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MODERN JURISPRUDENCE IN THE HOUSE OF LORDS: THE PASSING OF *LONDON TRAMWAYS*

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On July 26, 1966, Lord Chancellor Gerald Gardiner announced that the House of Lords had resolved that it might "depart from a previous decision when it appears right to do so."[1] The Lords' brief "Practice Statement"[2] is a monument that marks, in Professor Leach's phrase, the fall of the last "bastion of rigid stare decisis."[3] The capitulation of the most ancient common law court of last resort leaves none unable to overrule a prior decision.

Lord Gardiner's announcement wrote the epitaph not simply for an ill-advised rule of law, but for a whole school of legal thought. It completed in the mother jurisdiction a revolution that has coursed through the common law in this century, changing judicial concep-

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1 [1966] 1 W.L.R. 1234 (H.L.). The full text:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House.

2 The announcement constitutes a departure in form as well as content. "There was no pending case that raised the issue . . . . The judges and their reforming Lord Chancellor simply got together and decided to make the change." Lewis, *The Law: Britain Breaks with Precedent*, N.Y. Times, July 31, 1966, § E, at 6, col. 1.

Although courts are now widely permitted by statute to promulgate upon their own initiative rules of practice and procedure for the conduct of litigation, judicial instigation of substantive law reform is highly novel. But such action is not unknown: see the recent "administrative memorandum" of the New Jersey Supreme Court to its inferior courts, repudiating an earlier dictum concerning the applicability of the death penalty when not initially sought by the prosecution. *Memorandum To: All Superior and County Court Judges, Re: Waiver of the Death Penalty*, 45 N.J. 501, 213 A.2d 20 (1965).

3 Leach, *Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls*, 80 HARV. L. REV. 797 (1967).

tions about the nature of decisional law and the role of the courts in promulgating it.

I

The Lords' "Practice Statement" effectively overruled one the most celebrated cases in English jurisprudence, *London Tramways Co. v. London County Council*,[4] the 1898 decision that firmly committed the Lords to the doctrine that they were irreversibly bound by their own prior decisions. Although an attitude of sanctity toward precedent hovered over English law for most of the nineteenth century,[5] not until *London Tramways* was the rule of irreversible precedent made absolute.

The case involved a dispute over accounting principles. The defendant county council had exercised a statutory power of eminent domain over plaintiff's streetcar facilities. The council wanted to compute compensation on the basis of cost of construction less depreciation. The company sought payment based on capitalized earnings. In an earlier case,[6] the House of Lords had held that the statute prohibited use of the latter method; both the Queen's Bench and Court of Appeals treated the case as controlling. The sole issue on appeal to the House of Lords was whether it could disaffirm the former decision if so minded. Held Lord Chancellor Halsbury: "a decision of this House once given upon a point of law is conclusive upon this House afterwards, and . . . it is impossible to raise that question again . . . ."[7] Further, "nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House."[8]

Lord Halsbury's opinion is principally concerned with establishing the historicity of the doctrine by reviewing a string of nineteenth century dicta. Scholars have not considered the venture a success. Sir Frederick Pollock devoted several pages of his *Jurisprudence*[9] to a con-

4 [1898] A.C. 375.

5 *See* Beamish v. Beamish, 9 H.L. Cas. 274, 11 Eng. Rep. 735 (1861).

6 Edinburgh St. Tramways Co. v. Lord Provost of Edinburgh, [1894] A.C. 456 (Scot.). Consolidated under this case name were two appeals, one the Scottish case, the other from the decision in London St. Tramways Co. v. London County Council, [1894] 2 Q.B. 189. Consequently, the 1898 case raised not only the same issue, but between the same parties, and "was all but a question of *res judicata*." Stevens, *The Role of a Final Appeal Court in a Democracy: The House of Lords Today*, 28 MOD. L. REV. 509, 514 n.13 (1965). It is consummate irony, therefore, that Professor Dawson can treat Lord Halsbury's attempt to declare a timeless rule of stare decisis in 1898 as mere dictum. J. DAWSON, THE ORACLES OF THE LAW 91-92 (1968).

7 [1898] A.C. at 379.

8 *Id.* at 381.

9 F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 332-38 (5th ed. 1923).

vincing refutation of Halsbury's claim that the rule of irreversible precedent had been "established now for some centuries."[10] A contemporaneous note in the *Law Quarterly Review* commended the result, but dismissed the assertion of antiquity as "not only unproved but against the evidence."[11]

When he turned from history to logic, Lord Halsbury argued that only by the doctrine of irreversible precedent can the need for certainty be served. Rigidity would claim its victims, he admitted, but otherwise nothing would ever be settled:

> 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?[12]

II

Lord Halsbury's speech is remarkable for its failure to comprehend certainty as a virtue which need not be served with exclusivity to be served well. The opinion does not perceive a middle ground between a law without authorities and a law inexorably determined by authorities. Yet, speaking at the end of the nineteenth century, Lord Halsbury was not without models for the middle path. The evolution of England's judge-made common law exemplified such a system,[13] although Lord Halsbury insisted on another reading. Moreover, in the United States the courts had developed conspicuously their power to discard precedent,[14] and almost from the moment *London Tramways* was decided, English jurists were troubled to explain the ability of American courts "to pursue a safe course between the extremes of a never and an ever changing law."[15]

English academics have rationalized the American practice as characteristic of either our federalism or our constitutionalism. Pro-

10 [1898] A.C. at 379.

11 14 L.Q. REV. 331, 332 (1898).

12 [1898] A.C. at 380.

13 *See* J. DAWSON, *supra* note 6, at 1-99.

14 *E.g.*, Legal Tender Cases, 79 U.S. (12 Wall.) 457, 553 (1870), *overruling* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869).

15 Hutcheson, Book Review, 45 HARV. L. REV. 212, 216 (1931).

fessor Goodhart emphasized federalism and the American law school case-method training. The great bulk of American case law inevitably results, among so many jurisdictions, in divergent results on close questions, and the cross-fertilizing, nonauthoritarian character of American legal training juxtaposes jurisdictions to teach the law as a set of skills rather than a defined body of known wisdom.[16] To Rupert Cross "the momentous nature" of constitutional issues and "the difficulty of amending the Constitution" justified the American departure from the practice of the House of Lords.[17] English jurists dwelt frequently on this notion, unconcerned that it failed to explain overrulings in non-constitutional cases.

As late as 1961 A. W. B. Simpson contended that "it is difficult to detect any sharp breach of continuity in the development of the common law before and after" *London Tramways*.[18]

> All that the House lost after 1898, and all that other courts which are bound have lost, is the power to refuse to follow a limited number of earlier decisions *without distinguishing them*. Such a power was very rarely exercised before 1898; its loss was not therefore very momentous, for the development of new Common Law only rarely took place through the exercise of such a power.[19]

Though there were few reported instances in which the irreversible precedent rule defeated a worthy litigant, they were always noticeable. In a single volume of the King's Bench reports, Professor Goodhart counted six cases in which "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."[20]

The real incidence of the rule was preventive: it served throughout the twentieth century to deter the bringing of litigation that would have required the overturning of a previous decision. Indeed, it is this aspect of the rule that must have impelled the House to take the extraordinary step of discarding it by something akin to press a release.

16 A. GOODHART, *Case Law in England and America*, in ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 65-74 (1931).

17 R. CROSS, PRECEDENT IN ENGLISH LAW 14 (1961). *Accord*, Note, 14 L.Q. REV. 331-32 (1898).

18 Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE 148, 155 (A. Guest ed. 1961).

19 *Id.* The passage emphasizes, with original italics, the celebrated propensity of the House to evade *London Tramways* by tenuous distinguishing of contrary precedents. The intellectual gymnastics are studied at some length in R. CROSS, PRECEDENT IN ENGLISH LAW (1961).

20 A. GOODHART, *supra* note 16, at 55. The six cases (in Volume I of the 1926 King's Bench Reports) are cited at author's note 26.

III

What Lord Halsbury feared as "the disastrous inconvenience . . . of having each question subject to being reargued" has been understood in the American commentary to be merely one side of the problem. The other is the injustice inherent in throwing a veil of infallibility around acknowledged error.

The capacity to overrule involves the perception and admission of error—the expectation of error as a natural and regular phenomenon. If the courts, the interpreters of the law, are considered human institutions spinning a human product, then fallibility must be foreseen and the confession of error admired. But if law is the mind of God revealed to man, then error is the mark of faithless judges or confused deities. What the American realists derided as the slot machine theory has long been the received wisdom in England: judges do not make the law, they find it in the interstices between the scriptures from above and the records from the Plantagenets.

The treatment of error marks a great cleavage between the two schools of jurisprudence that have contended throughout the twentieth century for the adherence of common law courts. Less than a decade separates *London Tramways* from Roscoe Pound's St. Paul address on "The Causes of Popular Dissatisfaction with the Administration of Justice."[21] But between the pragmatism of the latter and the dogmatism of the former lies the broadest intellectual gulf in jurisprudence. As Pound later put it:

> Jurisprudence is the last in the march of the sciences away from the method of deduction from predetermined conceptions. The sociological movement in jurisprudence, the movement for pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument, has scarcely shown itself as yet in America.[22]

The revolution for which this passage was a battle cry has been largely won in the United States, but barely begun in England. Lord Gardiner's announcement now invites the English courts to join in the business of social reform, a role long familiar in America.[23]

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21 29 A.B.A. Rep. Part 1, at 395 (1906).

22 Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909).

23 Before becoming Labor's Lord Chancellor, Gardiner was already known as an advocate of modernization in courts and doctrine, including the creation of a supreme

Exercise of the power to overrule precedent redirects the judicial function from the search for authority to the quest for rational results. "[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct," wrote Cardozo, "are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely on the comparative importance or value of the social interests that will be thereby promoted or impaired."[24] If courts are lawmakers within their sphere, judges must test the wisdom of a decision by criteria broad enough to weigh the social consequences of the decision as well as its logical correspondence to precedent. To courts so minded, precedent remains probative, but not conclusive.[25]

IV

Although English writers have minimized the negative effects of *London Tramways*, none has attempted to reconcile it with the pragmatic values of sociological jurisprudence. In its institutional aspect, therefore, the fall of *London Tramways* restores the House of Lords to the posture of a genuine supreme tribunal. The Lords need no longer plead to Parliament to correct the Lords' errors. The House can be master of its own house. "Nowadays Parliament is much too busy with economic crises and such things to know or care about correcting most judicial mistakes. It thus becomes sheer cynicism to say, 'Go to Parliament for Reform.' "[26]

If haste is ever a virtue, it is surely not an English virtue. The fruits of Lord Gardiner's announcement have in its first year been nil. No overrulings have come forth; there is still no third party beneficiary contract,[27] and the law of torts knows no action against the English-

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tribunal "able to reconsider any previous decision." Gardiner & Jones, *The Administration of Justice*, in LAW REFORM *Now* 15, 16 (G. Gardiner & A. Martin eds. 1963).

24 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921) (footnote omitted).

25 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. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.

Id. at 150.

26 Lewis, *supra* note 2.

27 Tweddle v. Atkinson, 1 B. & S. 393, 121 Eng. Rep. 762 (1861). *See* Beswick v. Beswick, [1967] 3 W.L.R. 932 (H.L.), decided 11 months after the 1966 Practice Statement, rejecting the attempt of Lord Denning, M.R., in the Court of Appeal to permit a third party beneficiary to enforce a contract in her own right. [1966] Ch. 538.

man who lets his horse wander the roadways.[28] But the inquiry is still premature. The toppling of *London Tramways* will not of itself rescue English law from its century of petrification, or the House of Lords from what had become burgeoning disrepute.[29] But Lord Gardiner's announcement is the essential prerequisite, not merely because of the central importance of a modern concept of stare decisis, but, more fundamentally, because it implies a crucial change in attitude toward the role of courts and decisional law in the enterprise of government.

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28 Searle v. Wallbank, [1947] A.C. 341.

29 Lord Gardiner himself had urged the abolition of the House of Lords as the English court of last resort. Gardiner & Jones, *supra* note 23, at 16.