THE DOCTRINE OF STARE DECISIS IN BRITISH COURTS OF LAST RESORT

John A. Fairlie
University of Illinois

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Civil Procedure Commons, Comparative and Foreign Law Commons, and the Courts Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol35/iss6/4

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
THE DOCTRINE OF STARE DECISIS IN BRITISH COURTS OF LAST RESORT

John A. Fairlie*

THE House of Lords and the Judicial Committee of the Privy Council are both British courts of last resort. The House of Lords is the final court for the United Kingdom and reviews cases from the English Court of Appeals and equivalent courts of Scotland and Northern Ireland; the Judicial Committee hears appeals of cases from the colonies and dominions and ecclesiastical cases.

Readers of Professor Gray's lectures on The Nature and Sources of the Law are aware of the distinction he notes between the attitude of the British House of Lords, on the one hand, and the Judicial Committee of the Privy Council and the United States Supreme Court, on the other hand, as to the binding force of previous decisions by each of these courts in subsequent cases before the same court. Since the cases referred to by Professor Gray, this question has again been raised in both of the British courts, and the course of previous opinion and rulings has been traced in some detail. It should be of interest to examine the line of development in these courts because of its possible bearing on the position of the United States Supreme Court in connection with some of its recent decisions.

THE HOUSE OF LORDS

The main question was again brought up in the House of Lords in 1898, in the case of the London Street Tramways Company v. London County Council. Four years before, that court had held, in two street railway cases from Edinburgh and London, that when a local authority exercised its right to purchase a tramway, "the then value

*Professor of Political Science, University of Illinois. A.M., Harvard; Ph.D., Columbia. Author of numerous books and articles on government.—Ed.

1 39-40 Vict., c. 59 (1876); 40-41 Vict., c. 57, § 86 (1877); 13 Geo. 5, sss. 2, c. 2, § 1 (1) (1929). See also, 44-45 Vict., c. 68, §§ 9, 10 (1881); 15-16 Geo. 5, c. 49, § 226, sch. 6 (1925). I HOLDsworth, HISTORY OF ENGLISH LAW 368-377 (1922).

2 9 Geo. 4, c. 83, § 15 (1828); 13-14 Vict., c. 59, § 28 (1850); 63-64 Vict., c. 12, § 9 (74) (1900); 1-2 Geo. 4, c. 66, § 13 (1821); 12-13 Vict., c. 48, § 3 (1849); 5 Geo. 4, c. 67, §§ 4, 20 (1824); 7-8 Vict., c. 69, § 1 (1844). I Holdsworth, HISTORY OF ENGLISH LAW 520-525 (1922).

3 [1898] A. C. 375.

of the tramway” was to be measured by the cost of construction less depreciation of the structures in the street, with no allowance based on what might be the rental value of the undertaking as a going concern. In the later case, the former decision was followed by the lower court; the appeal was taken for the express purpose of asking the House of Lords to reconsider its former ruling; and the only matter discussed was whether the House of Lords would do this.

Counsel for the appellant reviewed previous cases in which this question as to the finality of decisions had been considered; and this account was accepted by the other side and by the court as an adequate presentation of the subject. These cases, with some others, will therefore be noted as tracing the development of the court’s position.

In the case of Perry v. Whitehead, in 1801, Lord Eldon had said that: “A rule of Law laid down by the House of Lords cannot be reversed by the Chancellor. . . . [It] must remain, till altered by the House of Lords.” This seems to imply that the House of Lords would not be bound to follow the earlier case.

In Stewart v. Agnew, decided in 1823, the House of Lords amended its judgment as to a point on which no decision had been given by the Court of Session, and on which no argument had, through misapprehension, been stated in the House of Lords by the party against whom the judgment had been pronounced.

In Fletcher v. Lord Sondes, a few years later, the judges dif-
ferred as to the applicability of the earlier case of *Bishop of London v. Fytche*, which was said to have overturned many previous decisions; but most of them seemed to consider the *Fytche* case binding so far as it went. Lord Chancellor Eldon said: "Your Lordships... are bound by that decision, unless there be some special circumstance to take this case out of the principle of that case." The Chief Justice of the King's Bench said: "I conceive that case to have established a rule and principle binding on all jurisdictions except that of your Lordship's House." 9

In *Tomney v. White*, 10 which appeared before the House of Lords on three occasions, an application for a bill of review on an appeal from Chancery was refused. Lord Brougham said on the second hearing: "After a final judgment of this House had been pronounced, that judgment could not be set aside, and the case could not be reheard without an Act of Parliament..." 11 Another application seems to have been more successful; but on a further request from the other party that this had been the result of suppression and misrepresentation, the House, on this ground, discharged the order granting leave to appeal and the order constituting the judgment thereon, and remanded the case to the Court of Chancery in Ireland.

In *Bright v. Hutton*, 12 decided in 1852, the judges first recommended a decision based on the earlier case of *Hutton v. Upfill*, 13 though but for that case they should be of the contrary opinion. The Chancellor (Lord St. Leonards), however, said it was his opinion that:

Fytche, 1 Bro. C. C. 96, 28 Eng. Rep. 1008 (1781). A majority of the judges, considering the *Fytche* case applicable, held that a bond from the incumbent of a rectory to a patron agreeing to resign on the request of the patron, so that the patron might appoint one of his brothers when capable, was void and illegal. Such bonds were evidently not uncommon, and had been upheld both before, and, it was argued, in some cases after the *Fytche* case, which held that a general agreement to resign at the request of a patron was void. To meet this situation an Act of Parliament was passed [7-8 Geo. 4, c. 25 (1827)] providing that such agreements made before the date of the decision should be valid.

"although you are bound by your own decisions as much as any Court would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by any rule of law which you may lay down, if upon a subsequent occasion you should find reason to differ from that rule; that is that this House, like every Court of Justice, possesses an inherent power to correct an error into which it may have fallen."

He considered that the *Upfill* case dealt with a novel situation and was uncertain in its application to that under consideration. Lord Brougham, who had supported the decision in the *Upfill* case, thought it was more a question of fact than of law. Lord Campbell disagreed with Lord St. Leonards’ statement, and expressed his opinion that a decision of the House of Lords on a point of law is conclusive upon the House itself, as well as upon all inferior tribunals, and that after such a judgment has been pronounced it can only be altered by an act of the legislature. But he did not consider that the *Upfill* case laid down any abstract point of law which bound them in the case before them, and agreed with the other judges as to this case.

In the case of *Wilson v. Wilson*, some years earlier, the then Chancellor (Lord Cottenham) had said: "If those later cases, particularly some which have been decided in this House, have settled the law, all those which preceded them may be thrown aside. . . . The authorities in this House are therefore against the appellant; and a now long train of authorities at law and in equity has proceeded upon the same ground."

Some years later, in another proceeding, dealing with the same matter, Lord St. Leonards reaffirmed his former opinion. "I have always entertained the opinion, that in the particular case, you [the House of Lords] cannot correct the error; it is settled; nothing but an Act of Parliament can reverse it. But I certainly hold, that this House has the same power that every other judicial tribunal has to correct an error (if it has fallen into one), in subsequently applying the law to other cases." Lord Brougham said: "I agree entirely . . . as to the impossibility of anything but an Act of Parliament altering any judgment of this House that has once been pronounced in a cause. It is a totally different thing, and is a *quæstio vexata*, how far we may or may not disregard any one of our own judgments, when applied to another cause."

In *Scott v. Maxwell*, decided in 1854, Lord St. Leonards quoted

---

16 1 Macq. 79 (Scot. App. 1854).
Lord Loughborough as agreeing that if the House went wrong on a point of law, though it could not reverse its decision, yet it was not bound to persevere in error.

The Earl of Halsbury (Lord Chancellor) remarked that Lord Campbell, in his life of Lord Brougham,\textsuperscript{17} refers to a mistake by Lord Wynford in pronouncing a judgment of the House, and a bill brought in to reverse the judgment, and afterwards withdrawn.

In \textit{Thellusson v. Rendlesham},\textsuperscript{18} it seemed to be agreed that the House of Lords would not reconsider a question which it had once decided. It is of interest to note that Lord St. Leonards objected in this case to one question which was submitted to the judges, on the ground that it had been settled by a previous decision.

In \textit{Attorney General v. Dean and Canons of Windsor},\textsuperscript{19} Lord Campbell adhered to and emphasized his former opinion in these words:

\begin{quote}
"the House of Lords is the court of appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals. The observations made by Members of the House, whether law Members or lay Members beyond the \textit{ratio decidendi} which is proclaimed and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities. But the doctrine on which the judgment of the House is founded, must be universally taken for law, and can only be altered by an Act of Parliament. So it is, even when the House gives judgment in conformity to its rule of procedure, that where there is an equality of votes, \textit{semper presumitur pro negantu}."
\end{quote}

As an illustration of the latter point, he referred to the case of \textit{Regina v. Millis},\textsuperscript{20} which was to play an important part in the case of \textit{Beamish v. Beamish},\textsuperscript{21} the following year. The above statement was made as an answer to one by the Master of the Rolls, in the lower court decision of the same case, that: "The decisions of the House of

\textsuperscript{17} 10 \textsc{Campbell}, \textsc{Lives of the Lord Chancellors} 383-384 (1875). Cf. \textsc{McGavin v. Stewart}, discussed in note 6, supra.


\textsuperscript{20} 10 \textsc{Cl. \\& F.} 534, \textit{8 Eng. Rep.} 844 (1844).

Lords are binding on me and upon all the Courts except itself.\textsuperscript{3} \textsuperscript{22}

Lords Chelmsford and Kingsdown agreed with Lord Campbell as to the judgment in this case, affirming the decision of the Master of the Rolls. But Lord Chelmsford said nothing as to the binding force of prior decisions; and Lord Kingsdown expressly reserved his opinion on this matter. Lord Campbell’s opinion here must therefore be considered as obiter dicta, and as such subject to the limitations he had himself noted.

At length, in \textit{Beamish v. Beamish},\textsuperscript{3} decided in 1861, the established doctrine was formally declared and approved by the law lords. Lord Campbell, though he had not agreed with the decision in \textit{Regina v. Millis},\textsuperscript{4} where the House of Lords was equally divided and judgment was pronounced under the technical rule of presumption for the negative, held that the House was bound by the decision in that case: “the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and supreme Court of Appeal ... must be taken for law till altered by Act of Parliament ... If [the law so laid down] were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority.”\textsuperscript{5} Three other lords concurred.

In later cases this position has been reaffirmed, though in some instances with qualifications which were not noted in the report of the \textit{Tramways} case in 1898. In \textit{Mersey Docks Trustees v. Gibbs},\textsuperscript{6}

\textsuperscript{24} 10 Cl. & F. 534, 8 Eng. Rep. 844 (1844). It does not seem to have been noted, either in the Beamish case or the Tramways case in 1898, that in the original trial of the Millis case the Court of Queen’s Bench in Ireland had also been equally divided, and one of the judges had withdrawn his judgment as a matter of form so as to obtain a judgment of the House of Lords on the question. In the Beamish case a motion to reverse the judgment of the Irish court failing on an equally divided vote, the decision in the negative on this question affirmed the formal judgment of the Irish court. The main question in the Millis case was whether a marriage by a Presbyterian clergyman in Ireland was valid; and after long discussions on the historical evidence and earlier cases, the result of the case was to determine that it was not, as the presence of a priest in holy orders was held to be necessary. This led to the passage of an Act of Parliament [7-8 Vict., c. 81 (1844)], authorizing marriages by Presbyterian ministers in Ireland, and confirming previous marriages by dissenting ministers. In the Beamish case, the bridegroom was in holy orders and performed the marriage ceremony himself; and the critical question was whether the priest had to be a third party, a question not involved in the Millis case.

\textsuperscript{26} 11 H. L. C. 686 at 729, 731, 11 Eng. Rep. 1500 at 1517 (1866).
Lord Wensleydale said: "If this question was res integra, not settled by the authority of decisions, I am strongly inclined to think that this decision of the Court could not be supported. . . . But I cannot help thinking that the decisions of your Lordships' House, which are no doubt binding upon your Lordships and all inferior tribunals, have gone so far that they have concluded the question. . . ."

The case of Inland Revenue Commissioners v. Harrison,\(^{27}\) followed the earlier cases of Braybrooke v. Attorney General\(^{28}\) and Attorney General v. Floyer,\(^{29}\) but Lord Selborne, in his opinion, said:

"if it had really turned out that Floyer's Case had proceeded upon an application of Lord Braybrooke's Case which when examined, was found to depend upon some erroneous assumption of fact not called to your Lordships' attention during the argument at the Bar, it might have deserved consideration whether or not that was an impediment to your Lordships dealing with a subsequent case according to a sound appreciation both of the facts and of the law, as your Lordships in the well-known instance of Bright v. Hutton felt yourselves at liberty to do, where even the Judges were unable to discover any sound distinction between that and a former case, Hutton v. Upfill, decided the contrary way by your Lordships' House.\(^{30}\)

In Campbell v. Campbell, some of the judges found a conflict between two earlier cases; and Lord Selborne took the position that: "If the two cases [decided in the House of Lords] are not to be so reconciled, I apprehend that the authority, which is at once the more recent and the more consistent with general principles, ought to be followed.\(^{31}\)

In Houldsworth v. City of Glasgow Bank,\(^{32}\) Lord Blackburn expressed a similar view to that of Lord Campbell, but more guardedly:

"when it appears that a case clearly falls within the ratio deciden\(d\) of the House of Lords, the highest Court of Appeal, I do not think it competent, for even this House, to say that the ratio deciden\(d\) was wrong. It must, however, in my opinion, always be open to a party to contend that the differences between the

\(^{27}\) L. R. 7 H. L. 1 (1874). Not referred to in the report of the 1898 case.
\(^{30}\) L. R. 7 H. L. 1 at 9-10 (1874).
\(^{31}\) 5 App. Cas. 787 at 798 (1880), referring to Campbell v. Campbell, 1 Pat. App. 343 (1743), and Leitch v. Leitch, 3 W. & S. 366 (1829).
\(^{32}\) 5 App. Cas. 317 at 335 (1880).
facts in the case then under discussion and those in the case on which the House of Lords proceeded are so material as to prevent his case from falling within the ratio decidendi of the House, even though the opinions of the learned and noble Lords who decided the case in the House are so worded as to seem to apply equally to the facts in the case then under discussion. . . .”

In the case of *Caledonian Railway Co. v. Walker’s Trustees*, Lord Chancellor Selborne said:

“It is your Lordships’ duty to maintain, as far as you possibly can, the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting. The reasons which learned Lords who concurred in a particular decision may have assigned for their opinions, have not the same degree of authority with the decisions themselves. A judgment which is right, and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then addressed the House.”

Reference was also made, in the 1898 case, to the Privy Council cases of *Ridsdale v. Clifton* and *Tooth v. Power*, where the Judicial Committee had stated and exercised its right to reconsider former decisions in later cases. But no mention appears to have been made of the opinion of Lord Halsbury, in the Privy Council case of *Read v. Bishop*, where he reaffirmed the previous rulings of the Judicial Committee on this matter.

On the basis of the statements presented, the Earl of Halsbury (Lord Chancellor), in the *London Tramways* case of 1898, rendered an opinion reaffirming the doctrine of the *Beamish* case.

“I adhere in terms to what has been said by Lord Campbell and assented to by Lord Wensleydale . . . and others, that a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that

33 7 App. Cas. 259 at 275 (1882).
37 [1892] A. C. 644, quoted at note 89, infra.
question again as if it was res integra and could be reargued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries. . . .”

He added, however, that an error of fact, as for example the existence of an Act of Parliament, might be further considered in a later case. Lords MacNaghten, Morris and James of Hereford concurred.

It may be noted that this statement of Lord Halsbury made no reference to the qualifications and doubts expressed by several of the law lords in various cases (some of which do not appear in the report of this case), nor to his own former statement reaffirming the different position taken by the Judicial Committee of the Privy Council on this question.

Several recent cases in which the House of Lords has adhered to this principle may be noted. In the case of *Inland Revenue Commissioners v. Blott*, 39 decided in 1921, Lord Sumner delivered a strong dissent; but some years later, in *Inland Revenue Commissioners v. Fisher's Exrs.*, 40 he insisted on the binding authority of the *Blott* case, in spite of considerable differences of fact between the two cases. In *Great Western Ry. v. Owners of S. S. Mostyn*, 41 it would have been possible to take a simple view of the matter had it not been for the doubtful and inconvenient case of *River Wear Commissioners v. Adamson*, 42 which Lord Haldane and the other judges held to be binding; and almost fifty pages are taken by a close analysis of what this case held. 43 In *Kleinwort v. Associated Automatic Machine Corporation*, 44 the House of Lords upheld the Court of Appeal in following the earlier case of *George Whitechurch, Ltd. v. Cavanagh.*

No recent case has been discovered where the question of reconsidering a previous decision of its own has been raised in the House of Lords. But it may be noted that in most of the cases referred to

---

38 [1898] A. C. 375 at 379.
39 [1921] 2 A. C. 171.
42 2 App. Cas. 743 (1877).
43 Cf. Goodhart, “Case Law in England and America,” 15 CORN. L. Q. 173 (1930), reprinted in GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 50 (1931). Mr. Goodhart also refers to six cases in the King's Bench reports for 1926, where one or more judges stated that they might have decided the case before them differently if they had not been bound by a prior decided case. But these cases do not involve the main question as to the position of the House of Lords.
44 77 L. J. (N. S.) 237, 50 T. L. R. 244 (1934).
since 1861 the judges have not clearly indicated that they were following earlier decisions against their own convictions, nor has there been another case where the House felt bound by a judgment resulting from an equal division of the judges, as in the Beamish case. Moreover, in several cases a number of the law lords have emphasized the need for carefulness in following all that has been said in the opinions in earlier cases.

Attention may also be called to remarks of Justice Brett, Master of the Rolls, in the Court of Appeal, in the case of the Vera Cruz,\(^4\) decided in 1884, where he said:

"there is no statute or common law rule by which one Court is bound to abide by the decisions of another of equal rank, it does so simply from what may be called the comity among judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions, it does so again on the grounds of judicial comity. But when a Court is equally divided this comity does not exist, for there is no authority of the Court as such, and those who follow must choose one of the two adverse opinions."

If this view had been taken in the Beamish case, the rule resulting from the Millis case might have been reconsidered.

A related question is as to the attitude of the House of Lords towards rules established by earlier cases in other courts on matters which have not been passed on by the House of Lords itself. On new problems, it is clear the House of Lords is free to exercise its own judgment. But in the case of long established rules which have been generally accepted there is a strong presumption in their favour. Yet even in such cases the House of Lords has exercised some freedom, and several recent cases indicate a tendency to do so more freely than in the past.

Some statements as to the general principle may first be noted. In Harvey v. Farquhar,\(^4\) it was said: "A rule lauded by the highest legal authorities . . . , and acted upon for centuries, ought not be disturbed upon appeal." In Baker v. Tucker,\(^4\) Lord Brougham said:

"if a case has been always supposed to be of one particular aspect and purport, and if that case being uniformly supposed in

\(^4\) 9 Prob. Div. 96 at 98 (1884).
\(^4\) L. R. 2 Scot. & Div. 192 (1872), headnotes.
subsequent cases to be such, has, as such, ruled those subsequent cases, it will not do to go back to some critical difference which may be raised respecting the authority of that case, because the law may be settled.”

In *Gorham v. Bishop of Exeter*, Lord Campbell said: “Were the language [of the statute] obscure, instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage.” In *Morgan v. Crawshay*, Lord Westbury said: “if we find a uniform interpretation of a statute upon a question materially affecting property, and perpetually recurring, and which has been adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding that interpretation.”

But, in *Trustees of Clyde Navigation v. Laird*, Lords Blackburn and Watson stated that this doctrine of *contemporario expositio* cannot prevail against a clear expression in a modern statute.

In *Airey v. Bower*, Lord Herschell said:

“I am content to rest my opinion entirely upon the reasons which have been given both by the learned judges in the case in the Court below and by other learned judges who in previous cases have arrived at the same conclusion. If the matter were even doubtful I should hesitate very long before, unless compelled to do so, I laid down a different rule of construction in relations to sections of the Wills Act, which have had for many years a particular construction given to them; because it is impossible to say how many persons may have acted upon the faith that that construction was correct, and rested the disposal of their property upon that belief. Of course if it were clear that the construction put by the Courts upon the sections was wrong, it would be our duty, disregarding the result, to express a contrary opinion.”

In the case of *Hamilton v. Baker*, where former decisions of the Admiralty Court were overruled, Lord MacNaghten said:

“I am sensible of the inconvenience of disturbing a course of practice which has been continued unchallenged for such a length of time and which has been sanctioned by such high legal authority.

---

49 19 L. J. (Q. B.) 279 at 285 (1850).
50 L. R. 5 H. L. 304 at 320 (1871).
51 8 App. Cas. 658 (1883).
52 12 App. Cas. 263 at 269 (1887), Boyes v. Cook, 14 Ch. D. 53 (1880) approved.
53 14 App. Cas. 209 at 222 (1889).
But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time."

A year later, however, in the case of Tancred, Arrol & Co. v. Steel Company of Scotland, the House of Lords followed an established rule of Scottish law; and Lord Herschell said: “I think that that doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be most improper to depart from it now, because one would be really altering the contract between the parties; for we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the law.”

Several years before these later statements in the House of Lords, Sir George Jessel, Master of the Rolls, had stated the general principle in language which has been quoted in later cases. In the case of Ex parte Willey, after stating: “I never allow my construction of a plain enactment to be biassed in the slightest degree by any number of judicial decisions or dicta . . . not actually binding upon me,” he went on to say:

“Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs.”

Turning to more recent cases where the House of Lords has overruled decisions of inferior courts of some years standing, we may first note that of West Ham Union v. Edmonton Union, in 1908. This was an appeal from the Court of Appeal, which had followed the earlier cases of Rex v. Tipton and Dorking Union v. St. Saviour's

54 15 App. Cas. 125 at 141 (1890).
55 23 Ch. Div. 118 at 127-128 (1883).
56 [1908] A. C. 1 at 4-5.
Union,\textsuperscript{58} which had held that when a poor law parish was divided, the inhabitants of that part of the former parish cut off had lost their settlement as a basis of poor relief. The decision of the Court of Appeal was reversed, and the decisions in the earlier cases overruled. Lord Chancellor Loreburn made this statement:

"Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it the duty of this House to overrule them, if it has not lost the right to do so by expressly affirming them."

In the case of Associated Newspapers v. City of London Corporation,\textsuperscript{59} the House of Lords disapproved and overruled the case of Sion College v. London Corporation,\textsuperscript{60} decided fifteen years earlier, as a majority of the judges held that earlier decisions on which it was based had not the results attributed to them in the Sion case. The Sion case had held that a statutory provision\textsuperscript{61} vesting certain reclaimed lands "free from all taxes and assessments" did not grant exemption from new taxes established after the Act; but in the House of Lords case it was held that the exemption applied to all taxes and assessments (not being imperial taxes).

In the case of Bowman v. Secular Society,\textsuperscript{62} the earlier cases of Briggs v. Hartley,\textsuperscript{63} and Cowan v. Milbourn,\textsuperscript{64} were overruled, and the principle of Regina v. Ramsey and Foote,\textsuperscript{65} was applied. Lord Chancellor Finlay dissented, saying:

"These authorities, beginning with De Costa v. De Paz in 1754 and ending with Pare v. Clegg in 1861, appear to me to establish that the Courts will not help in the promotion of objects contrary to the Christian religion, apart altogether from any criminal liability, and to show that Briggs v. Hartley and Cowan v. Milbourn were well decided, and that, if the law of England

\textsuperscript{58}[1898] 1 Q. B. 594.
\textsuperscript{59}[1916] 2 A. C. 429.
\textsuperscript{60}[1901] 1 K.B. 617.
\textsuperscript{61}7 Geo. 3, c. 37 (1766).
\textsuperscript{62}[1917] A. C. 406.
\textsuperscript{63}19 L. J. (Ch.) 416 (1850).
\textsuperscript{64}L. R. 2 Ex. 230 (1867).
\textsuperscript{65}15 Cox C. C. 231 (1883).
is to be altered upon the point, the change must be effected, not by judicial decision, but by the act of the Legislature."

The other law lords did not accept Lord Finlay's views as to the earlier cases, disagreed with Briggs v. Hartley and Cowan v. Milbourn, and held it was not blasphemy to propagate anti-Christian doctrine apart from scurrility or profanity; and upheld a bequest to the Secular Society.

In the case of Bourne v. Keane, the case of West v. Shuttleworth, and other cases based on it, were overruled; and it was held that a bequest of personal estate for masses for the dead was not void as a gift to superstitious uses (under an Act of Edward VI), since the Catholic Relief Act of 1829. In this case there were lengthy opinions by Lord Chancellor Birkenhead and Lords Buckminster, Atkinson and Parmoor, and a dissenting opinion by Lord Wrenbury, which approximated to those in the Millis and Beamish cases. This included discussions on the legality of masses at common law, the Chantrics Act of Edward VI, later Acts of Mary and Elizabeth, and the early case of Adams and Lambert. Lord Wrenbury's dissenting opinion cited the statement of Sir George Jessel in Ex parte Willey, and other cases on the importance of upholding established rulings.

Even without directly overruling earlier decisions, courts and judges may modify their effects by a change of emphasis and attitude. One phase of this is discussed in a recent article in the Harvard Law Review, by Mr. W. Ivor Jennings, of the London School of Economics and Political Science, in which he notes a change in the spirit and mental atmosphere of the English courts in cases arising under the housing legislation of recent years. Under the rule of Heydon's case (in the reign of Elizabeth), an Act of Parliament should be interpreted in the light of the evils it is intended to remedy.

---

70 Supra, note 55.
This rule is reproduced in Blackstone; though during the eighteenth century the courts followed a method of strict interpretation of statutes in so far as they interfered with common-law rights. Until comparatively recently, the courts applied to housing cases the ordinary rules of "literal" interpretation, and even in most of the later cases this is the method mainly adopted. But in some cases, the ordinary interpretation has been frustrated by the application of rules of common law and equity regarding covenants. As late as 1921 the principle of Heydon's case was applied. But since 1928 the courts have frequently applied the rule that where legislation interferes with property rights it must be construed strictly, so as to cut down the powers of local authorities.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The attitude of the Judicial Committee of the Privy Council, both as to granting a rehearing in a particular case and the degree to which it is bound by a decision in a previous case, was considered at length in a report of this committee, delivered November 13th, 1928, on a special reference in the matter of certain questions relating to the payment of civil servants in Ireland under article X of the articles of agreement for a treaty between Great Britain and Ireland. It was argued in the hearing on this matter that the committee was bound in law and without examination to follow a previous decision by the committee in the case of Wigg v. Attorney General for the Irish Free State, made the year before, although the reason for the special reference was the contention that a misunderstanding by the committee in that case as to the date of the transfer of the officers to the Government of the Free State, tainted if it did not vitiate, the result of that case.

In its report, the committee noted that the argument that it was bound by the previous decision was based mainly upon cases of requests for a rehearing of a particular suit, which had no direct application to the matter in hand. Reviewing these cases, it was noted that in the early cases a rigid standard was applied as to the competency of a rehearing. In Rajundarnarain Rae v. Bijai Govind Sing, where a rehearing was allowed, as the decision in the earlier cases had been given ex parte and was pronounced by default, Lord Brougham made some observations as to the general practice:

73 1 Commentaries *61 (1765).
"It is unquestionably the strict rule . . . that no cause in this Court can be reheard, and that an order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords. . . ."

He then pointed out that trivial errors in drawing up the judgment of the committee might competently be corrected, and added that except for one case in 1669 of doubtful authority, and another in Parliament of still less weight in 1642, "no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced." 78

Three cases, leading to Fenton v. Hampton in 1858, dealt with the binding character of an earlier decision upon the committee in a later case. In Beaumont v. Barrett, 79 the committee had upheld the power of a colonial legislature to punish for contempt. In Kielty v. Carson, 80 it refused to follow this case, and denied this power. In Fenton v. Hampton, 81 it said: "We think we are bound by the decision of the case of Kielty v. Carson, the greater authority of which, as compared with Beaumont v. Barrett, it is quite unnecessary to enlarge upon." In the 1928 report it is stated that: "These decisions do not contribute to the solution of the problem in issue." 82

In the case of The Singapore 83 a petition for a rehearing was refused, but it was said:

"We do not affirm that there is no competency in this Court to grant a re-hearing in any case. . . . Although it is within the competency of the Court to grant a re-hearing, according to the authorities cited above, still it must be a very strong case indeed, coming within the class of cases there collected, that would induce this Court so to interfere."

---

78 1 Moore P. C. 117 at 126, 129, 12 Eng. Rep. 757 at 760, 761 (1836). The case referred to by Lord Brougham as of doubtful authority was Dumaresq v. Le Hardy, 12 Eng. Rep. 761 (1667-8), when it was alleged that a matter of fact had been misrepresented to the earlier court, and that as a result the cause had been decided against the petitioners' clear and undoubted right and contrary to law. A rehearing was granted, with the result that the former decision was re-affirmed.


82 [1929] A. C. 242 at 249.

Another group of cases dealt with questions of ecclesiastical law. In the case of Hebbert v. Purchas, 84 dealing with the legality of certain practices, rubrics and vestments in church exercises, petitions for a rehearing were refused, in the following terms:

"Their Lordships are of opinion, in respect of the two Petitions addressed to the Crown, that no further proceedings should be taken therein. Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion, that expediency requires that the prayer of the Petitions should not be acceded to, and that they should be refused with costs."

The 1928 report comments: "It will be observed that the decision turned on expediency, not on competency, and that the Board abstained from laying down any general rule which is applicable to all cases." 85

The case of Hebbert v. Purchas was reconsidered in Ridsdale v. Clifton, 86 and again in Read v. Bishop of Lincoln. 87 In each of these cases the Judicial Committee reexamined the questions involved and disallowed and reversed some points in the earlier case. In the case of Ridsdale v. Clifton, Lord Chancellor Cairns said:

"Their Lordships have had to consider, in the first place, how far in a case such as the present, a previous decision of this tribunal between other parties, and an order of the Sovereign in Council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. . . . "

"In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be fixed as to third parties. "

"Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation. "

"Their Lordships are fully sensible of the importance of establishing and maintaining, as far as possible, a clear and unvarying interpretation of rules, the stringency and effect of which ought

84 L. R. 3 P. C. 664 at 671 (1871).  
to be easily ascertained and understood by every clerk before his admission to holy orders.

"On the other hand, there are not, in cases of this description, any rights to the possession of property which can be supposed to have arisen by the course of previous decisions; and, in proceedings which may come to assume a penal form, a tribunal, even of last resort, ought to be slow to exclude any fresh light which may be brought to bear upon the subject." 88

Noting also that in Hebbert v. Purchas the decision was pronounced ex parte, he added:

"These considerations have led their Lordships to the conclusion that, although very great weight ought to be given to the decision in Hebbert v. Purchas, yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law."

In the case of Read v. Bishop of Lincoln, the Earl of Halsbury, speaking for the committee, said: "In the present case their Lordships cannot but adopt the view expressed in Ridsdale v. Clifton as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law." 89 This statement, it may be noted, contrasts sharply from that expressed, also by the Earl of Halsbury, as to the binding character of previous decisions of the House of Lords, in the London Tramways case six years later.

Reference may also be made to the case of Cushing v. Dupuy, 90 not noted in the 1928 report. This was an appeal from the Court of Queen's Bench in Quebec; and the question was raised as to the right of appeal to the Privy Council. In the case of Cavillier v. Aylwin, 91 application for special leave to appeal under the Lower Canada Colonial Act 92 was refused. In the later case of In re Marois 93

---

89 [1892] A. C. 644 at 655.
90 5 App. Cas. 409 (1880).
92 31 Geo. 3, c. 31 (1791).
93 15 Moore P. C. 189, 15 Eng. Rep. 465 (1862). In the case of Johnston v. Minister and Trustees of St. Andrew's Church, 3 App. Cas. 159 (1877), where an application for leave to appeal was refused, it was stated that the Canadian Act which
an application for leave to appeal from a judgment of the Court of Queen's Bench for Lower Canada was allowed. Lord Chelmsford, after stating that, in Cavillier v. Aylwin, the very point was decided against the petitioner, said: "If the question is to be considered as concluded by that decision his petition must be at once dismissed; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded."

Leave to appeal was also granted in the case of Cushing v. Dupuy; and this has also been done in the later case of Tenant v. Union Bank, and others.

In the case of Narashima Appa Row v. Court of Wards, a petition for rehearing two appeals, which had been confirmed by Order in Council, was refused, as in Hebbert v. Purchas. In delivering the judgment of the Board, Lord Watson said: "there may be exceptional circumstances which will warrant this Board, even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties." He then states that this is an indulgence with a view mainly to doing justice where, by some accident, without blame, the party has not been heard, and an order has been made inadvertently, as if the party had been heard. "Even before report, whilst the decision of the Board is not yet res judicata, great caution has been observed in permitting the rehearing of appeals."

In the case of Tooth v. Power, in which a previous decision was urged as binding, the Judicial Committee said:

"Their Lordships think it right to add that, although, for obvious reasons, the case of Barton v. Muir was relied on as an authority absolutely binding upon them by both parties at the bar, yet it would have been their duty, had the necessity arisen, to consider for themselves whether the decision is one which they ought to follow. It was given ex parte; and that being the discontinued appeals to the Crown as a matter of right did not limit Her Majesty's prerogative to allow an appeal.

96 11 App. Cas. 660 at 663 (1886).
case, although great weight is due to the decision of this board, their Lordships are ‘at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law.’ These are the words used by Earl Cairns when delivering the judgment of the board in Ridsdale v. Clifton, which contains a full exposition of the law upon this point.”

From the review of earlier cases, it was held, in the 1928 report: “(1) that there is no inherent incompetency in ordering a rehearing of a case already decided by the Board, even when a question of a right of property is involved, but (2) that such an indulgence will be granted in very exceptional circumstances only. It is of the nature of an extraordinarium remedium.”

It was then noted that the matter then under consideration prescribed features widely different from those in the cases cited. This was not a petition for a rehearing, but a reference to the Board under section 4 of the Judicial Committee Act of 1833. This reference was granted because of an alleged mistake of fact into which the previous Board was alleged to have fallen, and which was said to have been material to the issue determined by it.

“To suggest that, if that proposition be made out, this Board is constrained, blindfold, to adhere to a decision based on a material error in fact, appears to be repugnant to good sense, and to attribute to the Board as a Court of final resort, an impotence which would be deplorable. None of the cases cited, unless it be the case of Dumaresq v. Le Hardy—which quantum valeat, is inimical to Mr. Dickie’s argument—deals with such a situation; and none of them appears to present an insuperable obstacle to a different decision being reached by the Board in this case from that pronounced in the case of Wigg’s case.”

Having thus decided that it was entitled to reconsider the question, the report of the Board took up the various problems involved and reached the same conclusion it had reached in the Wiggs case. It was also satisfied that the statement regarding the date of transfer of the officers had no effect upon the advice tendered by the Board to His Majesty.

The final result of this case was then, that, while reasserting that the Judicial Committee was not necessarily bound by its previous decisions, and was free to re-examine a question and form its own
judgment, yet in this instance the judgment of the previous Board was confirmed.

The difference in the position of the House of Lords and the Judicial Committee of the Privy Council as to the binding force of their own previous decisions, suggests the question whether there is any reason for this difference, and, if not, which of these two courts of final resort has adopted the more satisfactory rule? No discussion of these questions appears to have taken place in either of these tribunals; and, as has been noted, the same judge, sitting in different cases in each of these courts, has approved the rule and practice of each.

One explanation which may be suggested is that the effect of decisions of the House of Lords may be altered by an Act of Parliament, not only as to the future, but even as to the case decided. The Sondes and Millis cases led to the prompt passage of acts of Parliament legalizing past acts which had been held to be invalid, and in the Millis case legalized such acts for the future, though this did not prevent the Millis decision being accepted as a precedent in the Beamish case. In the more recent case of the Free Church of Scotland, Parliament in a large measure altered the results of the particular decision.

In a formal, legal sense it may be said that this is also true of decisions of the Privy Council. But in one important class of cases coming before that body, those from the self-governing dominions, Parliament in practice legislates only with the consent of the dominion concerned; and the difficulty of securing the agreement of two or more legislative bodies in different parts of the world bears some resemblance to that of amending the Constitution of the United States to overcome the effects of an unsatisfactory decision of the Supreme Court. In other matters, also, the cases coming before the Privy Council are less likely to be ordinarily subjects of Parliamentary legislation. At the same time, it may be that the very fact that the Judicial Committee has felt itself free to reconsider former decisions has prevented conditions where an Act of Parliament might have been thought necessary to overcome the effects of a decision generally considered unsatisfactory. 99

99 Mr. Arthur L. Goddard, editor of the Law Quarterly Review, in an essay on “Case Law in England and America,” considers that the present American tendency away from the strict English doctrine of stare decisis is due in large part to five reasons: “(1) the uncontrollable flood of American decisions, (2) the predominant position
To the present writer, the reasons given by the Judicial Committee for its position seem stronger than those given by the law lords in the House of Lords. The Judicial Committee recognizes the importance of stability in the rules of law, and does not often or lightly overturn a former decision. But it recognizes that conditions may occasionally arise where this becomes advisable. The House of Lords cases seem merely to assert that what has been must continue to be. The conditions of the Beamish case seem to have warranted a reconsideration of the Millis case. In the London Tramways case the fact that the previous decision had been made only a few years before, with no special reasons presented for reopening the question, makes the decision not to reconsider in that case seem not unreasonable. But the reassertion of the position that under no circumstances would the rule underlying a previous decision be reviewed does not seem so clearly necessary.

of constitutional questions in American law, (3) the American need for flexibility in legal development, (4) the method of teaching in American law schools, and (5) the restatement of the law by the American Law Institute.”

In another essay, on the New York Court of Appeals and the House of Lords, he states:

“In England with its comparatively stabilized civilization, with a law that has in large part attained its maturity, the desire for logic and consistency is paramount. This is best attained by a strict construction of statutes and by a syllogistic interpretation of the existing rules of law. In the United States, on the other hand, with its rapidly changing social conditions, with a common law which is not indigenous but has its origin in a foreign country with physical conditions strikingly dissimilar to those of America, it has been found necessary for the Courts to be more venturesome in adapting the materials with which they must work.”

GODDARD, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 65, 280 (1931).

To some extent, the latter statement may be considered applicable to the variety of cases coming to the judicial committee of the Privy Council, from dominions and colonies of widely different physical conditions, and social conditions both widely different and rapidly changing.