CASE NOTES

THE PASSING OF THE DOCTRINE OF STARE DECISIS IN THE HOUSE OF LORDS

The 26th of July, 1966, represents the passing of an era in the history of the House of Lords. On that day the Lord Chancellor, in a succinct and dignified statement to the House, abandoned the doctrine of *stare decisis* which had bound his brethren for eighty-five years.[1]

The Procedure adopted

Much has been written about the simplicity and unique nature of the procedure adopted by the House of Lords to effect the desired change in its practice without any significant attempt to explain that procedure. The explanation is to be found in the powers derived from the basic structure of the House of Lords when it meets to consider judicial business.

The House of Lords developed, between the fifteenth and nineteenth centuries both an original and an appellate jurisdiction, and it is the latter which is vital to our considerations. In 1873 Lord Selborne sponsored the Judicature Act which sought to remove the appellate jurisdiction of the House of Lords into a newly constituted appellate court, the Court of Appeal. This was never put into effect, and the Appellate Jurisdiction Act of 1876[2] restored the appellate jurisdiction of the House of Lords. This Act has been subsequently amended in some details but it embodies the substance of the structure and powers of the House in judicial matters.

The Act acknowledges that the House of Lords, whether dealing with public or judicial business, is a House of Parliament. An appeal to the House is an appeal to 'Her Majesty the Queen in her Court of Parliament'[3] and, therefore, although in theory a lay lord may sit and vote on judicial business, it has been established as a convention that lay lords shall not participate in appellate decisions. In 1844, Lord Wharncliffe advised the House in *O'Connell's Case*[4] that

> if noble lords unlearned in the law should interfere to decide such questions by their votes instead of leaving them to the decision of the law lords the authority of this House as a Court of Justice would be greatly impaired.[5]

The 1876 Act provides that no judicial business may be considered unless at least three Lords of Appeal[6] are present. Thus, it indirectly observes the convention, as the quorum in the House is three.

In general, all transactions of judicial business are conducted each morning of the week while the House is in session, prior to the whole House meeting to consider public business. Judgments on appeals are in the form

1 [1966] 1 W.L.R. 1234.
2 (1876) 39 & 40 Vict. Ch. 59.
3 *Ibid.* s. 4.
4 *O'Connell v. Reg.* (1844) 11 C. & J. 155; 8 E.R. 1061.
5 *Ibid.* 421.
6 (1876) 39 & 40 Vict. Ch. 59, s. 5. See also s. 5 for the definition of Lords of Appeal.

of speeches addressed to the House, and at their conclusion the Lord Chancellor, or the Senior Lord of Appeal present, puts the matter formally to the vote of the House. In 1948, the House by a sessional resolution, established an 'Appellate Committee' to hear appeals referred to it, but it cannot deliver judgment. Thus, judgment is delivered by the House on a Report from the Committee. In 1960, a second Appellate Committee was established, and the two now sit concurrently.

It becomes clear that the House of Lords when considering judicial business is nevertheless operating as a House of Parliament, a legislative body; so it seems that the simplicity of the Lord Chancellor's statement derives from the fact that he was employing Parliamentary, in contra-distinction to judicial, procedures.

The 1876 Act, in section II, set down the powers of the House in relation to the conduct of its appellate jurisdiction. It provides that the House is to have full power to determine its own procedure and practice as it sees fit. The principal distinction between Parliamentary procedure and practice and Parliamentary law is clearly drawn by Erskine May, in that

> the law of Parliament can only be effected by statute, whereas either House is free to modify its own procedure by its independent action.[7]

What then is the procedure of the House?

The procedure of the House is derived from four main sources. Firstly, practice, secondly, standing orders and occasional orders, thirdly, rulings from the chair, and fourthly, statutory modifications. The major source is practice, the method employed by Lord Gardiner, and it is derived largely from the seventeenth and eighteenth centuries. However, most declarations as to practice were made in order to give authoritative exposition to an already existing procedure rather than to create new practice and so in employing Parliamentary procedures, Lord Gardiner's course was even then unusual. Indeed, the similarity between Parliamentary practice and judicial precedent was adverted to by Erskine May when he wrote that

> Practice was developed by precedents which were established in much the same way and are still treated with similar respect in Parliament as judicial precedents in the Courts.[8]

The distinction between judicial and parliamentary precedent is that the former is derived from speeches of the Lords of Appeal on actual cases whereas a Parliamentary precedent is simply derived from custom or usage and can never be binding on the Parliament as it is primarily exercising a legislative function. Further, in order to alter such a precedent there need be no actual case before the House which calls the precedent into question. It is enough that a majority in the House concerned accede to the alteration, and this, in effect, is how the change in the approach of the House to *stare decisis* was effected.

The Foreseeable Consequences

The abandoning of *stare decisis* will affect both the operations of the House itself and its relations with other Courts in other places. Within

[7] *Parliamentary Practice* (17th ed.) 221. [8] *Ibid.* 225.

the House it will undoubtedly precipitate a re-argument of principles whose application leads to injustice and which hinder the proper development of the law. In this connection one thinks of the decisions in *Smith's* case[9] and *Shaw's* case[10]. The new approach will allow the Law Lords to modify their technique in that they may take a clear line when confronted with decisions which are logically inconsistent or manifestly incorrect, rather than being forced to employ the devices of distinguishing and reconciling which ultimately lead to further confusion and sophistry.

The Statement may also allow the House to further develop its relationships with other Courts in the Commonwealth by allowing a more enlightened interplay of ideas and principles. Coming, as it does, in a period of increasing participation by judges from Commonwealth Courts in the business of the Privy Council, the change suggests that the House may be more ready to consider doctrines adopted by Commonwealth courts which are at variance with its own. The sharp conflict of views exemplified in the cases of *Parker*[11] and *Smith*[12] may now be more readily assessed since both parties may now admit to an error.

There is no real possibility of widespread and radical alterations in the principles of law as they stand in the Reports of the House. The Statement is conservative in nature, and acknowledges precedent as 'the indispensable foundation' of the law. Further, in the third paragraph, it indicates that if the House overrules a particular principle it may nevertheless uphold transactions entered into on the faith of the discredited principle prior to its overthrow. The operation of this reservation will be of considerable interest and importance. It will be surprising if the House acts in any other way than that which *Lord Wright* predicted:

> No Court will be anxious to repudiate a precedent. It will only do so if it is completely satisfied that the precedent is erroneous.[13]

No matter how the House acts upon the new freedom it has given itself it may be safely predicted that the simple statement made by the Lord Chancellor will assert a profound influence on the future development of English law.

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[9] *D.P.P. v. Smith* [1961] A.C. 290.
[10] *Shaw v. D.P.P.* [1961] 2 All E.R. 466.
[11] *Parker v. R.* (1963) 111 C.L.R. 610.
[12] [1961] A.C. 290.
[13] (1942) 4 University of Toronto Law Journal 247, 276.