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reached its decision with the 'utmost distaste'.[97] For all the exceptions and qualification discussed later in this book, the English doctrine of *stare decisis* retains its coercive edge.

[97] (1987) STC 168, 181 Sir Nicholas Browne-Wilkinson VC.

II

RATIO DECIDENDI AND *OBITER DICTUM*

1. *RATIO DECIDENDI* AND THE STRUCTURE OF JUDGMENTS

According to the preliminary statement of the English rules of precedent contained in the last chapter, every court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts (other than the House of Lords) are bound by their previous decisions. This statement is too concise because it does not indicate that the only part of a previous case which is binding is the *ratio decidendi* (reason for deciding). The principal object of the present chapter is to consider what is meant by the *ratio decidendi* of a case when the phrase is used by judges and other lawyers and by what methods it may be determined. This will show what is entailed by 'following' or 'applying' a case and by being 'bound' by a previous decision, although these matters are not discussed until the beginning of the next chapter.

The *ratio decidendi* is best approached by a consideration of the structure of a typical judgment. The contemporary English judge almost invariably gives reasons for his decision in a civil case. Assuming that the trial is by a judge alone without a jury, he generally summarizes the evidence, announces his findings of fact, and reviews the arguments that have been addressed to him by counsel for each of the parties. If a point of law has been raised, he often discusses a number of previous decisions. Nowadays it is comparatively seldom that a civil case is tried by a judge and jury. When there is a jury, the judge sums the evidence up to them and bases his judgment on their findings of fact. In criminal cases tried on indictment, the all-important feature from the point of view of a lawyer is the summing up to the jury. The form of the judgments in appellate courts is similar to that of a judge who tries a civil case without a jury. It consists of a review of facts and arguments and a discussion of relevant questions of law. Several opinions are frequently delivered in appellate courts because appeals are always heard by more than one judge.

It is not everything said by a judge when giving judgment that constitutes a precedent. In the first place, this status is reserved for his pronouncements on the law, and no disputed point of law is involved in the vast majority of cases that are tried in any year. The dispute is solely concerned with the facts. For example, the issue may be whether a particular motorist was driving carelessly by failing to keep a proper look-out or travelling at an excessive speed. No one doubts that a motorist owes a legal duty to drive carefully and, very frequently, the only question is whether he was in breach of that duty when he caused damage to a pedestrian or another motorist. Cases in which the only issues are questions of fact are usually not reported in any series of law reports, but it is not always easy to distinguish law from fact and the reasons which led a judge of first instance or an appellate court to come to a factual conclusion are sometimes reported at length. For example, an employer is under a legal duty to provide his employees with a reasonably safe system of working. The question whether that duty has been broken is essentially one of fact, but the law reports contain a number of cases in which judges have expressed their views concerning the precautions which an employer should have taken in particular instances. When an injury would not have occurred if a workman had been wearing protective clothing it has been said that his employer ought to have insisted that such clothing should have been worn instead of merely rendering it available for those who desired to wear it, but the House of Lords has insisted that observations of this nature are not general propositions of law necessarily applicable to future cases and the decisions based upon them do not constitute a precedent.[1] There is no point in endeavouring to ascertain the *ratio decidendi* of such cases.

The second reason why it is not everything said by a judge in the course of his judgment that constitutes a precedent is that, among the propositions of law enunciated by him, only those which he appears to consider necessary for his decision are said to form part of the *ratio decidendi* and thus to amount to more than an *obiter dictum*. If the judge in a later case is bound by the precedent according to the English doctrine of *stare decisis*, he must apply the earlier *ratio decidendi* however much he disapproved of it, unless, to use the words of Lord Reid, he considers that the two cases are

[1] *Qualcast (Wolverhampton) Ltd.* v. *Haynes* [1959] AC 743.

'reasonably distinguishable'.[2] Dicta in earlier cases are, of course, frequently followed or applied, but dicta are never of more than persuasive authority. There is no question of any judge being bound to follow them. Even when the *ratio decidendi* of a previous case is merely a persuasive authority, it must be followed in later cases unless the judge has good reason to disapprove of it.[3] It constitutes a precedent, and the difference between a persuasive precedent and an *obiter dictum* is only slightly less significant than that between binding and persuasive precedents. If, for example, a High Court judge of first instance comes to the conclusion that a proposition of law contained in a previous opinion of another High Court judge of first instance is *ratio*, he will be a great deal more reluctant to differ from it than would be the case if he was satisfied that it was merely a *dictum*, although a judge of first instance is not bound to follow the decision of another judge of first instance.

The distinction between *ratio decidendi* and *obiter dictum* is an old one. As long ago as 1673 Vaughan CJ said:

> 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 had been broach'd, is no judicial opinion; but a mere *gratis dictum*.[4]

Nowadays an *obiter dictum* would normally be spoken of as a judicial opinion, but the contrary practice prevailed long after 1673. Thus Austin, lecturing between 1828 and 1832, said:

> Such general propositions, occurring in the course of a decision, as have not this implication with the specific peculiarities of the case, are commonly styled extra judicial, and commonly have no authority.[5]

There are undoubtedly good grounds for the importance attached to the distinction between *ratio decidendi* and *obiter dictum*. In this context an *obiter dictum* means a statement by the way, and the probabilities are that such a statement has received less serious consideration than that devoted to a proposition of law put forward as a reason for the decision. It is not even every proposition of this nature that forms part of the *ratio decidendi*. To quote Devlin J, as he then was:

> It is well established that if a judge gives two reasons for his decision, both are binding. It is not permissible to pick out one as being supposedly the

[2] p. 36 *supra*.
[3] See Richard Bronaugh, 'Persuasive Precedent', in Goldstein (ed.), *Precedent in Law*, ch. 8.
[4] *Bole* v. *Horton*, Vaughan 360 at 382.
[5] *Jurisprudence* (5th edn.), ii. 622.