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CASE LAW IN ENGLAND AND AMERICA*

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It has become almost traditional for lawyers who deal with the subject of Anglo-American relations to emphasize the fact that one of the fundamental bonds between England and the United States is the common law. It is my purpose to suggest that this bond is a weakening one, and that even at the present time there is a marked divergence between the English and the American attitude to the most characteristic doctrine of the common law—the doctrine of *stare decisis*.

In his lectures on *The Theory of Judicial Decision*,¹ Dean Pound emphasized the fact that one of the three fundamental elements of what we call law is:²

[A] body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts whereby these precepts are eked out, extended, restricted, and adapted to the exigencies of administration of justice.

He then gave the following example of this element:³

In our legal system we have a good example in the doctrine as to the force of judicial decisions as affecting judicial decision of subsequent cases. It is almost impossible for the common-law lawyer and the civilian to understand each other in this connection.

I believe that at the present time it is almost as difficult for the English lawyer to understand the American theory of precedent as it is for him to understand the civilian, and that in place of two conflicting systems—the common law and the civilian—we are now faced with three different methods, the English, the American, and the civilian. The American system at present lies closer to the English than it does to the civilian, but the tendency seems to

*An address delivered April 27, 1929, on the Frank Irvine Lectureship, established by the Conkling Inn of Phi Delta Phi.

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¹(1923) 36 HARV. L. REV. 641. ²*Ibid.* 645. ³*Ibid.* 646.

be for it to shift towards the latter. To make this clear it is necessary to consider briefly what the three systems are.

The civilian system, as exemplified by the French practice, has been well stated by Professor Lambert of the University of Lyons in an article shortly to be published in the *Yale Law Journal*.⁴

In France, the judicial precedent does not, *ipso facto*, bind either the tribunals which established it nor the lower courts; and the Court of Cassation itself retains the right to go back on its own decisions. The courts of appeal may oppose a doctrine proclaimed by the Court of Cassation, and this opposition has sometimes led to a change of opinion on the part of the higher court. The practice of the courts does not become a source of the law until it is definitely fixed by the repetition of precedents which are in agreement on a single point.

Decided cases, therefore, only affect the law in so far as they create a practice or body of doctrine.⁵ An individual case, even if decided by the highest court, has only a limited persuasive authority, unless the situation is exceptional. Moreover, it is only in a severely restricted number of situations that these *de facto* precedents are applied. As Judge Henry of the Mixed Tribunals of Egypt has said:⁶

The codes are supposed to contain the whole of the law, and such theory is by no means so far from truth as a Common Law legislator might suppose. In actual practice certainly 99 per cent of the cases coming before the courts are disposed of by the broad general principles to be found in the codes.

A number of distinguished writers, including Professor Holland⁷ of Oxford and Dean Pound,⁸ have suggested that the distinction

⁴Now published: Lambert and Wasserman, *The Case Method in Canada and the Possibilities of its Adaptation to the Civil Law* (1929) 39 *YALE L. J.* 1, 14.

⁵*Cf.* the article, *Case Law and the European Codified Law* (1925) 19 *ILL. L. REV.* 505, by Hans Sperl, dean of the faculty and professor of law at the University of Vienna, in which he says at 519: "In the sense thus explained judicial decisions are esteemed in the countries of continental Europe. Not as the finding-place (Fundort) of the positive law; not as a source, recognized by the state constitution, from which new law may flow; but only as instructive for a sound understanding and just application of the statutes. These are purposes sufficiently high and important to explain why men collect and study the courts' decisions and utilize them as significant guide-posts in the application of a code.

"Continental countries and jurists will never bring themselves to abandon the exclusive authority of statutory law, and concede to a judicial decision the force of a legal rule binding in similar cases thereafter arising."

⁶Henry, *Jurisprudence Constante and Stare Decisis* (1929) 15 *A. B. A. J.* 11, 12.

⁷HOLLAND, *JURISPRUDENCE* (13th ed. 1924) 70: "There have been of late some symptoms of an approximation between the two theories."

⁸*Op. cit. supra* note 1, at 646: "In fact our practice and the practice of the Roman-law world are not so far apart as legal theory makes them seem to be."

between the civilian and the common law systems is more marked in theory than in practice. It is interesting on this point to cite the experience of Judge Henry:⁹

But from my own experience in the actual application of the Civil Law, including of course my observation of the work of counsel before the court, I have come to realize that such indicia may be misleading. It is clear that the divergence in attitude as to precedents between the Civil Law and the Common is still great, and that there is little likelihood of its becoming substantially less for a long time to come.

It is, of course, true that a system which recognizes the persuasive effect of established practice will tend under certain circumstances to resemble a system based on the binding effect of individual precedents, but the machinery and technique of reaching this similar result are fundamentally different. It is only necessary to compare the small working library of a French lawyer with the number of reports required by an English barrister to realize that here are two different systems. Compare, also, such works as Williston on *Contracts* and Wigmore on *Evidence* with their thousands of citations and continual analytical references to individual cases, with such standard French works as Planiol, *Droit Civil*, Colin et Capitant, *Droit Civil*, Bédarride, *Droit Commercial*, in which individual cases are never discussed and only cited in rare instances. It is hardly surprising to find that the civilian refers to the English system of case law as "*la superstition du cas*".¹⁰

The English doctrine of precedent has been well stated by Sir John Salmond:¹¹

A judicial precedent speaks in England with authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established. . . .

Absolute authority exists in the following cases:

(1) Every court is absolutely bound by the decisions of all courts superior to itself. A court of first instance cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow the judgments of the House of Lords.

(2) The House of Lords is absolutely bound by its own decision. . . .

(3) The Court of Appeal is, it would seem, absolutely bound by its own decisions and by those of older courts of co-ordinate authority, for example, the Court of Exchequer Chamber.

This unqualified statement of the binding nature of a precedent has, as far as I know, not been questioned by a single English author-

⁹*Op. cit. supra* note 6, at 11.

¹⁰*Cf. Kotze, Judicial Precedent* (1918) 144 *LAW TIMES* 349.

¹¹HOLLAND, *JURISPRUDENCE* (7th ed.) 187.

ity. Sir Frederick Pollock¹² and Professor Holland¹³ accept this view, and Mr. Allen in his recent book, *Law in the Making*,¹⁴ although he considers this is a strictly nineteenth century doctrine, does not dissent from it.

The only doubtful voice is that of Professor W. Jethro Brown of Australia, who acknowledges that precedents bind, but fears that the doctrine of *stare decisis* is being whittled away by ingenuity in making distinctions:¹⁵

Of course precedents bind! But there appears to me a more evident desire and/or ingenuity in distinguishing a precedent from the complexus of facts before the Court if the application of precedent might lead to inconvenient consequence.

Unfortunately Professor Brown does not give any references to prove these ingenious distinctions. Whether a distinction is ingenious or not is after all a matter of personal judgment, and a statement, unsupported by citations, is only of doubtful value, however distinguished the writer may be. In this connection it is interesting to note that Lord Justice Scrutton¹⁶ and Mr. Stallybrass,¹⁷ the editor of *Salmond on Torts*, differ in their views as to the

¹²POLLOCK, JURISPRUDENCE (5th ed. 1923) 346. ¹³*Op. cit. supra* note 7, at 68.

¹⁴Mr. Allen says at 191: "In the eighteenth century, precedents play a large part in the practice of the law, but the Judges do not consider themselves in any way bound by decisions of which they do not approve." With all respect, we feel that this language goes too far. He cites Chief Justice Vaughan's dictum that yet "if a Court give judgment judicially, another Court is not bound to give like judgment, unless it think that judgment first given was according to law." Concerning this dictum Sir Frederick Pollock, *op. cit. supra* note 12, at 325, remarks: "If Vaughan, C. J., really said that a judge can never be bound to follow an authority with which he personally does not agree, he disregarded the uniform practice of English courts." Mr. Allen also cites Lord Mansfield's dictum in *Jones v. Randall*, 1 Cowp. 37 (1774) as giving "the characteristic view", but Lord Mansfield was hardly a typical common law judge. It is certainly true that the eighteenth century doctrine was not as inflexible as is that of the present day—due perhaps to the fact that there was not a single High Court of Judicature and also to the fact that some of the reports were unsatisfactory—but the uniformity of the decisions in that century, with certain rare exceptions, seems to conflict with Mr. Allen's view.

¹⁵Brown, *Administration of Justice in England 1906 v. 1923* (1924) 33 YALE L. J. 838.

¹⁶*In re Polemis*, [1921] 3 K. B. 560, 577: "Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that some one finding the cheque should commit forgery...; while if some one negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled."

¹⁷SALMOND, TORTS (Stallybrass's 7th ed. 1928) 175: "The explanation seems to be that a man may well contract not negligently or indeed at all to provide the occasion for another's wrongdoing, but that independently of contract or intention he will not be held liable for it."

reasonableness of the distinction drawn by the House of Lords between the facts in *Weld-Blundell v. Stephens*¹⁸ and those in *London Joint Stock Bank v. MacMillan*.¹⁹

How strictly the English courts construe the doctrine of *stare decisis* is shown by the recent case of *Great Western Ry. v. Owners of S. S. Mostyn*,²⁰ in which the House of Lords had to consider the doubtful and inconvenient case of *Wear v. Adamson*.²¹ Almost fifty pages are occupied in a close analysis of what the latter case held, although, as Viscount Haldane pointed out,²² if it had not been for the *Wear* case, it would have been possible to take a simple view of the matter. In 1921 in *Inland Revenue Commissioners v. Blott*²³ Lord Sumner delivered a strong dissent, but in 1926 in *Inland Revenue Commissioners v. Fisher's Ex'rs*²⁴ he insisted upon the binding authority of the *Blott* case and pointed out that it could not be distinguished.²⁵

Perhaps the most striking illustration of the binding nature of precedents under the English system is to be found in Volume I of the 1926 King's Bench reports, for in six cases there reported,²⁶ one or more of the judges state that they might have decided the case before them differently if they had not been bound by a prior decided case. Only two examples need be given. In *Daley v. Lees*, Lord Hewart, C. J., says:²⁷

One has to approach the matter on the pure question of law whether *Parker v. Talbot* applies and governs this case. . . I am compelled to take a course and expound a view which, if the matter were open, I should not take or expound.

¹⁸[1920] A. C. 956, 985. ¹⁹[1918] A. C. 777. ²⁰[1928] A. C. 57.

²¹2 App. Cas. 743 (1877).

²²*Supra* note 20, at 63: "But we cannot proceed here on this simple view. It has been established by a decision which is binding on us by this House that the language must be interpreted as subject to some qualification which is implicit in the words, and the question which alone we are free and bound to examine, is what this qualification is, and how far it extends."

²³[1921] 2 A. C. 171. ²⁴[1926] A. C. 395.

²⁵*Ibid.* 407: "My Lords, the authority of *Blott's* case constrains your Lordships to dismiss this appeal, but, as I regret the necessity for this conclusion, perhaps I may venture to state how it is that, in my view, in spite of considerable differences of fact between the two cases, the result must, nevertheless, be the same."

²⁶*Daley v. Lees*, [1926] 1 K. B. 40, 46; *Huyton and Roby Gas Co. v. Liverpool Corp.*, [1926] 1 K. B. 146, 152; *Freeborn v. Leeming*, [1926] 1 K. B. 160, 171, 172; *Chaplin v. Smith*, [1926] 1 K. B. 198, 205; *Williams v. Guest, Keen and Nettlefolds*, [1926] 1 K. B. 497, 504; *Pontypridd Union Guardians v. Drew*, [1926] 1 K. B. 567, 575, 576.

²⁷*Supra* note 26, at 46.

In *Williams v. Guest, Keen and Nettlefolds*, Lord Justice Atkin said:²⁸

I agree that the appeal should be dismissed, and I do so solely because I consider that this Court is bound by the decision in *Steel v. Cammell, Laird and Co.*, which it is impossible to distinguish from the facts of this particular case.

It is important to note that no one of the cases referred to above was concerned with property or with contract rights. The English doctrine of *stare decisis* is not based upon the narrow theory that precedents should be binding only in those cases in which a departure from a prior decision would injure a person who had relied on it. It is founded on the broader theory that it is essential for the law to be certain, and that to attain this certainty it is worth while to sacrifice justice in occasional cases. This has been stated in its most positive form by the Earl of Halsbury:²⁹

Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal? My Lords, “interest rei publicae” that there should be “*finis litium*” at some time, and there could be no “*finis litium*” if it were possible to suggest in each case that it might be reargued, because it is “not an ordinary case,” whatever that may mean.

The doctrine applies, therefore, in all cases equally. It is as desirable to determine definitely the law of crimes and of torts as it is to establish the law of property or of contracts, although the criminal and the tortfeasor cannot reasonably be supposed to have relied upon the law. It is on the ground that certainty in the law is essential that the English doctrine is based.

Is this doctrine one which will probably endure? Is there any evidence that English lawyers and jurists are dissatisfied with it? The negative evidence is overwhelming. A search through the English periodicals since 1900 does not show a single article or note

²⁸*Supra* note 26, at 504.

²⁹*London Street Tramways Co., Ltd. v. London County Council*, [1898] A. C. 375, 380. As this case has been frequently criticized, it may be noted that it was decided by a strong House which included Lord Macnaghten. In referring to this case, the HARVARD LAW REVIEW in a comment, (1920) 34 HARV. L. REV. 74, said: “The admission of the House of Lords that it cannot reverse itself, on a proposition of law is one of weakness.” That is a failing of which Lord Halsbury has never before been accused.

by an English lawyer in which the system has been adversely criticized. No modern English poet has arisen to denounce the English law as Tennyson did seventy years ago.³⁰

Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.

Perhaps the reason why the English lawyer is not dissatisfied with the present system is that the "myriad" precedents do not exist. The English cases to 1865 are reprinted in the *English Reports* in about 175 volumes. The semi-official *Law Reports* from 1865 to the present date occupy about 450 volumes. Thus 625 volumes will make a complete working library. Only a small proportion of the decided cases are reported each year; unless a case deals with a novel point of law—and novelty is strictly construed—it will rarely find its way into the *Reports*.³¹ In 1927 the *Law Reports* of the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the Chancery and King's Bench Divisions, the Divisional Court dealing with appeals from the County Courts, and the Probate, Divorce, and Admiralty Division, totalled less than four thousand pages. In the same year the reported opinions of the New York courts alone occupied seven thousand pages. It is hardly surprising to find that the English lawyer has no difficulty in digesting the annual reports, and that he does not, therefore, demand a change in the established system.

What is the present American doctrine concerning the binding nature of precedents? Is there any material evidence on which we can venture to predict its probable course in the future? The answer to the first question we will find primarily in the opinions of the courts; the answer to the second we must seek in recent books and articles.

It is unnecessary to point out here that the United States Supreme Court and the highest courts of the various states have never held themselves to be absolutely bound by their own decisions.³² In the

³⁰Leolin, the unhappy lover in *Aylmer's Field* attempts to win his lady by becoming a successful barrister.

³¹For an authoritative statement of the English system of reporting see Sir Frederick Pollock, editor of the *Law Reports*, *English Law Reporting* (1903) 19 L. Q. REV. 451.

³²In *Washington v. Dawson & Co*, 264 U. S. 219, 238, 44 Sup. Ct. 302, 309 (1924) Mr. Justice Brandeis cites twelve instances in which the Supreme Court has reversed itself.

past, however, these reversals have been few in number and considered definitely exceptional. The strenuous efforts of the courts to "distinguish" cases is evidence of this feeling that a precedent must not be overruled. As Professor Hardman has written,³³ "a few sporadic departures from *stare decisis* do not create a tendency," and, on the whole, it may be said that the nineteenth century American doctrine approximated the English view.

But when we turn to the twentieth century we find a marked difference in the attitude of the courts; a feeling of freedom exists which would strike an English judge as revolutionary. It is only necessary to quote a few examples from the many that could be given.

In *Hertz v. Woodman*³⁴ Mr. Justice Lurton said:

The Circuit Court of Appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.

In *Rosen v. United States*³⁵ Mr. Justice Clarke uses striking language to justify judicial legislation:

Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1879 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved.

In *Adams Exp. Co. v. Beckwith*,³⁶ the Supreme Court of Ohio, in overruling the doctrine laid down in *Ellis v. Bitzer*,³⁷ which "it must be conceded. . . has been the law of Ohio since 1825," said by Wana-maker, J.:

A decided case is worth as much as it weighs in reason and righteousness, and no more. It is not enough to say "thus saith the court." It must prove its right to control in any given situation by the degree in which it supports the rights of a party violated and serves the cause of justice as to all parties concerned.

In *Thurston v. Fritz*³⁸ the Supreme Court of Kansas departed from the common law rule concerning dying declarations:

³³Hardman, *Stare Decisis and the Modern Trend* (1926) 32 W. VA. L. Q. 163.

³⁴218 U. S. 205, 212, 30 Sup. Ct. 621, 622 (1910).

³⁵245 U. S. 467, 471, 38 Sup. Ct. 148, 150 (1918).

³⁶100 Ohio St. 348, 351, 352, 126 N. E. 300, 301 (1919).

³⁷2 Ohio 89, 15 Am. Dec. 533 (1825).

³⁸91 Kan. 468, 475, 138 Pac. 625, 627 (1914).

The doctrine of *stare decisis* does not preclude a departure from precedent established by a series of decisions clearly erroneous, unless property complications have resulted, and a reversal would work a greater injury and injustice than would ensue by following the rule.

The New York Court of Appeals in *Oppenheim v. Kridel*³⁹ expressed the same doctrine in even stronger words, when Crane, J., said:

In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights.

These examples, taken from cases decided by courts in widely separated states, show that the modern American doctrine of precedent is far more liberal than the strict view of the English courts. Only where a departure from earlier cases would interfere with vested rights do we find a marked hesitation in repudiating established rules which are thought to conflict with the mores of the present day.

When we turn to recent legal literature we find an even more radical spirit than is shown by the courts. This is only to be expected for judges are, and ought to be, cautious in accepting novel doctrines. The number of recent books and articles which deal with the theory of precedent is strong evidence that the American jurist is attempting to create a new system which he believes will be more in consonance with the social welfare than has been that of the past. The views range all the way from the more moderate suggestion of slight modification to the radical demand for the complete abolition of *stare decisis*.⁴⁰

³⁹236 N. Y. 156, 165, 140 N. E. 227, 230 (1923).

⁴⁰The following quotations from recent articles, which are cited in alphabetical order, will give some idea of the trend of American thought on this subject:

C. E. Blydenburgh, *Stare Decisis* (1918) 86 CENT. L. J. 388, 389: "The rule of *Stare Decisis* is founded on public policy, but to give to this rule such adamant power that no court would be permitted to depart therefrom, and to make it law like that of the 'Medes and Persians, which altereth not,' is to emphasize the fact of 'judge-made laws' which has been so largely criticised in the press of late years."

Samuel B. Clarke, *What May Be Done to Enable the Courts to Allay the Present Discontent with the Administration of Justice* (1916) 50 AM. L. REV. 161, 163: "The court must not deem itself bound by any precedent but may nevertheless give due weight to precedents according to their just value as evidence of the law."

Arthur L. Corbin, *The Law and the Judges* (1914) YALE REV. 234, 242: "The legal profession is now on the defensive largely because of its having put over-emphasis upon one of the sources of declared rules—the decisions in former

The moderate view can be found in the articles of Judge Cuthbert

cases—to the exclusion of other sources. Had the judges ever adhered strictly to the doctrine that precedents are the only source of the common law and are of binding effect, surely those precedents would have been overthrown in short order and the judges along with them. But precedents have been forgotten, have been disregarded and evaded, have been flatly disapproved and over-ruled. We must not forget this fact, even though at times the judges did not move as fast as other people. These processes have kept the declared judicial rules within hailing distance of advancing civilization, although occasionally civilization is obliged to send out a loud hail."

Hon. John W. Davis, *The Case for the Case Lawyer* (1916) 3 MASS. L. Q. 99, 102 (This interesting article is not sufficiently well known.): "To make precedents the fount and origin of the law is to compel their study; to compel their study is to put a premium upon the knowledge so acquired; and to put a premium upon this knowledge is to encourage its over-exhibition by the overzealous. We should think of the case lawyer at least with the charity due to one who has been led into temptation."

Hon. Lindley M. Garrison, *Blind Adherence to Precedents* (1917) 51 AM. L. REV. 251, 252: "If this system had resulted in an unbroken line of unanimous decision, even though it might be admitted that error had crept in and that many principles had been distorted, and some denied, there would be much to be said in favour thereof, and great caution would be proper before attempting to alter the system even for the purpose of reaching and curing those instances in which error had intruded. But we all know that the system has not resulted in any such thing. In all, except the simplest matters, there is a great contrariety of decision and precedent."

Dean Leon Green, *The Duty Problem in Negligence Cases* (1928) 28 COL. L. REV. 1014, 1036: "This doctrine [*stare decisis*] has never been needed, it can be obviated in any case, but it is sometimes embarrassing and frequently requires subtlety in order to avoid its effects. It creates infinitely more difficulties than it renders benefits. For one thing a court's scheme of things may become so ponderous in the course of time that the succeeding judges cannot possibly know what their predecessors have done. Courts unwittingly reverse themselves more often than otherwise, and doubtless they spend more time trying to maintain a consistency of decision than on any other one problem. Moreover, this feeling that a court must drag along the dead part of itself creates a psychological dead-weight of tremendous import."

Robert Sprague Hall, *Precedents and Courts* (1917) 51 AM. L. REV. 833, 855: "And when the court has been found to have taken a false position, it should not, when the opportunity arrives for it to correct its mistake, sophisticate, in order to avoid admitting its former error."

Thomas P. Hardman, *op. cit. supra* note 33, at 165-6: "The result is that within the last few years there has been in many quarters a perceptible change of judicial and juristic attitude toward the function of precedents—a tendency in the direction of conscious judicial renovation, judicial legislation or judicial restatement of the law. . . . With respect to the function of applying such apt precedents or precepts to the facts of the case, where the logical or historical application after the manner of the last generation would defeat the social justice desired, there is in many localities a growing tendency toward a less mechanical application, so as to do justice in the individual case or in that class of cases."

W. Pound and of Dean McMurray, and in Chief Judge Cardozo's famous book, *The Nature of the Judicial Process*.

Frederick G. McKean, Jr., *The Rule of Precedents* (1927) 76 U. OF PA. L. REV. 481, 487, 488, 491, 494, 496: "[T]hus expediency no less than the moral force of the principle *stare decisis* inclines courts to abide by precedent in such cases [rules of property]. Of course changes affecting contingent interests and expectancies and which do not disturb vested rights will be unhesitatingly corrected. . .

"Another wide class of cases in which courts hesitate to overrule precedents arises where contracts have been made in reliance upon a decision. . . .

"As no man has a vested right to do wrong, precedents *per se* have less weight in the law of torts than in that of contracts and property. . . .

"There is no vested right in erroneous precedents in criminal law. . . .

"The maxim *stare decisis*, etc., does not appear to have very great weight in the law of evidence and procedure, as a general rule."

Hon. Robert von Moschzisker, *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409, 413: "For the purpose of keeping the law standardized so it may be knowable to all, the doctrine of *stare decisis* dictates that decisions formally reduced to judgment shall thereafter be followed as precedents; that is to say, the law of such decisions,—even though thought to be wrong in principle or to have been incorrectly applied,—shall not be departed from in subsequent cases where a departure is apt to do more harm than would occur should the decision be allowed to stand until the legislature might see fit to change the rules of conduct there laid down or acted upon. But if, after thorough examination and deep thought, a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent, where departure therefrom can be made without unduly affecting contract rights or other interests calling for consideration."

Dean Roscoe Pound, *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 605, 614: "That our case law at its maturity has acquired the sterility of a fully developed system, may be shown by abundant examples of its failure to respond to vital needs of present day life. . . . Our judge-made law is losing its vitality, and it is a normal phenomenon that it should do so."

Dean Roscoe Pound, *Law in Books and Law in Action* (1910) 44 AM. L. REV. 12, 20: "We have developed so minute a jurisprudence of rules, we have interposed such a cloud of minute deductions between principles and concrete cases, that our case-law has become ultra-mechanical, and is no longer an effective instrument of justice if applied with technical accuracy."

Dean Roscoe Pound, *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 940, 943: ". . . If we actually set as much store by single decisions as we purport to do in legal theory, the path of the law would lie in a labyrinth. In truth, our practice has learned to make large allowances for both of these features of decision which are inseparable from a judge-made customary law. The tables of cases distinguished and cases overruled tell a significant story."

Clarence G. Shenton, *The Common Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence* (1918) 23 DICK. L. REV. 37, 50, 51: ". . . The exceptions sanctioned by the sponsors and advocates of the rule have consumed it. As a means of promoting stability and certainty *stare decisis* is a wretched failure. . . .

"*Stare decisis* requires us to assume the unbelievable, that all precedents have been correctly decided for all time, or else to conclude that, in its futile attempts to promote stability, its sole justification is to perpetuate error."

Judge Pound says:⁴¹

Case law is not wholly bound by the rules of past generations. It is a "myth of the law" that *stare decisis* is impregnable or is anything more than a salutary maxim to promote justice. Although "certainty is the very essence of the law," the law may be changed by the courts by reversing or modifying a rule when the rule has been demonstrated to be erroneous either through failure of adequate presentation of proper consideration, or consideration out of due time of the earlier case, or when "through changed conditions it has become obviously harmful or detrimental to society."

The American doctrine is stated by Dean McMurray as follows:⁴²

In such matters, we can only speak of averages, of tendencies. And it is, I think, safe to say that in most American jurisdic-

Hon. Harlan F. Stone, *Some Aspects of the Problem of Law Simplification* (1923) 23 COL. L. REV. 319, 320: "... A generation ago the suggestion that we should seriously consider any substitute for the traditional method of developing and systematizing our law by judicial decisions, corrected or supplemented by occasional, more or less haphazard legislation, would have been accorded the scant courtesy of mildly derisive opposition. But what then seemed impossible or improbable has already been transferred into the realm of the probable and those who appraise the tendencies which give substance and direction to our legal development and who view the future with discerning eye already see the problem of law simplification as one which is not only inevitable but immediate....

"... But every new citator, every new digest, every new compilation which we eagerly seize upon to lighten our labours, comes, like Banquo's ghost, to confront us with the disquieting reality that the common law system of precedent which our forbears have cherished for some ten centuries cannot continue indefinitely to develop solely through the medium of reported decisions."

Edward B. Whitney, *The Doctrine of Stare Decisis* (1904) 3 MICH. L. REV. 89, 94: "Yet I believe not only that the doctrine of *stare decisis*, unless some entirely novel and radical legislation can be devised to save it, must disappear through the inevitable course of human progress—and progress does not always lead from a worse to a better system—but that its hold, in the more crowded Federal and State courts at least, has already to a considerable extent been weakened."

John E. Young, *Law as an Expression of Ideals* (1917) 27 YALE L. J. 1, 29: "The court's change of heart has not, however, proceeded far enough to remedy all the evils peculiar to judicial legislation; for at the present time when a new question arises, it is governed more in framing a rule to decide it by what Glanvil, Bracton, Coke, or Blackstone may have said in respect to a somewhat similar matter, than by a consideration of the results it will produce; that is, by a consideration of whether these results will probably be just as the ordinary man understands justice; while it is too plain for argument that that is the test which should be applied to determine whether a law is just, if laws are intended to effectuate public ideals."

⁴¹Pound, *Some Recent Phases of the Evolution of Case Law* (1922) 31 YALE L. J. 361, 363.

⁴²McMurray, *Changing Conceptions of Law* (1915) 3 CALIF. L. REV. 441, 446.

tions today a more rational theory as to the binding force of precedent generally obtains than that held by the British House of Lords. The very multiplication of authority tends to impair to some extent its force, especially where the decisions in various jurisdictions are inconsistent and conflicting. The better class of modern lawyers and judges have, in part from the very copiousness of authority, come to regard precedent as their servant and not as their master, as presumptive evidence of what the law is rather than as absolutely conclusive evidence.

Chief Judge Cardozo says:⁴³

I think adherence to precedent should be the rule and not the exception. . . . But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. . . . There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.

The more radical repudiation can be found in Dean Wigmore's *Problems of Law*:⁴⁴

Is the judge to be bound by his precedent? This part of the question ought not to trouble us overmuch. *Stare decisis*, as an absolute dogma, has seemed to me an unreal fetich. The French Civil Code expressly repudiates it; and, though French and other Continental judges do follow precedents to some extent, they do so presumably only to the extent that justice requires it for safety's sake. *Stare decisis* is said to be indispensable for securing certainty in the application of the law. But the sufficient answer is that it *has* not in fact secured it. Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves,—the government of the living by the dead, as Herbert Spencer has called it.

Professor Oliphant, in his Presidential Address to the Association of American Law Schools in 1927,⁴⁵ took an equally radical position although he disguised it under the title of *A Return to Stare Decisis*. His plea resembles Rousseau's demand for a return to the law of nature—a law of nature which never existed except in the author's imagination. The theory Professor Oliphant advances is really that of the civil law, for it is the practice of the court which he considers to be the important matter:

Not the judges' opinions, but which way they decide cases will be the dominant subject-matter of any truly scientific

⁴³CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921) 149, 150, 151.

⁴⁴WIGMORE, PROBLEMS OF LAW (1920) 79. ⁴⁵(1928) 14 A. B. A. J. 71, 159.

study of law. This is the field for scholarly work worthy of best talents for the work to be done is not the study of vague and shifting rationalizations but the study of such tough things as the accumulated wisdom of men taught by immediate experiences in contemporary life,—the battered experiences of judges among brutal facts.

It is, I think, therefore safe to say that the present American tendency is strongly away from the strict English doctrine of *stare decisis*. But is this merely a temporary step to be followed by the reaction which so frequently succeeds legal innovations, or is it likely to be accentuated in the future? I believe that the latter is the fact, and that in no distant time the American doctrine will approximate that of the civil law. This will be due in large part to five reasons: (1) the uncontrollable flood of American decisions, (2) the predominant position of constitutional questions in American law, (3) the American need for flexibility in legal rules, (4) the method of teaching in the American law schools, and (5) the restatement of the law by the American Law Institute.

(1) It is not necessary to point out to a legal audience how unmanageable is the bulk of our American case law at the present time. Every year we are publishing about three hundred and fifty volumes of reports, which can be compared with the five or six volumes for all of England and Wales. As far back as 1902 the President of the American Bar Association, in his annual address to the Association,⁴⁶ stated that the law reports of the past year contained 262,000 pages, and estimated that a man by reading 100 pages a day might go through them in eight years: by which time there would be new reports on hand sufficient to occupy him for fifty-six years more. Nothing effective has been done since then in the way of birth control or infanticide to check "the fecundity of our case law" which "would make Malthus stand aghast."⁴⁷ Mr. Justice Stone appeals to the judges,⁴⁸ "Unless courts set some restraints on the length and number of published opinions, it is inevitable that our present system of making the law reports the chief repository of our unwritten law will break down of its own weight." But is there any likelihood that this appeal will be heard?⁴⁹

⁴⁶Cited by Whitney, *op. cit. supra* note 40, at 97.

⁴⁷CARDOZO, *THE GROWTH OF THE LAW* (1924) 4: "The fecundity of our case law would make Malthus stand aghast. Adherence to precedent was once a steady force, the guarantee, as it seemed, of stability and certainty. We would not sacrifice any of the brood, and now the spawning progeny, forgetful of our mercy, are rearing those who spared them."

⁴⁸STONE, *LAW AND ITS ADMINISTRATION* (1915) 214.

⁴⁹In his article, *The Art of Judicial Reporting* (1925) 10 CORNELL LAW QUARTERLY 103, Mr. Rosbrook, Deputy New York Supreme Court Reporter, gives some

Inevitably as the number of opinions increases so does their length, for there are more relevant authorities which must be cited. Mr. John W. Davis⁵⁰ has referred to two extreme examples—one opinion which contained 351 citations, and another which boasted of 325. These are fortunately exceptional, but many conscientious judges feel that it is necessary to refer to a large number of cases to show that they have covered the law on the subject. Where the question is one on which the courts of the various states are nearly divided, the judge's opinion may resemble a table of cases. With this can be compared the judgments of the English courts in which the number of citations rarely exceeds five or six. As an example I have chosen volume I of the 1926 King's Bench reports which covers 53 cases. The total number of citations for 48 of these cases is 201, or an average of 4 1/5 citations per case. The largest number for any one case was 13, and in five there were no citations. I have excluded five cases all decided by one erudite judge who is so exceptional in his enthusiasm for citations that to include him would give a false idea of the usual practice. He has 94 citations in his five cases, the highest number in any one case being 27.

Much as we may pity the judge and the practicing lawyer who must work under the American system, we must reserve the major part of our sympathy for the legal author. In an attempt to give a true exposition of even a comparatively simple legal question he may have to digest literally hundreds of cases. Some American legal articles have been described, not unfairly, as a line of text supported by a page of footnotes. Is it surprising that the men who have been crushed by this system have at last revolted and are demanding a new method which will be concerned with legal principles instead of with the minutiae of myriad precedents?⁵¹

interesting figures to show what has been done in the New York Court of Appeals and in the United States Supreme Court to cut down the number of reported opinions. The percentage of cases in which opinions were written was reduced in both courts: in 1906 the United States Supreme Court wrote opinions in 47 per cent of the cases while in 1923 the percentage was reduced to 29; in 1906 the percentage for the New York Court of Appeals was 35 while in 1923 it was 28.6. Owing, however, to the increase in litigation the actual number of opinions remained stationary. In 1906 the United States Supreme Court wrote 187 opinions and in 1923 it wrote 211—an increase of 24; in 1906 the New York Court of Appeals wrote 201 opinions and in 1923 it wrote 192—a decrease of 9.

⁵⁰*Op. cit. supra* note 40, at 108.

⁵¹The only optimistic note is sounded by Mr. Justice Holmes in his article, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 458: "The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within

(2) A second reason for the American attitude to the doctrine of precedent can be found in the predominant position of constitutional cases in American law. As these are, of course, of peculiar interest and importance, it is only natural that the legal method necessary for their solution should influence the method applied to ordinary common law cases. But in dealing with constitutional questions it has been found essential to keep the law as flexible as possible. In the last analysis these questions are primarily questions of public policy, and here the doctrine of *stare decisis* is least successful. Lord Watson has stated this in striking words in the leading case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*⁵²

A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy.

The English courts, which deal almost solely with questions of strict law, do not feel cramped by the doctrine of *stare decisis*; the American courts sometimes find it necessary on questions of constitutional law to make a complete *volte face* within the course of a few years.⁵³ It is natural, therefore, that, when these same courts are faced with questions of private law, they should adopt a similar view in regard to the binding nature of common law precedents.

(3) But even if the method in use in constitutional cases had not influenced the method to be applied in private law, nevertheless the strict English doctrine would have proved unsuitable to American life. The rapidly changing social and economic conditions in the United States place the rigidity of the case system under an unusual

a reasonable time. It is a great mistake to be frightened by the ever increasing number of reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned. The use of the earlier reports is mainly historical, a use about which I shall have something to say before I have finished."

But reports which can be mastered within a reasonable time by such a legal genius as Mr. Justice Holmes may prove unmanageable for the ordinary lawyer.⁵²[1894] A. C. 535, 553. Cf. Winfield, *Public Policy in the English Common Law* (1928) 42 HARV. L. REV. 76.

⁵³Cf. *People v. Williams*, 189 N. Y. 131, 81 N. E. 778 (1907) with *People v. Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639 (1915).

and heavy strain. At one time it was the fashion to suggest that the primary virtue of the case system was its flexibility, and that because of this the common law was able to adapt itself to changing conditions while the civil law had to remain stationary, but as Professor Geldart has pointed out, this is the exact reverse of the truth.⁵⁴ "Where a rule has once been decided, even though wrongly, it is difficult or impossible to depart from it. I do not agree with those who think that *flexibility* is a characteristic of Case Law. The binding force of precedent is a fetter on the discretion of the judge; but for precedent he would have a much freer hand."⁵⁵ The case system, therefore, satisfies the needs of a country such as England where conditions are more or less static; its conservatism is less suited to the United States with its kaleidoscopic civilization.

(4) A less obvious, but an equally powerful, influence in undermining the strict doctrine of precedent has been the method of teaching in the American law schools, not only in those which are departing from the absolute casebook method but also in those which are still true to it. Is not the case book method the apotheosis of precedent? Is it not based on the theory that the law is only to be found in the *ratio decidendi* of the cases? Is it not merely a modern adaptation of the medieval moots, those cradles of the common law? Superficially the method is the same, but the result is essentially different because the materials used are different. The medieval moots dealt with English law. But the American law school does not teach American law, for there is no such law. "The national law school," Judge Pound has said,⁵⁶ "teaches 'general legal principles' which are assumed to be uniform, although state rules vary." The method is primarily the method of comparative law, in which the doctrines laid down in English, federal, Massachusetts, Ohio, and New York cases are analysed and compared. As in dealing with so many jurisdictions it is almost always possible, especially where the point at issue is a doubtful one, to find cases which reach

⁵⁴GELDART, ELEMENTS OF ENGLISH LAW, 28.

⁵⁵For the contrary view see Wm. Draper Lewis, *Present Status of the American Law Institute* (1929) 6 N. Y. U. L. REV. 337, in which he says: "The common law system has one great advantage over the system of expressing and developing law by the action of legislatures. This advantage is its flexibility. No principle of the common law is so firmly established as to prevent its modification in application by a court if the facts of the instant case show the injustice of its unmodified application. The common law is thus capable of being molded to the changing needs of life silently and without the shock of sudden change which so often results from legislative changes."

⁵⁶Pound, *The Law School Curriculum* (1923) 8 CORNELL LAW QUARTERLY 117, 125.

conflicting results on the same state of facts, the task of the student is to weigh their comparative claims to validity. This may depend upon a large number of different factors, including in many cases a consideration of the practical effect of the result. The teacher must guide the student in his choice between the conflicting cases, and, in doing so, he tends to lay down a general principle himself by which to test the cases. He is, therefore, less concerned with the *ratio decidendi* given by the court in each particular case than with the general average of the results reached by the courts of the various states. The constantly recurring expression, "the majority and the minority rule", is evidence of this comparative law method. An English teacher of law, on the other hand, has a far simpler task, for it is only necessary for him to determine what principles and rules the courts of a single jurisdiction will follow. He is primarily an expositor; he analyses the grounds on which the judges have decided a particular case and suggests how far the principle necessarily involved therein may extend. Rarely will he refer to the cases of another jurisdiction, unless the point is one which has not been settled by English law. The English teacher emphasizes what the judge has said: the American professor explains what the judge should have said.

The distinction between the American and the English method of instruction is even more clearly marked in the moot courts. For example, a Harvard moot court is a court sitting in an imaginary jurisdiction of Ames.⁵⁷ As all precedents are merely persuasive, the arguments are concerned with the determination of what principle it would be best for the court to adopt. A moot court in the Inns of Court or at Cambridge University, on the other hand, is sitting as an English court. It is bound by English precedents, and it must follow the principles laid down in these whether it believes them to be correct or not.

The American law student, having been taught not the law of a single jurisdiction but the principles of a number of different jurisdictions, is less inclined to believe in the authority of precedents than is his English brother. His critical faculty has been sharpened to such an extent that he regards every judicial opinion with suspicion. With such a background, his devotion to the doctrine of *stare decisis* must be far weaker than is that of the English student

⁵⁷*Introductory Suggestions for Law School Work*, Harvard University (1928-29), at 33: "Of course, in law club arguments all decisions are 'persuasive authority only'. There is deemed to be no law as yet in the 'Ames Jurisdiction' on the particular point or points involved in counsel's case."

who has been taught to accept the doctrine contained in a case as laying down the law. It is only natural that in later life, when the student has become a practicing lawyer or a judge, he will be profoundly influenced by his early training.

(5) Finally, the tendency to depart from the doctrine of *stare decisis* will receive a tremendous impetus in the restatements of the American Law Institute. As long as there was nothing to put in its place, the precedent system, or some slightly modified form of that system, was bound to continue unless we were to have more or less arbitrary justice. If the judges were not bound by prior cases, what limits would there be to judicial legislation? But with the creation of a code of law, whether official or unofficial, an adequate substitute can be offered. Its acceptance may be delayed for a number of years, but it is almost inevitable that it will in time replace the clumsy machinery of today.⁵⁸

These are some of the more important influences which are undermining the doctrine of precedent in the United States at the present time. But it is doubtful whether the system of case law has ever been really suited to the conditions peculiar to this country. In speaking of the history of case law in his recent book, *Some Lessons from Our Legal History*, Professor Holdsworth says:⁵⁹

A system of case law will never be so successful as it has been in England, in the absence of the peculiar conditions in which it originated and was developed. These conditions can, I think, be summarized as follows:

In the first place, a system of case law demands, for its satisfactory working, the presence of a centralized judicial system. . . .

In the second place, a system of case law demands a group of learned lawyers, both at the Bar and on the Bench, who are bound together by a common professional tradition. . . .

In the third place, a system of case law demands an independent well paid bench, which is, on the whole, more able than the bar.

⁵⁸The success of the American Law Institute's work will depend upon the degree to which past cases are no longer cited as precedents. The restatements are not intended to be well-made digests of past cases; they are a substitute for these cases. In *The American Law Institute* (1927) 43 L. Q. REV. 449, 458, 459, Mr. George W. Wickersham, President of the Institute, said: "The restatements are designed not merely to furnish clear and accurate statements of the rules of the common law, but where a divergence of opinion has arisen upon the rule in any given case, to influence the highest Courts of the different States to adopt that rule which on the whole seems to be sustained by the soundest reason. . . ."

"A mere academic restatement of the law, whatever its form, will not be sufficient for the undertaking. To fulfil its objects the restatement must have an authority greater than that now accorded to any legal treatise, an authority more nearly on a par with that accorded the decisions of the Courts."

⁵⁹HOLDSWORTH, *SOME LESSONS FROM OUR LEGAL HISTORY*, 20, 22, 23.

No one of these three conditions can be found in the United States at the present day. In place of a small judiciary centralized in London,⁶⁰ there is an army of judges scattered throughout the states in a bewildering number of courts. For each English judge there must be at least a hundred American ones. Mr. Justice Stone has given some interesting figures:⁶¹ "In New York we have 109 Supreme Court and Court of Appeals judges, or approximately one judge to each 100,000 inhabitants. . . In England and Scotland there are judges exercising powers corresponding to those of our Supreme Court and Court of Appeals judges numbering 49, or approximately one judge for each 840,000 of the population." These figures are even more striking if we include the federal district and circuit judges. It is obvious that, if the law as between the various states, or even within a single state, is to develop any uniformity, it cannot be left to depend upon the diverse interpretations of a thousand different judges.

The case system also requires a learned bar on which the bench can rely. Judicial work becomes overwhelming if the judge must depend on his own research for the relevant authorities. In England, with a practicing bar limited to a few hundred barristers of ability and experience, the courts are free to assume that their sole duty is to determine the issue on the arguments advanced by counsel.⁶² One result of this reliance is that in the majority of the cases the judges are able to deliver oral judgments immediately upon the conclusion of the argument. In America there are as many able lawyers as there are in England, but there is also a far larger number of less competent ones. Unfortunately, it is of frequent occurrence that the cases which are of the greatest importance to law as a science are argued by lawyers of the second class.⁶³ In deciding the cases the courts too often must rely upon themselves.

⁶⁰London has remained the centre of the English judicial system. Such great cities as Birmingham, Liverpool, and Manchester do not have permanent High Court judges, but are only visited from time to time by judges on circuit from London.

⁶¹STONE, *op. cit.* *supra* note 48, at 210.

⁶²In *Glebe Sugar Refining Co. v. Trustees of Greenock*, [1921] W. N. 85, 86, the Lord Chancellor said: It is not possible in the ordinary course for their Lordships to be aware of all the authorities, statutory and otherwise, which might be relevant to the issues in the particular case. Their lordships are in the hands of counsel and those that instruct counsel, and it is the practice of the House to expect, and even to insist, that authorities that bear one way or another upon matters in debate, shall be brought by counsel to their attention.

⁶³*Cf.* Judge Learned Hand, *Bench, Bar and Law Teaching* (1926) 24 MICH. L. REV. 466, 478: "Indeed, in my own city the best minds of the profession are

For the system to justify itself it is obvious that there must be respect for the wisdom and learning of the judge. To ask a court to follow the judgments of Lord Coke or Lord Holt is one thing; to expect it to be bound by the views of Scroggs or Jeffreys is quite another. Under the latter circumstances the doctrine of precedent becomes unreasonable. In view of the great number of American judges, and the unfortunate method of choice in some of the states, there must be some judges whose decisions will be accepted with a certain hesitancy.⁶⁴ But here the rule applied to Sodom and Gomorrah must be reversed, for one weak judge will do more to discredit the doctrine of case law than ten able ones can remedy. It is only if the great majority of the decisions meet with the approval of the legal profession that the belief in the authority of precedents can continue.

Thus the conditions peculiar to England, which have made case law so successful there, do not exist in the United States. We can, therefore, face the prospect of an eclipse of the doctrine of *stare decisis* without regret. But whether we regret it or not, I believe that such a change is inevitable. Precedents, and especially the precedent of a single case, will no longer be considered a binding source of law which judges must accept under all circumstances. Only if decided cases have created a practice upon which laymen have relied, will the American courts feel that they are bound to follow them. This, as I have attempted to show, is the doctrine of the civil law and directly contrary to that of the English law with its insistence upon the need for certainty. I therefore believe that, as concerns the fundamental doctrine of precedent, English and American law are at the parting of their ways.⁶⁵

scarcely lawyers at all. They may be something much better or much worse, but they are not that. With courts they have no dealings whatever, and would hardly know what to do in one if they came there. For example, the situation has become such that I cannot quite see how a system of jurisprudence dependent upon precedent is permanently to get on at all with its best talent steadily drawn away from the precedent makers."

⁶⁴Cf. CARDOZO, *op. cit. supra* note 47, at 5: "The output of a multitude of minds must be expected to contain its proportion of vagaries. So vast a brood includes the defective and the helpless."

⁶⁵This address consists almost entirely of quotations from other writers, but, if I may be permitted one more quotation, "The convincing force, if any such there be, of this article will consist in its want of originality." Judge Jeremiah Smith, *The Use of Maxims in Jurisprudence* (1895) 9 HARV. L. REV. 13, 14.