are all 'ambiguous.' But it is futile to study their ambiguity as if it could be catalogued in advance of their use, and fatal to confuse it with the potential plurality of meanings on which the usefulness of words depends." The following passage is relevant to the doctrine of interpretation: "The meaning of every judgment, the only real meaning it has, or can have, is the meaning it *had*, and was *meant* to have, in the context in which it was made. All the rest is *ex post facto* speculation about words—and endless and fruitless at that." Whitehead, in his *Essays in Science and Philosophy*, 73, expresses the same thought thus: "In fact, there is not a sentence, or a word, with a meaning which is independent of the circumstances under which it is uttered. The essence of unscholarly thought lies in the neglect of this truth."

8 Del Vecchio, *Formal Bases of Law*, 129, 130.

9 [1950] A.C. 361, at 369.

10 Lord Simonds states in effect (at 372) that the 'holding' in *Fairman's Case*, [1923] A.C. 74, that the plaintiff was a licensee was one of law. In my opinion, however, it was a finding of fact. Lords Atkinson, Sumner, and Wrenbury all assumed that the factual elements of the categories of invitees and licensees were clear. A licensor-licensee relation existed where the licensor had no interest in the presence of the licensee. They held that the plaintiff did not fall within the established category with its established legal concomitants. This holding was professedly one of fact. A bold application of the doctrine *ex facto non oritur ius* would have enabled the House of Lords, in *Jacobs v. London County Council*, to have said that the defendant in that case did have an interest in the plaintiff's presence, and so the plaintiff was no mere licensee.

decision by two principles of law both are rules binding on subsequent judges (subject of course to the limitations of the doctrine of judicial hierarchy). He proceeds, however, to support this proposition by an argument which has the appearance of a *reductio ad absurdum,* but which it is submitted contains a fallacy, based on using a word in two different senses. Here is the argument: "If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing." The force of this argument lies not in the apparent inconsistency between 'decided two things' and 'decided nothing', but in an implied *reductio ad absurdum* derived from the proposition that every case decides something. There is no actual inconsistency between "ex facie decided two things" and "decided nothing"; the argument to be conclusive must be that a test which leads one to say that a case decided nothing must be unsound. The fallacy in that argument lies in the equivocal use of the verb 'decide'. In the proposition, 'no case can decide nothing', the verb is the equivalent of the noun 'decision' previously used by Lord Simonds. The reference is to the ultimate order of the court; such order there indeed must be, either for the plaintiff or the defendant,[11] the appellant or the respondent. But in the phrase 'decided two things', the reference is not to the ultimate decision but to the determination of some question of law involved in the final decision. The real problem for consideration was this: Two alternative determinations of law both lead to the same ultimate decision; is a subsequent court bound by both determinations? No verbal manipulation can solve this question of policy, especially having regard to the fact that there are some who doubt whether a subsequent court is bound by a determination of law of an earlier court, even when that determination was the sole reason for the decision of the earlier court. The proposition which Lord Simonds propounds may be both desirable and supported by authority; I have no doubt, however, that the argument used to support the proposition is not conclusive. The possibility that a case may be authority for no more than the ultimate decision is not inherently absurd. Authority for the view that this is

11 For simplification of exposition I will deal in this article only with actions where there is a plaintiff and a defendant. The principles are, however, applicable to all cases, such as chancery actions for the determination of the construction of a will. All cases are cases of litigation and arise because of a *lis,* so that there are those who affirm and those who deny. Where agreeing parties ask for an order of the court we either have an example of the settlement of a *lis* or of administration as opposed to adjudication.

indeed the situation where different rules of law are set out in the judgments of a court is to be found in the speech of Viscount Dunedin in *The Mostyn.*[12] Vicount Dunedin was dealing with *River Wear Commissioners v. Adamson,*[13] where in his view each of the majority Lords expressed a different ratio decidendi. He was of the opinion that no one of the rationes decidendi was binding; nevertheless this opinion did not result in "wiping *River Wear Commissioners v. Adamson* off the slate."

For my other examples I turn to juristic writings. Goodhart says of the phrase 'ratio decidendi', "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."[14] Later he lays down "as the first rule for discovering the ratio decidendi" the negative principle that "it must not be sought in the reasons on which the judge based his decision."[15] The ambiguities to which Goodhart has not in my opinion paid sufficient attention are those of the terms 'ratio decidendi' and 'reason.' The term 'ratio decidendi' has in current usage, as one of its significations, the principle of law actually propounded by the judge as the basis of his decision. It is true that it also has the meaning employed by Goodhart, viz., the principle of law for which a case is a binding authority; and the ambiguity has doubtless led some students and judges into believing that the principle of law propounded by the judge is of binding authority. Nevertheless it appears inaccurate to imply that the only meaning of ratio decidendi is that of the principle of law for which a case is of binding authority. I shall contend that it is more desirable to use the term to denote only the principle of law propounded in the actual reasoning of a judge. This, in my opinion, will minimise the chances of logical error. A vital question for the doctrine of precedent is whether the principle propounded by a judge is of binding authority. According to the terminology I favour, this question is asked in the form—Is a ratio decidendi of binding authority? According to the terminology favoured by Goodhart, the question becomes—Is the principle propounded by the judge the ratio decidendi? I believe that the first form is less likely to mislead than the second.

The other ambiguity in Goodhart's statement to which I direct attention is that of the term 'reason.' In this context it is the more

12 [1928] A.C. 57, at 73.
13 (1877) 2 A.C. 743.
14 *Essays,* 2.
15 *Essays,* 4.

important because it has led Goodhart into error. The term 'reason for a decision' may be a translation of 'ratio decidendi' and mean the principle which, applied to the facts of the case, leads to the decision. On the other hand it may have a wider meaning and signify all the reasoning leading to the ultimate decision, and thus refer also to the reasons which have led a judge to accept the principle which constitutes the ratio decidendi (my suggested terminology). In my opinion Goodhart's demonstration of his thesis by reference to *Priestley v. Fowler* and *Hochster v. Delatour* only appears relevant to it because of the confusion between 'reason for a decision' and 'reason for a ratio decidendi' resulting from the ambiguity of the word 'reason.' As I shall show, what Goodhart does is to demonstrate that though the reasoning leading to the principle propounded by the judge be faulty, that principle remains authoritative.[16] What he set out to show was that the principle for which a case is of binding authority is not to be found in the opinion of the judge.

I leave for later discussion the part which ambiguity played in the old controversy between Landon and Hamson and the newer controversy between Morris and Megarry over the nature of 'obiter dictum.'[17]

Decision.

It is of the utmost importance to distinguish between, on the one hand, the final order made by a court, "the formal expression of an adjudication in a suit" and on the other, "the statement given by the judge of the grounds of a decree or order."[18] There is no constitutional provision in English law, as there is for example in French law, requiring a judge to give reasons for the order he makes, but it has always been the practice for judges under the English legal system to do so. As Lord Simonds says, " . . . while it is the primary

16 This proposition was not followed by Hodson J. in *Cackett v. Cackett*, [1950] 1 All E.R. 677; see pages 316-317, *infra*.

17 See pages 327-329, *infra*.

18 The quotations are from Lord Porter's opinion in the *Banking Case: Commonwealth of Australia v. Bank of New South Wales*, [1950] A.C. 235, at 294. Wambaugh says of the distinction between the reasoning of the court and its decisions, " . . . it is very important from every point of view and goes to the very foundation of this discussion as to the use of reported cases" (in Vanderbilt's *Studying Law*, at 545). The sequel to the *Banking Case, Nelungaloo Pty. Ltd. v. Commonwealth of Australia*, [1951] A.C. 34, leads Lord Normand to say (at 53), "The logic of the Constitution may sometimes impose this apparent contradiction between the reasoning and the conclusion of the judgment in the appeal."

duty of a court of justice to dispense justice to litigants, it is its traditional role to do so by an exposition of the relevant law."[19] Unfortunately no technical language of an unambiguous character exists to enable the distinction to be made shortly and clearly. The recorded order of a court is sometimes called the 'curial order', but this does not appear to be a term of art. The final order of a common law court in a civil action was once technically known as a 'judgment', and of a court of equity as a 'decree'; but the Judicature Act used 'judgment' to apply to both.[20] The term 'judgment' does not however cover the 'sentence' of a criminal court. Nor in civil cases is it exhaustive, for 'orders' are made in interlocutory matters.[21] From the point of view of the doctrine of precedent, of course, a 'case' may be concerned with an interlocutory application as well as with a 'final and conclusive' determination of issues. The multiplicity of terms appears in the Commonwealth of Australia Constitution Act, where reference is made to 'judgments, decrees, orders, and sentences.'[22]

19 *Jacobs v. London County Council*, [1950] A.C. 361, at 369. The following remarks about opinions in prize cases can be generally applied. "The decision of a continental judge is usually very brief . . . . The English decisions on the contrary are frequently long drawn out . . . . They contain a detailed statement of the facts involved, a summary of the contentions of opposing counsel, a profuse citation of previously reported decisions, and sometimes even of unreported cases extracted from the public archives, quotations from the opinions of authoritative text writers, sometimes an exhaustive historical review of the law and practice, and always an elaborate argument of the court in support of its conclusion. Sometimes they are monuments of painstaking research and industry, and in important cases the opinion of the court constitutes a learned and illuminating contribution to the history and development of the law": Garner, *Prize Law during the World War*.

The practice of giving reasons is not invariable. It will be recalled that a Lord Chief Justice is said to have advised the judge newly oppointed to the county court bench for political services, "Announce your decisions firmly and loudly, but never give reasons. Your decisions may sometimes be right. Your reasons are bound to be wrong."

20 Judicature Act 1873 (36 & 37 Vict. c. 66), s. 100. "Since the Judicature Act, the expression 'decree', having lost its distinctive meaning, has been superseded in use by the more comprehensive 'judgment':" Seton, *Judgments and Orders* (6th ed.), cccxxii. 'Decrees' of course are still obtained in the Divorce Court.

21 See also Lord Esher's statement: "A judgment is a decision obtained in an action, and every other decision is an order." (*Onslow v. Commissioners of Inland Revenue*, (1890) 25 Q.B.D. 465, at 466).

22 S. 73. Lord Porter in the *Banking Case* (at 294) points out that in the Judicial Committee Acts of 1833 and 1844 the corresponding phrases were "determination, sentence, rule or order" and "order, sentence or decree."

It is highly desirable for exposition of the doctrine of precedent that there should be one term to designate the outcome of a 'case', whatever may be the nature of the case. American writers on the subject have selected the word 'decision',[23] and Lord Porter has described that word as "an apt compendious word" to apply to this notion.[24] It has nevertheless to be pointed out that currently the word 'decision' is employed with many meanings. It is not a technical term. Lord Porter says, "It is not necessarily a word of art."[25] In Stroud's Judicial Dictionary it is called "a popular and not a technical word." Says Wambaugh, "This is a comprehensive word, free from technicality."[26] Hicks points out that it "is used in at least three different senses; first, to refer to the entire case; second, to refer to the conclusion reached and the reason for reaching it; and third, to mean only the final conclusion."[27] Nor is this list complete. What Lord Porter calls "the determination of a question" is often referred to as a decision. For example, Lord Wright says, "It is not competent for your Lordships to re-open a previous decision of this House on a point of law."[28] Indeed the term 'decision' is often used as equivalent to ratio decidendi.

I myself support those who propose the limitation of 'decision' to the ultimate order of a court. Nevertheless I do not agree with Lord Porter that the "natural and primary meaning" of the word is "the formal order" of a court.[29] There are of course semantic difficulties about the phrase "natural and primary." I presume Lord Porter really means no more than Wambaugh does when the latter says, "The ultimate step taken by a court is commonly termed a decision."[30] A dispute as to what is the common use of a word can however only be settled by taking a census of usage; and I confess

23 Gavitt, *Introduction to law and the Judicial Process*, 57; Hicks, *Materials and Methods of Legal Research*, 101; Wambaugh, *How to use Decisions and Statutes* (from Cooley's *Brief Making*), reprinted in Vanderbilt, *Studying Law*, 545. Goodhart in footnote 15 to his article states that the American practice is to employ the word "judgment"; but I have only found support for this view in Beardsley and Orman, *Legal Bibliography*, 177.

24 *Banking Case*, [1950] A.C. 235, at 294.

25 *Ibid.*

26 *Studying Law*, 544-545.

27 *Materials and Methods of Legal Research*, 100.

28 *Cull v. Commissioners of Inland Revenue*, [1940] A.C. 51, at 68.

29 [1950] A.C. 235, at 294.

30 *Studying Law*, 544. It will be noted that in Wambaugh's own title for his paper, viz., "How to use Decisions and Statutes", 'decision' is not used in what he implies is its common meaning, but as the equivalent of 'case.'

that I base my dissent on conjecture and not on statistics. The important point is to realise the plurality of meanings, and not to be led into either logical error by a shift of meaning, or factual error by ascribing the wrong meaning to the word in a particular context. In my opinion such a logical error was committed by Lord Simonds in *Jacobs v. London County Council,* and it is possible that a factual error was committed by the Judicial Committee of the Privy Council in the *Banking Case.*

I hope Australian readers will forgive a further discussion of their most argued case; I can only plead that I shall not discuss s. 92. It will be recalled that the respondents had obtained a declaration from the High Court of Australia that s. 46 of the Banking Act 1947 was *ultra vires* the Commonwealth legislature. Before the High Court the respondents had contended that the section was invalid for two reasons, (i) that it infringed the freedom of commerce clause of the constitution, (ii) that it transgressed the prescribed limits *inter se* of the powers of the Commonwealth and the States as laid down in the constitution. The High Court declared that s. 46 of the Banking Act was *ultra vires* the Commonwealth legislature. The reason adduced by the majority of the judges was that, though the section did not transgress the limits *inter se of* Commonwealth and State powers, it did offend the freedom of commerce clause. The appellants, of course, accepted the view that the section did not infringe the *inter se* limits, but sought to appeal against the declaration of the High Court, desiring to affirm that the section did not offend against the freedom of commerce clause. Nevertheless the respondents contended that the Privy Council could not hear the appeal because of s. 74 of the Commonwealth of Australia Constitution Act. This provides, "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States." The appellants contended that this section prevented the respondents from seeking to contend before the Privy Council that the High Court were wrong in the expression of opinion that s. 46 did not infringe the *inter se* limitations, but maintained that the section did not prevent them (the appellants) from arguing the question of the interpretation of the freedom of commerce clause, since that did not raise an *inter se* question. Thus the issue turned upon the meaning of the word 'decision' in s. 74. Did it refer to the determination of questions of law which led ultimately to the declaration of the High Court, or did it apply to that declaration

itself? Lord Porter, who delivered the opinion of the Board, took the view that in the section 'decision' meant "the formal expression of an adjudication in a suit."[31] This required the construction of 'upon any question' as 'involving any question'; but that step was taken and s. 74 was interpreted to mean that no appeal lay from a decision involving the determination of an *inter se* question.[32]

Since in this article I am not discussing the doctrine of interpretation but that of precedent I do not propose to examine further the problem of interpretation involved in the *Banking Case*. It is sufficient to point out that it is a highly instructive case from the point of view of the doctrine of precedent, illustrating not only the ambiguity of the word 'decision', but emphasizing also the basic distinction between the ultimate order of a court and the reasoning leading to the pronouncement of that order.

Judgment.

Reference has already been made to the use of 'judgment' to denote the formal order of a court. The final sentence in a law report dealing with an action in the Queen's Bench or Chancery Division of the High Court usually concludes, "Judgment for plaintiff (or defendant)." O. 41 of the Rules of the Supreme Court of England deals with the entry of judgments in a book; but this is the judgment of record, and it is well known that that does not include the judicial statement of the grounds on which that 'judgment' is based. For that statement one turns to the law reports. The judicial utterances in the Lords are technically 'speeches', and the Judicial Committee of the Privy Council tenders its 'advice' in what is technically an 'opinion.' But the name by which the judicial statements expressed in other courts are known is 'judgment', and indeed the speeches in the Lords and the opinions of the Privy Council are also often referred to as judgments.[33]

I cannot recall any difficulty arising out of the plurality of meanings of the word 'judgment.' Nevertheless it is desirable to have an agreed name for the entire judicial utterance containing both the

31 [1950] A.C. 235, at 294.

32 [1950] A.C. 235, at 297.

33 For example, Lord Atkin's speech in *Donoghue v. Stevenson* is called a judgment by Scrutton L.J. in *Farr v. Butters Bros. & Co.*, [1932] 2 K.B. 606, at 611. The Incorporated Council of Law Reporting calls the opinions of the Privy Council 'judgments.'

decision[34] and the judges' reasoning leading to the decision. 'Judgment' is a word commonly used to designate that statement, and might well be reserved for that purpose.

Opinion.

As a technical term 'opinion' is perhaps confined to the judgment of the Judicial Committee of the Privy Council. In ordinary use it is often used as synonymous with 'judgment.' Members of the House of Lords often refer to their speeches as 'opinions'; and the All England Reports invariably designate their speeches as 'opinions.'

There is one meaning of 'opinion' different from that of judgment. This is that of the part of the judgment containing the reasoning leading to the decision. This is the meaning adopted by Goodhart,[35] and it is suggested that it should be generally adopted.

I am again unaware of any difficulty arising from the ambiguity of 'opinion.' Nevertheless the suggested terminology is desirable not only in the interests of precision, but also as a further means of emphasizing the vital distinction between the decision and "the reasoning set out by the court as the basis for the decision."[36]

The parts of a judgment.

A judgment can be divided not only into opinion and decision, but also into other parts resulting from the division of an opinion into its elements. In order to bring out clearly the difference between a reason for a ratio decidendi and a ratio decidendi, it is desirable to state the various parts of a judgment.

It is necessary in the first place to point out that the following list refers only to possible parts. As has already been said, there is no requirement that a judgment should contain any opinion at all. I have been present in court when interesting questions have been raised and have heard the judge at the end of counsel's arguments say merely, "judgment for the defendant with costs." The contents of

34 There is of course a difference between the judicial statement of the decision and the actual order drawn up and entered on the records. The latter is not necessarily a verbal reproduction of part of the judgment. In many cases orders are drafted by counsel, and there is sometimes argument as to whether a draft order is in accordance with the judgment delivered by the court.

35 See footnote 15 of his *Essay*. The adoption of this meaning for 'opinion' is in accordance with juristic practice in the United States; see the authorities referred to above in note 23.

36 The quotation is from Hicks, *Materials and Methods of Legal Research*, 100.

judgments may vary in substance as much as they do in length, but the following is an attempt at a complete enumeration of the possible relevant parts of a judgment not complicated by legal issues as to the admissibility of evidence:—

(1) A survey of allegations of fact and of the evidence adduced as proof.
(2) A survey of the arguments submitted as to what facts should be found.
(3) A statement of the judge's reasons for coming to conclusions of fact.
(4) The findings of fact.
(5) A survey of the alleged rules of law submitted as relevant to the case.
(6) A survey of the arguments submitted in support of the acceptance of propositions as rules of law.
(7) A statement of the judge's reasons for determining that suggested propositions are rules of law.[37]
(8) Determinations of rules of law.
(9) A statement of the consequences of the application of rules of law to found facts.
(10) A statement of the decision of the court.

It is not suggested that judgments follow the order in this enumeration, and it is repeated that not all judgments contain all the above elements. Findings of fact may not be complete, and indeed may be entirely absent; arguments of counsel may be passed over in silence. Some arguments, the judge may say, do not call for resolution; where they relate to fact he may say that a finding of fact is not necessary because of a determination of law; where they relate to law he may say that a determination of law is not necessary because of a finding of fact.[38] In some cases a judge may proceed directly from findings of fact to a statement of his decision, so that the rule of law on which he based his decision is implicit and the formulation of a rule of law as the basis of the judge's decision may be a task not of discovery but of construction. What is emphasized at present is that a distinction exists between the reasoning of a judge and the pronouncement of a rule of law which leads to the judicial decision.

[37] Sometimes the suggestions emanate from the judge himself.
[38] Such situations are relevant to the question (discussed in Part II) whether a rule of law is necessary for a decision so as to constitute a ratio decidendi.

Reasons and Reasoning.

The analysis of a judgment into its component parts shows that a distinction can be drawn between the statement of the reasons for accepting a particular proposition as a rule of law, and the pronouncement of the rule of law itself. Both are often referred to by the same names, reasons or reasoning; and the identity of name has led to confusion of substance.

Goodhart has pithily stated, "A bad reason may often make good law."[39] This proposition can be interpreted in various ways. If by 'reason' is denoted the reason for a rule of law then there are two meanings. (i) Just as in arithmetic one can by chance arrive at the right answer to a sum despite faulty working, so too a 'good' rule of law may be supported by bad reasoning. (ii) A proposition enunciated by a judge as a rule of law has binding authority as law despite the fact that it can be demonstrated that the reasons which led him to accept the proposition were unsound. Two further meanings for the proposition are derived if we attribute to 'reason' the significance of a rule of law pronounced by the judge as the reason for his decision. This yields: (iii) A proposition pronounced by a judge to be a rule of law has binding authority as a rule of law even though it can be seen to be 'bad.'[40] (iv) Though the pronouncement by a judge of a rule of law as the basis for a decision is not of binding authority,[41] the case itself in which the pronouncement is made may be of binding authority for some other rule of law. The thesis for which Goodhart contends in his article is that of (iv); but the arguments he employs establish (ii). I propose to examine this second proposition, because doubt has been thrown on it by the judgment of Hodson J. in *Cackett v. Cackett.*[42]

The reasoning which leads to the pronouncement of a rule of law consists of particular premises and the inferences from them. The reasoning may be unsound because either the premises or the inferences are defective. Goodhart cites an example given by Corbin of an unsound inference, viz., Lord Campbell's reasoning in *Hochster v. Delatour.* He comments, "Lord Campbell's *non sequitur* has not, however, prevented *Hochster v. Delatour* from becoming a leading

39 *Essays,* 4.

40 'Badness' will generally be judged by some extra-legal standpoint such as morality or social utility.

41 In other words, is 'bad' from the standpoint of law itself.

42 [1950] 1 All E.R. 677; [1950] P. 253.

case."[43] While the validity of any inference can be tested by logic, the test of the validity of the premises depends on their nature, and they may be infinitely varied. Some may be value propositions falling within the field of ethics or politics, some may be propositions of fact which may fall within the domain of sciences like economics or psychology; for most of these the judges will adopt common sense criteria of validity. In many instances, the reasoning of the court is based on the interpretation of statutes or the authority of a precedent. Sometimes of course the words of a statute constitute the rule on which the judge relies for his decision, there being in his view no question of the selection of one of several possible meanings. Sometimes the judge relies on a rule of law as being binding on him by virtue of a precedent without suggesting that there is any problem of determining the ratio decidendi. These latter situations give rise to interesting questions, but the one situation with which I shall deal is this. In the instant case *I* the judge bases his decision on a rule of law *x*. His reason for holding that *x* is a rule of law binding on him is that in a precedent case *P* the ratio decidendi was *x*. Suppose it be shown that *x* was not the ratio decidendi of *P*, is it possible in a subsequent case *S* for a judge to hold himself not bound by *x*? Is he bound by *x* because it was the ratio decidendi of *I*, or can he take note of the faulty reasoning of the judge in *I* and consider himself not bound?

It would appear from *Cackett v. Cackett*[44] that Hodson J. would consider that the judge in *S* was not bound. But before dealing with *Cackett v. Cackett* authority has to be stated for the general proposition that a bad reason for the principle of law pronounced

[43] *Essays*, 3. It is submitted that Corbin's criticism of Lord Campbell's reasoning cannot be supported. The proposition which Corbin alleges was one of Lord Campbell's reasons for the doctrine of anticipatory breach was not so regarded by Lord Campbell. In *Hochster v. Delatour*, (1853) 2 El. & Bl. 678, 118 E.R. 922, one of the arguments used by the defendant in denial of the plaintiff's claim to sue immediately for an anticipatory breach was that "the plaintiff has no remedy for breach of contract unless he treats the contract as in force, and acts upon it down to (the date of performance)" (at 689). It was in rebuttal of this argument that Lord Campbell said, "It is surely much more rational . . . . that, after renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining the right to sue" (at 690). This is the passage which gave rise to Corbin's criticism. But it was not used by Lord Campbell to justify the doctrine of an immediate right to sue; such a right he derived from quite different arguments.

[44] [1950] 1 All E.R. 677; [1950] P. 253.

by a judge does not deprive that principle of authority.[45] There are many cases which can be used to illustrate this proposition; but I select *Priestley v. Fowler* [46] and *Watteau v. Fenwick*,[47] the former because it is discussed by Goodhart, and the second because I have discussed it myself elsewhere.

Priestley v. Fowler is the case where Lord Abinger is said to have planted the doctrine of common employment. Nevertheless Pollock suggests that no such doctrine was "actually decided" by that case,[48] and Scrutton L.J. expressly asserts that "so far as any principle is stated in the decision" it is a different one from that of the doctrine of common employment.[49] If this view be correct, then *Priestley v. Fowler* could be cited in support of Goodhart's doctrine that the principle for which a case is authority is not necessarily to be found in the judgment. Goodhart, however, asserts that the doctrine of common employment was 'laid down'[50] in *Priestley v. Fowler,* and in my opinion this is the correct view. What Goodhart further demonstrates is that the doctrine of common employment was not affected by the fact that "the two reasons on which Lord Abinger based his judgment are palpably incorrect."[51] The point of Lord Abinger's reasons was a *reductio ad absurdum.* If the master is responsible generally, then he would be responsible for particular instances like the negligence of a chambermaid putting a fellow servant in a damp bed. Some of the instances dealt with independent contractors and not fellow servants. There is little doubt that the first argument is not logically convincing. The second argument was that a servant might be worse off if there was liability on the part of the master. It was the duty of the servant to protect the master even against negligence of fellow servants. The exercise of that duty would afford "much better security against injury the servant may sustain by the negligence of others engaged under the same master than any recourse

45 In connection with this principle it is not inappropriate to quote Girard's comment on Pothier's errors of comprehension of the texts of Roman Law: "Il est certain que quand Pothier a mal compris une theorie romaine, ce n'est pas la theorie veritable de Rome, mais le contre-sens de Pothier qui a passe dans le Code."

46 (1837) 3 M. & W. 1; 150 E.R. 1030.

47 [1893] 1 Q.B. 346.

48 *Law of Torts* (12th ed.), 100, note (a).

49 In *Fanton v. Denville,* [1932] 2 K.B. 309, at 316.

50 *Essays,* 2. There is no doubt that by 'laid down' Goodhart means propounded. Thus he summarizes Lord Abinger's first reason as consisting in the view that any rule denying the doctrine of common employment would be absurd.

51 *Essays,* 2.

against his master for damages." This reason may conflict with modern notions that development of self-reliance may be too costly and that a servant's duty to his master is not as extreme as Lord Abinger claimed, but it is difficult to see why it is 'palpably incorrect.'

In *Watteau v. Fenwick*,[52] the plaintiffs sold spirits to the manager of a hotel whom they believed to be the owner. The defendants were in fact the owners, but the licence was taken out in the manager's name and it was his name which was printed on the door as the licensee. The manager had no authority from the defendants to buy the goods, it having been arranged indeed that such goods were to be supplied by the defendants. The problem for Wills J. was therefore whether in these circumstances the defendants could be liable even though neither actual nor apparent authority existed. Wills J. held that the defendants were liable, and his determination has been followed by a Divisional Court in England. It has become established law in many of the United States, and Arts. 194 and 195 of the Restatement of Agency are based on it. Nevertheless the reasoning of Wills J. is in my opinion quite unsound. He gave two reasons. The first was the analogy of the situation as between dormant and active partners; "no limitation of the authority as between the dormant and active partner", he said, "will avail the dormant partner as to things within the ordinary authority of a partner." But this dictum is inconsistent with s. 5 of the Partnership Act 1890 (53 & 54 Vict. c. 39), which requires knowledge that the person acting is a partner; such knowledge does not exist where the partnership consists of an active and a dormant partner. The second reason was the authority of *Edmunds v. Bushell*.[53] In that case so far as the indorsee for value of a bill of exchange was concerned there was no apparent authority of the acceptor to bind the defendant. Neither was there any actual authority; and yet the indorsee was able to recover on the bill against the defendant. But Wills J. appears to have overlooked the fact that if the indorser had a right to sue, this right was transferred by the indorsement to the indorsee. On the facts it is clear that there was apparent authority so far as the indorser was concerned.

A breach has been made by *Cackett v. Cackett*[54] in the doctrine that recognition of the error in the reasoning by which a judge has educed a ratio decidendi does not annul the authority of the ratio decidendi. The question before Hodson J. in this case was whether

52 [1893] 1 Q.B. 346; discussed in (1939) 17 Can. Bar Rev. 693, at 695.
53 (1865) L.R. 1 Q.B. 97.
54 [1950] 1 All E.R. 677; [1950] P. 253.

insistence on the practice of coitus interruptus amounted to wilful refusal to consummate a marriage. In *Cowen v. Cowen*[55] the husband on some occasions insisted on the use of a sheath and on others had practised coitus interruptus. The Court of Appeal held that both practices constituted wilful refusal.[56] In *Baxter v. Baxter*,[57] the House of Lords said the use of a sheath did not constitute wilful refusal. With regard to coitus interruptus Viscount Jowitt, delivering the judgment of the House, said, "coitus interruptus . . . . does not arise in the case before the House, and I prefer to express no opinion on it." It would appear therefore that so far as coitus interruptus was concerned Hodson J. was bound by the ratio decidendi of *Cowen v. Cowen*. But he considered that he was not bound. He examined the reasoning which had led the court in *Cowen v. Cowen* to arrive at its ratio decidendi. The court had based itself on a passage from the judgment of Dr. Lushington in *D. v. A.*[58] Hodson J. affirms that Viscount Jowitt in his speech in *Baxter v. Baxter* "makes it plain that the House considered that the Court of Appeal (in *Cowen v. Cowen*) had completely misapprehended the effect and meaning of Dr. Lushington's words." Accordingly, said Hodson J., "The whole foundation of the conclusion arrived at by the Court of Appeal (in *Cowen's case*) having been destroyed, in my judgment the conclusion is also destroyed."[59]

The breach effected by Hodson J. has not been very large. A ratio decidendi has not been rejected merely because the reasoning establishing it has been shown to be faulty to the satisfaction of the court otherwise bound by the ratio. The reasoning, he averred, has been demonstrated to be faulty by the House of Lords. It may be that the principle of *Cackett v. Cackett* is that a ratio decidendi may be rejected by a court, otherwise bound by it, if the reasoning on which it was based has been declared to be faulty by a court superior to that pronouncing the ratio decidendi.

Since this article is mainly concerned with terminology it is inappropriate to consider at length the extent to which courts are in fact concerned with the reasoning of a precedent as opposed to

55 [1946] P. 36.

56 There was a single judgment. In it Du Parcq L.J. said, "sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination . . ." (at 40).

57 [1948] A.C. 274.

58 (1844) 1 Rob. Ecc. 279; 163 E.R. 1039.

59 [1950] P. 253, at 258.

the ratio decidendi. A full examination would involve, for example, consideration of the limitations in *Young v. Bristol Aeroplane Co. Ltd.*, particularly that dealing with decisions given *per incuriam*.[60] Some comments are however appropriate. In the first place the dictum of Hodson J. (quoted above) involves a *non sequitur*. A proposition may be correct even though the reasoning on which it was in fact based was bad. Other reasonings may be found to support it. As I said in my discussion of *Watteau v. Fenwick*, "Sometimes . . . a decision introduces a desirable rule into the legal system as a result of faulty reasoning on the part of the judge. It is afterwards that the true reasons are found for the decision."[61]

The next comment is that examination of the reasoning of a precedent is of course usual where a court is presented with a ratio decidendi by which it is not bound; for example, one pronounced by an inferior court. I select an example where the reasoning consisted in the averment that a court was bound to apply a rule because it had been established in an earlier case. In *In re Constable's Settled Estates*,[62] the Court of Appeal was asked to follow the judgment of Farwell J. in *Re Cornwallis-West and Munro's Contract*.[63] Farwell J. had based his judgment on the authority of *Re Wright's Trustees and Marshall*.[64] Examination of the opinion in that case showed that it was based on the belief that the judgment in *Harrison v. Round*[65] laid down the proposition that a tenant for life of a re-settlement was not restored to the estate he held under the settlement. The Court of Appeal in *In re Constable's Settled Estates*, however, took a different view of the judgment of *Harrison v. Round*, and so they refused to follow Farwell J.[66]

60 [1944] K.B. 718, at 730.
61 (1939) 17 Can. Bar Rev. 692, at 695.
62 [1919] 1 Ch. 178.
63 [1903] 2 Ch. 150.
64 (1885) 28 Ch. D. 93.
65 (1852) 2 De G. M. & G. 190; 42 E.R. 844.
66 The maze of precedent surrounding this topic is added to by the case of *Parr v. Attorney-General*, [1926] A.C. 239. According to Wolstenholme and Cherry (12th ed.) II, 938, *In re Constable's Settled Estates* was overruled by *Parr v. Attorney-General*. But in my opinion that was the view of the dissenting judge in *Parr v. Attorney-General*. The certainty engendered by the doctrine of precedent is disturbed by s. 22 (2) of the Settled Land Act 1925 (15 & 16 Geo. 5, c. 18) which according to Wolstenholme and Cherry amounts to a statutory reversal of *Parr v. Attorney-General*. The whole subject is of great practical importance in Northern Ireland where the Settled Land Act 1925 does not apply. It is doubtful whether the ordinary practising solicitor appreciates the niceties of the law to which the doctrine of precedent contributes.

Ratio decidendi.

Whether the doctrine of precedent makes for excessive rigidity as Goodhart contends, or for anarchic uncertainty as Stone impliedly suggests,[67] or whether as Holdsworth says it hits the golden mean between too much certainty and too much flexibility, depends on the question of how the rule of law for which a precedent is authority is determined. This central core is infected with ambiguity, for the language used in dealing with the theme generally includes the phrase 'ratio decidendi'. There are quite a few meanings connected with the phrase, but the basic ambiguity, as has already been said, is that which arises from the two following meanings.

The first meaning is that employed by Goodhart and Stone; it is that of the rule of law for which a case is of binding authority. They both quote Salmond without indicating any different use of the phrase—"The underlying principle which . . . forms its authoritative element is . . . the *ratio decidendi* . . . which alone has the force of law."[68]

The other meaning of ratio decidendi is the rule of law to be found in the actual opinion of the judge, forming the basis of his decision. One of the earliest uses of the phrase in a judgment was that by Lord Campbell in *Attorney-General v. Dean and Canons of Windsor*,[69] and there he expressly describes the concept he has in mind as the rule "propounded and acted upon in giving judgment."

The term 'ratio decidendi' is in some contexts used with the first meaning, and in others with the second. In English judicial language it is, according to my observations, now employed only with the second meaning. A confusion of the two meanings may be responsible for the assumption of many judges that the rule propounded by a judge is of binding authority. On the other hand, a refusal to recognize that the term ratio decidendi may mean the rule propounded by a judge, and that such a rule may be of binding authority, makes unsatisfactory Stone's demonstration that the doctrine of precedent involves "a category of indeterminate reference."

While the terminological issue is of little importance compared with the relevant substantial questions, yet it is worthy of fairly full treatment, and accordingly I adduce further examples.

67 Stone's treatment of precedent is to be found in his *Province and Function of Law*.

68 Salmond, *Jurisprudence* (7th ed., 1924), 201; cited in Goodhart, *Essays*, 1, and Stone, *Province and Function of Law*, 197.

69 (1860) 8 H.L.C. 369, at 392; 11 E.R. 472, at 481.

The term is not part of the technical language of English law. Wharton's Law Lexicon sets out a passage from Austin. Austin himself ascribes the phrase to unstated "writers on jurisprudence."[70] Austin's examination of the significance of the phrase was for many years the fullest treatment of the subject. He gives two definitions of it, both of which refer to the same concept:— (1) "The general grounds (or . . . general reasons) of judicial decisions . . . as abstracted from the specific peculiarities of the decided . . . cases."[71] (2) "The general rule or principle which that decision established."[72] These are the forerunners of Salmond's definition. However, even the meticulous Austin also used the phrase to mean the actual statement of the judge, and this he did when denying that the rule established by a decision is to be found in the actual opinion. "A rule of law established by judicial decision", he says, "exists nowhere in precise expressions, or in expressions which are parcel of the *ratio decidendi.*"[73] Nevertheless Austin standardised, for "writers on jurisprudence", the use of *ratio decidendi* as referring to a rule of law for which a case is authority.

Though it may be going beyond a terminological examination it is relevant to note that this use of the phrase ratio decidendi lends itself to the formulation of a doctrine which, in my submission, no longer represents English law. The doctrine expressed in the older terminology is that every case has a ratio decidendi, and no more than one ratio decidendi.[74] In the other meaning of the phrase it is untrue that every case has a ratio decidendi, and also untrue that a case may not have more than one ratio decidendi. But it appears

70 The only discussion I have noticed of the ambiguity of the phrase is to be found in *Punch*, in a comment on Mr. Basil Neill's suggested amendment to a bill; for "result of that appeal", he proposed the words, "*ratio decidendi* of that appeal" (158 Hansard (Fourth Series), 931).

71 5th ed., 627. The term corresponds to *ratio legis*. In its origin therefore it had reference to a principle not necessarily pronounced by the judge.

72 *Ibid.*

73 5th ed., 630. He continues, "The terms or expressions employed by the judicial legislator, are rather faint traces from which the principle may be conjectured." It should be noted that, in my opinion, a *ratio decidendi* even in the sense of a rule *propounded* by a judge is not necessarily a rule *pronounced* by a judge. The words of a judgment are not the equivalent of the words of a statute. The principle is embodied in the actual words, but these words must not only be read in their context, but also with the elimination of faults of expression. See further on this point the next paragraph.

74 I have been unable to find a specific formulation of this doctrine, which is nevertheless implicit in much of the literature. The nearest to an express statement that I have found is the passage in Ames, *The Science of Jurisprudence* (1872), 484.

still to be a matter of debate whether the substantial doctrine has been overthrown, whether every case is authority for some one rule of law and for only one rule of law.

The phrase 'ratio decidendi' does not appear to be frequently used by judges, who prefer the term 'principle.' Nevertheless, when employed, the usual meaning is that of a rule actually propounded by the judge. We have express recognition of this meaning in the following judicial statements. In *Korner v. Witkowitzer*,[75] Denning L.J. defines ratio decidendi as "one of the links in the chain of reasoning." In *Jacobs v. London County Council*,[76] Lord Simonds implies that a ratio decidendi is "a reason given by a judge for his decision."[77]

An interesting use of ratio decidendi is that by Viscount Dunedin in *The Mostyn*.[78] For him a ratio decidendi is derived from the opinion of a judge, "If from the opinions delivered it is clear what the *ratio decidendi* was which led to the judgment." But he subscribes to the doctrine that there is but one rule of law for which a case is authority. On the other hand he says that a ratio decidendi is binding. Consequently in a multi-judge court there is only a ratio decidendi if the majority judges are agreed on the reasons for the decision. If they give different reasons then there is no ratio decidendi. In the terminology I advocate, it would be said, where judges give different reasons, that there are several rationes decidendi. The substantial question involved is whether in such a case each ratio decidendi is binding. Viscount Dunedin clearly says no. Lord Simonds does not say that in such a situation each ratio decidendi is binding, but his reasoning would suggest that it is.

A further ambiguity of the phrase 'ratio decidendi' has to be noted. Hitherto only those meanings have been considered which refer to a rule of law. But sometimes the phrase is used to denote any reason which ultimately brings about the decision. Thus where

75 [1950] 1 All E.R. 558, at 573.

76 [1950] 1 All E.R. 737, at 741. Another random example of judicial use of ratio decidendi is by Greer L.J. in *British Thomson-Houston Co. Ltd. v. Federated European Bank Ltd.*, [1932] 2 K.B. 176, at 182. Greer L.J. equates ratio decidendi with opinion for he says, "it is not necessary for me to inquire whether it was an essential element in the ratio decidendi."

77 The following passage from Viscount Haldane's speech in *Cornelius v. Phillips*, [1918] A.C. 199, at 211, is relevant, though again the reference to ratio decidendi is only by implication. " . . . . dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided."

78 *Great Western Rly. Co. v. Owners of S.S. Mostyn*, [1928] A.C. 51, at 73.

a finding by a court against the plaintiff on the issue of fact which he has raised results in a decision for the defendant, without consideration of any rule of law, in common parlance this finding of fact is said to be the ratio decidendi. On the other hand it can also be said that there is no ratio decidendi. Confusion is increased when some reason for a judge's finding of fact or for his determination of law, a reason which may consist in a moral or economic doctrine, is also called a ratio decidendi. My own preference is for using ratio decidendi to mean a rule of law propounded by a judge in his actual reasoning as the basis for his judgment, and for referring to any other matters such as a finding of fact by the more English expression "reason for the decision."

The important statement by Lord Simonds in *Jacobs v. London County Council,*[79] dealing with a judgment containing more than one ratio decidendi gives rise to the problem of this last mentioned ambiguity. Lord Asquith has dealt with Lord Simonds' remarks as if they were concerned with the situation where one reason for a decision consisted in a rule of law and the other reason in a finding of fact.[80] Lord Simonds, in his statement, does in fact use the purely English phrase, 'reason for decision', but it is clear that it is used as the equivalent of ratio decidendi which he used in an earlier sentence. The argument does not however turn on the verbal question of choice of phrase. What is submitted is that it is clear from the context, for example the reference to "exposition of the relevant law" and "pronouncement of some legal problem", that Lord Simonds meant by both 'ratio decidendi' and 'reason for decision' a statement of a rule of law. If this be so Lord Simonds' dictum need not be extended to the situation where a judge himself finds facts which make unnecessary his pronouncement of law.

The implicit ratio decidendi.

A distinction must be drawn between a proposition specifically pronounced by a judge as being the rule of law on which he bases his decision, and a rule of law implicit in the judge's opinion but not specifically formulated by him. The term ratio decidendi as at present used covers both concepts, and no nomenclature exists for distinguishing them. The concept of an implicit ratio decidendi is moreover not easily distinguished from the ratio decidendi in Goodhart's sense, i.e., a rule of law not propounded by the judge for which

79 [1950] A.C. 361, at 369.
80 (1950) 1 J. Soc. Public Teachers of Law (n.s.) 350, at 359.

his decision is nevertheless an authority. The suggestion is offered that if the term 'ratio decidendi' is employed for these three concepts they be distinguished by the epithets express, implicit, and constructive. It would however be better not to employ the term 'ratio decidendi' at all for the last concept.

The manner in which what I have just called the implicit ratio decidendi may be confused with the constructive ratio decidendi is illustrated by Austin. In discussing how a ratio is determined he says, "The process is one of abstraction from all the peculiarities of the case, not one of examining the opinion of the judge." Here he has in mind a constructive ratio decidendi. A little later he states, "As the general propositions which the decision contains are not commonly expressed with much premeditation, and as they must be taken in conjunction with all the peculiarities of the case, it follows that the very terms in which those propositions are clothed are not the main index to the *ratio decidendi*."[81]

Priestley v. Fowler provides an example of an implicit ratio decidendi. The fact that the ratio is implicitly propounded rather than expressly pronounced is perhaps the explanation for the observation of Scrutton L.J. that the doctrine of common employment is not stated by Lord Abinger.[82] The two main arguments which form the basis of Lord Abinger's judgment are directed to showing that a rule contradicting the doctrine of common employment would not be satisfactory. The implication is that he considers the doctrine of common employment to be a satisfactory rule, and the decision of the case follows from an application of the doctrine.

The implication in *Hochster v. Delatour* is so immediate that the case is better classified as an example of an express ratio decidendi. However, the distinction between an express and an implicit ratio decidendi is not clear cut, and the case may be regarded as illustrating this latter proposition. Lord Campbell C.J. said, "It cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for breach of agreement till the day for doing the act has arrived."[83] This can be described as an inverted statement of the positive doctrine that in some situations an action can be brought before the day; or it may be said that the positive doctrine is implicit in the negative statement.[84]

81 5th ed., 630.
82 See above, note 49.
83 (1853) 2 El. & Bl. 678, at 688; 118 E.R. 922, at 926.
84 In the language of formal logic it would be said that we have an example of immediate inference: not [SeP] = SiP.

An instructive illustration of the way in which a modern court considers itself bound by the actual opinion of an earlier court though not by the actual words of that opinion is furnished by *Milne v. Commissioner of Police for the City of London,*[85] in which the speeches in *Powell v. Kempton Park Racecourse Company*[86] were discussed, and the implicit ratio decidendi of the earlier case formulated in slightly different ways by the various law lords. The question involved was the interpretation of the following section of the Betting Act 1853 (16 & 17 Vict. c. 119), "No place . . . shall be kept for the purpose of . . . any person using the same . . . betting with persons resorting thereto." In *Powell's Case* only two reasoned speeches were delivered by the majority judges; one, the speech of Lord Halsbury L.C., dealing with the interpretation of the word 'using', and the other that of Lord James, dealing with the interpretation of the word 'place.'[87] Nevertheless it may be assumed, as Lord Wright stated in *Milne's Case,* that "Lord Halsbury's speech represented the opinions of the majority of the House."[88] Lord Wright also stated, though this was doubted by Lord Atkin,[89] that the majority "expressed their assent to the particular words of Lord Halsbury." These particular words, whose effect was the issue in *Milne's Case,* were "that word" (viz., 'using') "imports here . . . the character of the use as a use by some person having the dominion and control over the place." But though these words may be regarded as an expression of the ratio decidendi of the Lords in *Powell's Case* they were not regarded as sacrosanct. The Lords in *Milne's Case* considered themselves bound by Lord Halsbury's reasoning, but not by the precise words in which he expressed himself. Thus Lord Maugham L.C. said, "I am not able to take the view that this House is bound to accept the language of Lord Halsbury as if the words employed were those of a statute."[90] Lord Porter said, "The observation of

85 [1940] A.C. 1.

86 [1899] A.C. 143.

87 The majority consisted of six Lords. In addition to Lord Halsbury and Lord James there were Lord Watson, who said, "I am of the same opinion", Lord Macnaghten who said, "I concur in the motion proposed by the Lord Chancellor", Lord Morris who said, "I also agree", and Lord Shand who said, "I also am of the opinion." In addition Lord Halsbury stated, (a) "Lord Herschell who saw my judgment concurred in the views which I have expressed", (b) "I had a letter from the Lord Chancellor of Ireland that he also agrees with the judgment I have proposed to your Lordships." The precise authority of such extra-judicial statements does not appear to have been the subject of examination.

88 [1940] A.C. 1, at 41.

89 *Ibid.*, at 26.

90 [1940] A.C. 1, at 16.

Lord Halsbury . . . must be read in the light of the matters there in issue."[91] In the result the Lords stated what they considered to be the ratio decidendi implicit in Lord Halsbury's opinion. According to Lord Maugham, "dominion or control must indicate or include dominion or control de facto."[92] Lord Atkin said, "An apparent dominion and control must be sufficient to satisfy Lord Halsbury's words,"[93] and Lord Wright said, "Lord Halsbury meant no more by these words than such de facto dominion and control as enabled the bookmaker to ply his trade in the place."[94]

Obiter Dictum.

The phrase 'obiter dictum', often abbreviated to 'dictum', though not strictly a technical term with a precise meaning, is part of the technical apparatus of English law, and has a much older genealogy than ratio decidendi. As early as 1670, it is found in the celebrated judgment of Vaughan C.J. in *Bole v. Horton,*[95] in a statement which serves as a definition of the term, and which is also made by conversion to serve as Wambaugh's criterion of a ratio decidendi. "An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary opinion, had been broached is no judicial opinion, nor more than a gratis dictum." A most important ambiguity which appears in this definition, and thus affects the meaning of the phrase, is that of the word "necessary." It is however proposed to consider first another matter.

It is to be noted that 'dictum' etymologically suggests some actual extract from the opinion; but undoubtedly the concept exists of a rule of law implicitly propounded by a judge though not necessary for the decision of the case. A judge may say that it is unnecessary for him to decide a particular issue, and nevertheless, as in the *Commonwealth Banking Case,* proceed to discuss the issue. His discussion of this issue may not contain an express pronouncement of a

91 *Ibid.*, at 50.

92 *Ibid.*, at 17.

93 *Ibid.*, at 26.

94 *Ibid.*, at 42.

95 (1670) Vaugh. 360, at 382, 124 E.R. 1113, at 1124. Reference must be made also to Lord Abinger's dictum, "It was not only an obiter dictum, but a very wide divaricating dictum": *Sunbolf v. Alford,* (1838) 3 M. & W. 218, at 252, 150 E.R. 1135, at 1137. In the text the dicta which are considered are those which propound rules of law.

rule of law, yet the formulation of such a rule may be implicit.[96] The practice of reporters is to introduce their formulation of an implicit rule by the word "semble."[97] It would appear that the phrase 'obiter dictum' is also sometimes used to cover such an implicit rule.

There is a particular use of the phrase 'obiter dictum' which is connected with the doctrine that the rule of law for which a case is of binding authority is not to be found in the reasoning of the judge. According to this use, a proposition pronounced by the judge as the basis of his decision may be called an obiter dictum. This meaning can be reconciled with the definition of Vaughan C.J. by interpreting 'necessary' in that definition as meaning 'necessary' in the opinion of the commentator on the precedent, and not in the opinion of the judge pronouncing the dictum. The possibility exists because the word 'necessary' is ambiguous. The two meanings of necessity may be distinguished by the names objective and subjective necessity. If the precedent could have been decided by reference to some rule of law, other than that on which the judge relied, then there was no objective necessity for his having given his opinion. On the other hand if, according to the judge's actual reasoning, a rule of law is required as a premise for his conclusion, then it is subjectively necessary; only a rule of law which does not furnish 'a link in the chain of reasoning', but is introduced 'by the way', is not subjectively necessary. Sometimes the phrase 'obiter dictum' is used to connote objective necessity; a proposition enunciated by a judge and considered by him to be a necessary step in his reasoning is nevertheless called an obiter dictum, because in the opinion of the commentator some other proposition would have led to the same decision. More often, however, the term 'obiter dictum' is used to refer to a rule which the judge himself did not consider necessary; the connotation is one of subjective necessity.

This ambiguity of the term 'necessary'[98] affects also the meaning of the phrase 'ratio decidendi.' Even if the limitation of ratio

96 See for example Lord Radcliffe's discussion in *Boissevain v. Weil*, [1950] A.C. 327, at 339, that an action for money had and received did not lie. (Obiter I add that the reporter's language in the headnote was inapt. He states that the sum "was irrecoverable as a debt." 'Debt' could apply to a claim for money had and received; the ratio decidendi was that the sum was not recoverable under a claim for money lent).

97 Wambaugh says that "an obiter dictum is occasionally called a 'semble' " (Vanderbilt, *Studying Law*, 554). I have not come across this practice.

98 A recognition of the ambiguity of the term 'necessary' now appears in Lord Asquith's stimulating address to the Society of Public Teachers of Law: see *op. cit.*, at 359.

decidendi to a rule propounded by a judge be adopted, the problem remains of distinguishing ratio decidendi from obiter dictum. The suggestion of Wambaugh is that a ratio decidendi, in contradistinction to an obiter dictum, is a rule "necessary to the judgment given of record." This is how the term is often employed; witness, for example, the statement of Denning L.J. already quoted, that a ratio decidendi is a link in the chain of reasoning. But, as with obiter dictum, the question arises whether by 'necessary' is meant objective or subjective necessity. 'Ratio decidendi' is sometimes employed with the connotation of one meaning of necessity and sometimes with the other meaning.

The ambiguities of 'obiter dictum' and 'ratio decidendi' are such that what one writer calls 'ratio decidendi' may by another be called 'obiter dictum.' It is important, of course, not to confuse terminological difficulties with substantial issues. If the terminology be employed which has regard to the actual reasoning of the judge, then the question can be asked whether a ratio decidendi, which *ex definitione* is not an obiter dictum, may nevertheless possess no binding authority.

A debate which illustrates the topic under discussion, though the contestants differed both in their terminology and their substantial doctrines, is that between Landon and Hamson. In a short article, Landon[99] asserted that the decision in *Bell v. Lever Bros.*[100] could have been reached by a different route than that traversed by the Lords. There need have been, in his view, no examination of the principles governing "the rescission of an executory contract on the ground of fundamental mistake." Instead there could have been a reference to the "rules governing indebitatus assumpsit for money paid by mistake." Indeed in his view the issue turned really on a question in that branch of the law.[101] Consequently he said, "Lord Atkin's restatement of the law, which he claims (at p. 227) has 'established order into what has been a somewhat confused and difficult branch of the law', must be relegated to the status of an obiter dictum."[102]

A reply to Landon was first made by Tyler.[103] He did not deal

99 (1935) 51 Law Q. Rev. 650.

100 [1932] A.C. 161.

101 Landon's criticism is similar to that made by Viscount Simon in the *Fibrosa* Case of the judgment of Collins M.R. in *Chandler v. Webster* ([1904] 1 K.B. 493), where he describes it as " . . . the failure to distinguish between (1) the action of assumpsit for money had and received in a case where the consideration has wholly failed, and (2) an action on the contract itself": [1943] A.C. 32, at 47.

102 (1935) 51 Law Q. Rev. 650, at 652.

103 (1936) 52 Law Q. Rev. 27.

with Landon's treatment of the nature of an obiter dictum, but dealt solely with the contention that the real issue in *Bell v. Lever Bros.* was concerned with the rules governing indebitatus assumpsit. Landon's thesis had been that it was not necessary to consider whether the compensation agreements were void for mistake, because, even assuming that they were void, the money paid could not be recovered having regard to the rules of indebitatus assumpsit. Tyler denied this last proposition, and consequently stated that it was necessary for the court to have considered the validity of the compensation agreement.

The reply to Landon, which Hamson propounded, boldly attacked Landon's conception of the nature of an obiter dictum.[104] He did in fact agree with Tyler, but went further and maintained that, even if Tyler were wrong, nevertheless Landon was wrong. He asserted that consideration of the validity of the compensation agreements was an essential step in the actual reasoning of the House of Lords, and consequently their determination of this issue was not obiter dictum but ratio decidendi. The House of Lords had reasoned that, whatever the position might be if the compensation agreements were void, the money was irrecoverable if they were valid. The inquiry into the law of mistake was undertaken to see if the agreements were valid. A determination of the law of mistake led to the conclusion that the agreements were valid, and that conclusion led to the decision that the money claimed was irrecoverable. In view of the actual reasoning of the Lords, Hamson repudiated Landon's attempt to base the decision on a principle of indebitatus assumpsit "even if the alleged principle were incontestably true." He said, "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 in the case, neither judge nor counsel, adverted; even if the alleged principle were incontestably true. To depart so frankly from a very deliberately expressed *ratio decidendi* is merely to cease, *pro tanto,* to be concerned with actual decided common law."[105] It would appear indeed that in Hamson's view, if the Lords had proceeded to discuss the law of reclaiming money paid by mistake in indebitatus assumpsit, their determination would have been obiter,.

It is clear that Hamson and Landon were not disagreeing merely over a question of terminology. Indeed at first sight both appear to agree that an obiter dictum is a rule which is not of binding authority. But it has to be asked whether the lack of binding authority

104 (1937) 53 Law Q. Rev. 118.
105 (1937) 53 Law Q. Rev. 118, at 123.

is part of the denotation of the term or a legal consequence. Both do agree that an obiter dictum has no binding authority; but in Landon's view this is so because only objectively necessary rules of law have such authority, and in Hamson's view because a rule which has no subjective necessity lacks binding authority. Their fundamental disagreement is not over the question whether a rule of law which is an essential step in the actual reasoning of the court must be called a ratio decidendi, but whether such a rule of law is of binding authority. It may now appear that the contestant from Oxford was espousing a lost cause, but seventeen years ago the view he held was probably the dominant doctrine of English jurists.[106] There are still many who would agree with him, but so far as judicial exposition is concerned, Cambridge provided the prophet of the newer learning,. A more widespread appreciation of the difference between the contestants is however hampered by the confusion which is caused by the ambiguities in existing terminolo2gy.

A further distinction of meaning of the term 'necessary' has to be noted. This too affects the meanings of ratio decidendi and obiter dictum and the substantial doctrine of precedent. Failure to enunciate this distinction clearly has contributed to the existence of another debate in the pages of the *Law Quarterly Review* between Oxford and Cambridge, this time in the persons of Morris and Megarry. This debate is considered in the next part of this article, for appreciation of the issues involved, it is believed, is facilitated by the adoption of the notation there proposed,.

(To be continued)

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106 It was the doctrine of another Oxford jurist expressed in his *Law in the Making,* which contains the fullest discussion of precedent in English literature.

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