## Final Court Jurisprudence in the Crystallisation Era

I

In the nineteenth century, the House of Lords grappled with all sorts of questions about its judicial function – such as whether lay peers should participate in legal decisions, whether split decisions were tolerable, and whether a body of lords without Scottish legal training should be able to determine matters of Scots law. Whether the House could reverse its decisions on appeals was not the most urgent of these questions. Legal peers vacillated over it, though as the century progressed they formed a clear preference for the negative answer.[1] In *London Tramways v London County Council* (1898) they confirmed this preference, resolving that the House would henceforth be bound by its earlier decisions when acting as a judicial body.[2] The resolution, as is well known, lasted till 1966.[3]

Around half way through this near-on seventy-year period in the history of the Appellate Committee, Lord Atkin suggested that since a final court precedent is protected from judicial overruling, it might be considered "crystallised".[4] In this essay, the *London Tramways* years are the *crystallisation era*. The label comes with provisos. Parliament could shatter these judicial crystals. The courts could diminish their value. There were other judges of the era who considered crystallised precedents to be those judgments, no matter their provenance, which had long been followed without demur.[5] Even since 1966, some final court precedents have prevailed as if crystallised because there has been no will to overrule them, or because there has been the will but not the opportunity.[6] And maintaining that there

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[1] See D. Pugsley, "*London Tramways* (1898)" (1996) 17 J. Leg. Hist. 172 at 179-181.

[2] i.e., "that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House." *London Tramways v London C.C.* [1898] A.C. 375 at 381; [1898] 78 L.T. 361 at 363 per Halsbury L.C.

[3] *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77.

[4] *Rose v Ford* [1937] A.C. 826 at 833; [1937] 3 All E.R. 359 at 362. See also *Scruttons v Midland Silicones* [1962] A.C. 446 at 473; [1962] 1 All E.R 1 at 10 per Lord Reid.

[5] See, e.g., *Rodriguez v Speyer Bros* [1919] A.C. 59 at 83 (per Lord Haldane) and 117 (per Lord Sumner; [1918-1919] All E.R. Rep. 884 at 895 and 913-914.

[6] Apex court judges occasionally express a preference for reassessing their own precedents rather than seeing the legislature do the work (e.g., *R v Jogee* [2016] UKSC 8; [2017] A.C. 387 at [85]). But it is sometimes a matter of chance being a fine thing. Despite criticism throughout the courts of the approach taken in *Lloyds Bank v Rosset* [1991] 1 A.C. 1071;

was a crystallisation *era* might seem forced, considering that there were legal peers who regarded the House of Lords to be bound by its own judgments before *London Tramways*, and that final court judges remained reluctant to overrule these judgments even once they had resolved that they could. The label is, nevertheless, adopted in this essay as shorthand for the period when House of Lords precedents were settled authority absent the rare event of abrogating legislation.[7]

Judicial opinions, Ronald Dworkin maintained, are jurisprudence in both senses of the word – not only case law but also, if only implicitly, exercises in legal philosophy.[8] Anyone considering House of Lords judgments of the crystallisation era could be forgiven for forming the impression that there were law lords, particularly in the second half of the era, whose jurisprudential – legal-philosophical – dispositions seemed different from those identifiable among their judicial forebears. Dworkin's own vocabulary can be used to articulate this impression. The more creatively-minded of these law lords broadly corresponded to his conventionalist (more specifically, soft bilateral conventionalist) judge who understands legal practice to be organised around core conventions such as statutory interpretation and precedent-following but who also appreciates that the content of these conventions – how to read statutes, ascertain *rationes*, and so on – is organic.[9] It takes quite a stretch to say even of the most principle-oriented law lords of the era that they mimicked his judge who accepts integrity as an interpretive ideal.[10] Yet it is possible to identify instances in which law lords confronted with unfortunate but binding precedent would reason in ways which were not always straightforwardly conventionalist – in ways which betrayed at least hints of the adjudicative aspirations associated with law as integrity.

There is a world of difference, of course, between forming an impression and adducing evidence that there was a shifting of mindsets. And even if it is accepted that a shift occurred, all manner of factors – the disproportionate dominance or influence of particular law lords, the Appellate Committee's changing docket, and so on – might contribute to the explanation for it. The existence of a rule against

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[1990] 2 W.L.R. 867 to inferring common intention between a claimant and a sole trustee, for example, the opportunity to overrule the precedent would seem to be contingent on an acquisition case reaching the final court.

[7] Rare today as then: see *Patel v Mirza* [2016] UKSC 62; [2017] A.C. 467 at [114] per Lord Toulson.

[8] See R. Dworkin, *Law's Empire* (London: Fontana, 1986), at p.90 ("… any judge's opinion is itself a piece of legal philosophy"), also p.380.

[9] Dworkin, *Law's Empire* (1986), at pp.120-124, 142-144, also p.157 ("law ... as a game with holes between the rules").

[10] See Dworkin, *Law's Empire* (1986), at pp.165-166, 218, 255 and (on mimicking) p.245.

overruling could only be one such factor. Nevertheless, there is plenty of case law and extra-judicial commentary from the crystallisation era indicating that the rule was often on law lords' minds.

The point of this essay is to show that there were, among law lords of the era, two broad types of reaction to final court *stare decisis*, and to argue that the judicial philosophies and motivations underpinning each type of reaction are more subtle than has commonly been appreciated. First, there was a category of law lords who were critical of the final court's precedent-following convention because it ran counter to their vindicating instincts. These law lords thought of precedent as normally bearing testimony to the common law. When the rule governing a dispute forms part of the common law, they believed, the courts could usually give effect to it by following precedent. But they also recognised that a precedent might have the common law wrong, and that even a court of last resort will find it difficult to avoid perpetuating error if the precedent is applicable on the facts of today's case, is its own creation, and cannot be overruled. It is easy, and for the most part accurate, to characterise these law lords as defenders of *stare decisis*, given their commitment to the notion that judges apply law that exists rather than make law afresh. But they favoured the doctrine only up to a point. When following precedent meant mis-applying the law, it offended against their legal philosophy.

To call this philosophy legal formalism, legal conservatism, or black letter law is inapposite; none of these labels captures why these judges were sometimes wary of final court *stare decisis*. Their wariness stemmed from faith in a different philosophy: the declaratory theory of the common law – the theory that the law is already (has always been) settled, and that precedent does not necessarily equate with, sometimes will be at odds with, this settled law. Something akin to a declaratory instinct can be detected among our second category of law lords too, though none of them can be associated with declaratory theory in its classical form.[11] While these law lords showed no enthusiasm for the rule against overruling, they were not especially taxed by it. The rule operated to put them in a similar spot to lower court

[11] A. Beever, "The Declaratory Theory of Law" (2013) 33 O.J.L.S. 421, makes the case for a non-classical version of the declaratory theory which seems to accommodate this second group of law lords. According to Beever, judicial reliance on equity to supplement common law rules – "in order to produce the results called for by the principles of the common law" (p.427) – might be understood as a declaratory manoeuvre, even though the equitable intervention "change[s] the positive law" (p.427). In so far as there is a declaration, it is a declaration of a principle – of "the reasons that lie behind" the judicial ruling (p.431) – rather than an actual rule. For an argument against treating this type of exercise as declaratory in nature, see Dworkin, *Law's Empire* (1986), at pp. 130, 225, 227-228, 239.

judges up against an inconvenient but binding judgment: not being able to overrule precedent, they had to determine if it was possible to avoid following it.

It is well known that these law lords were often accomplished at finding ways of sidestepping what they could not overrule, though their repertoire of circumventing tactics was perhaps somewhat wider – and some of the tactics more subtle – than is commonly presumed. To think of these tactics as legislative was, for at least some of the law lords deploying them, potentially misleading: when they demonstrated resourcefulness in the face of binding judgments, they considered themselves to be making law only in the sense that they were re-fashioning existing sources. There is, we might way, more to both these categories of crystallisation-era law lords than meets the eye: the ones who were more minded to declare than to create did not always welcome having to follow precedent, and the innovative efforts of those who embraced creativity tended to be undertaken in ways that betrayed a desire not to undermine final court *stare decisis*.

## II

Before and throughout the crystallisation era, those who contributed to the judicial business of the House of Lords regularly argued that legal certainty is more likely to be undermined when a final court can overrule itself.[12] Their concern was not with epistemic but with expectation certainty – with the fact that the susceptibility of a final court precedent to overruling can undermine confidence not in what the precedent is understood to establish, but in its status as decided law. Halsbury LC reasoned according to expectation certainty in *London Tramways* itself, where he justified the decision on the basis of *res judicata*.[13] There were other crystallisation-era law lords who took the same route.[14] The end of the era did not see this reasoning discredited.

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[12] See, e.g., Simon L.C., *The Limits of Precedent* (Birmingham: Holdsworth Club, 1943), at pp.8-9; *Report of the Select Committee on the Appellate Jurisdiction. House of Lords Sessional Papers* (London: H.M.S.O., 1856) (264) VIII 401, minutes of evidence, at para. 39 (Richard Bethell); *Bright v Hutton* (1852) 3 H.L. Cas. 341 at 392; 10. E.R. 133 at 153 per Lord Campbell.

[13] *London Tramways* [1898] A.C. 375 at 379; also *Jacob v Jacob* [1900] 82 L.T. 270 at 271 per Halsbury L.C. ("[I]t appears to me to be entirely unnecessary to go over again the argument upon a question which has been settled"). *London Tramways* concerned a petition to have the House of Lords reject its own application of the law in two earlier tramways cases (one of which had the same litigants and raised the same point of law).

[14] See, e.g., *Egyptian Delta Land & Investment Co. v Todd* [1929] A.C. 1 at 30; (1929) 14 T.C. 119 at 154 per Lord Sumner; *Myers v D.P.P.* [1965] A.C. 1001 at 1037; [1964] 2 All E.R. 881 at 895 per Lord Pearce, dissenting.

Rather, it was re-deployed to support the view that a final court should never overrule its precedents lightly.[15]

The argument from expectation certainty supported the Appellate Committee's choice to bind itself. From another perspective, the issue of choice was a red herring. Lord Wright called this the argument from "constitutional logic".[16] Though judges would sometimes have a rush of blood to the head and assert that the Appellate Committee was beyond correction,[17] parliamentary supremacy dictated otherwise. But therein lay the rub: if overruling final court precedent is tantamount to an act of repeal, and the constitution accords responsibility for any such law-altering act not to judges but to the legislature, the Appellate Committee was constitutionally prohibited from overruling itself.[18] Late in the crystallisation era, Lord Reid disparaged the argument as pedantry.[19] Others before him inverted its logic and maintained that they were constitutionally accorded rather than denied an overruling

[15] See, e.g., *Fitzleet Estates v Cherry* [1977] 1 W.L.R. 1345 at 1349; [1977] 3 All E.R. 996 at 999 per Lord Wilberforce.

[16] Lord Wright, "Precedents" (1943) 8 C.L.J. 118 at 120. (Wright was attributing the argument to Lord Campbell rather than making it himself.)

[17] See, e.g., *Assessor for Aberdeen v Collie* 1932 S.C. (Lands Val. App. Ct) 304 at 312; 1932 S.L.T. 128 at 130 per Lord Sands ("The House of Lords has a perfect legal mind. Learned Lords may come or go, but the House of Lords never makes a mistake…. Occasionally to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault").

[18] See *Bright v Hutton* (1852) 3 H.L. Cas. 341 at 391-392; 10 E.R. 133 at 153 per Lord Campbell; *Beamish v Beamish* (1861) HL Cas 274 at 339; 11 E.R. 735 at 761 per Campbell L.C. ("… if [the law laid down as your *ratio decidendi*] were not considered … binding upon your Lordships, this House would be arrogating to itself the right of altering the law, and legislating by its own separate authority"); *Report of the Select Committee on the Appellate Jurisdiction* (1856), at para. 387 (Roundell Palmer); *A-G v Dean of Windsor* (1860) 8 H.L. Cas. 369 at 391-392; 11 E.R. 472 at 481 per Campbell L.C.; *Radcliffe v Ribble Motor Services* [1939] A.C. 215 at 245-246; [1939] 1 All E.R. 637 at 655-656 per Lord Wright; *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446 at 467-468 per Lord Simonds; Lord Jowitt, response to W.K. Fullagar, "Liability for Representations at Common Law" at (1951) 25 Australian L.J. 296; P. Devlin, *Samples of Lawmaking* (London: Oxford University Press, 1962), at pp.20-22.

[19] *Chancery Lane Safe Deposit Co. v I.R.C.* [1966] A.C. 85 at 111; [1966] 1 All E.R. 1 (decided Dec. 1965) at 9 (stating that even though the facts of the House of Lords precedent applied by the majority "were indistinguishable from the facts of this case", it was "pedantic and unreasonable" to treat the precedent as binding). When Denning – dissenting in *Close v Steel Co. of Wales* [1962] A.C. 367; [1961] 2 All E.R. 953 – undertook what Reid perceived to be a similar act of rebellion (though Denning insisted that the precedent applied by the majority in *Close* was distinguishable), Reid disapproved: H.L. Deb. 25 April 1963 vol. 248 cols 1336-1337.

power: the judicial branch of the lords is part of parliament, they argued, and parliament can unmake its laws.[20]

The rule against overruling also met with the objection that it demanded the impossible, that adhering to it would prove too tall a task. Even if only by accident, Frederick Pollock predicted, the House would end up countermanding some of its judgments.[21] By 1959, Lord Denning had come up with a list of what, to his eyes, were implied breaches.[22] A yet more prevalent objection was that there is (*pace* Louis Brandeis[23]) no point keeping the law settled if it is not settled right. Before *London Tramways*, the House of Lords had occasionally maintained that it could overrule its precedents if they were manifestly erroneous.[24] The position was not completely abjured in the crystallisation era, though law lords sympathetic to it usually claimed not that the House had this overruling power but rather that it was baffling that it should have stripped itself of it.[25]

Those who lamented *London Tramways* were often disposed towards common-law creativity,[26] and those who eschewed creativity sometimes seemed as if intent on finding precedents by which they could claim to be bound.[27] But there were

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[20] Lord Justice Cohen (appointed Lord of Appeal in Ordinary Nov. 1951), "Jurisdiction, Practice and Procedure of the Court of Appeal" (1951) 11 C.L.J. 3 at 13-14; Lord Denning, *From Precedent to Precedent* (Oxford: Clarendon Press, 1959), at p.34; see also J.E. Landau, "Precedents in the House of Lords" (1951) 63 Jurid. Rev. 222 at 233.

[21] F. Pollock, *A First Book of Jurisprudence* (London: Macmillan & Co., 1896), at p.316.

[22] Denning, *From Precedent to Precedent* (1959), at pp.31-33.

[23] *Burnet v Coronado Oil & Gas Co*. 285 U.S. 393 at 406; 52 S. Ct. 443 at 447 (1932) (Brandeis J., dissenting).

[24] *Bright v Hutton* (1852) 3 H.L. Cas. 341 at 388 per St Leonards L.C. ("[T]his House … possesses an inherent power to correct an error into which it may have fallen"). St Leonards was disagreeing with Lord Campbell. In an earlier case, Campbell seemed receptive to St Leonards' position: *Brown v Annandale* (1842) 8 Cl. & Fin. 437 at 455; 8 E.R. 170 at 179. See also *Lancashire & Yorkshire Railway Co. v Bury Corporation* (1889) 14 App. Cas. 417 at 419 [1886-1890] All E.R. Rep. 166 at 168 per Lord Herschell ("[T]here are, as it seems to me, special reasons why a judgment so given should not be disturbed unless it be clearly shewn to have proceeded upon an erroneous view of the law").

[25] See Wright, "Precedents" at pp.122 and 145.

[26] See, e.g., Lord Denning, *Borrowing From Scotland* (Glasgow: Jackson, 1963), at p.30 (the lecture was delivered in 1961, the year before his return to the Court of Appeal); Lord Evershed, "The Judicial Process in Twentieth Century England" (1961) 61 Columb. L. Rev. 761 at 790; also his remarks at H.L. Deb. 25 April 1963 vol. 248 col. 1342, on how "the rule of precedent … in this country has become over-strict".

[27] See *Great Western Railway v S.S. Mostyn (Owners)* [1928] A.C. 57 at 94 (per Lord Phillimore) and 99 (per Lord Blanesburgh); [1927] All E.R. Rep. 113 at 132 and 134 ("[B]y the *ratio decidendi* of that case – if it can be discovered – and by the decision itself – whether its *ratio decidendi* can be discovered or not – your Lordships are as much bound as is at least every English Court"); also *Fitzwilliam's Collieries v Phillips* [1943] A.C. 570 at 583; [1943] 2 All E.R. 346 at 351 per Lord Romer.

also law lords who favoured a more relaxed doctrine of precedent while being suspicious of judge-made law. Lord Parker certainly took *stare decisis* seriously, and he accepted that the House could not overrule its precedents even when they compelled decisions contrary to public policy.[28] Yet he was willing to find ways around precedents of this kind, and he appeared to be of the view that the House should not follow its own judgments when doing so would sustain a legal error.[29] On the matter of *stare decisis* Lord Tomlin resisted categorisation. While he was not averse to distinguishing House of Lords precedent, and while he accepted that an appeal might raise a point of principle yet to be judicially resolved,[30] he was wont to justify the positions he took by claiming them to be consistent with what the authorities provided.[31] Yet he considered final court *stare decisis* a matter for "regret", and confessed that he hoped the doctrine would be "relaxed to some extent" so that the House might "escape from precedents where they are or have become plainly unreasonable or inconvenient."[32]

Tomlin made this confession in the United States, where there has never been an equivalent to *London Tramways*, and where ossification of final court precedent is resisted not only by those who argue that the Supreme Court should be able to overrule its own judgments so that it can correct its misinterpretations of the Constitution, but also by those who argue for the same so that the Court might advance the Constitution as a living instrument.[33] There were crystallisation-era law

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[28] *Bowman v Secular Society* [1917] A.C. 406 at 452; [1916-1917] All E.R. Rep. 1 at 23. For his general attitude to precedent, see *Parker v S.S. Black Rock* [1915] A.C. 725 at 729 ("[T]he … duty … is … the result of … a line of decisions which lays down a distinctly workable rule … and I should be unwilling in any way to interfere with it").

[29] *Admiralty Commissioners v S.S. Amerika (Owners)* [1917] A.C. 38 at 43; [1916-1917] All E.R. Rep. 177 at 180 ("This House … is bound to administer the law as it finds it. The mere fact that the law involves some anomaly is immaterial unless it be clear that the anomaly has been introduced by erroneous judicial decision").

[30] On distinguishing, see *Glanely v Wightman* [1933] A.C. 618 at 632; (1933) 17 T.C. 634 at 669; on unresolved principle, see *Hillas v Arcos* [1932] All E.R. Rep. 494 at 499; (1932) 147 L.T. 503 at 512.

[31] See, e.g., *Simpson v London, Midland & Scottish Railway Co.* [1931] A.C. 351 at 369; [1931] All E.R. Rep. 590 at 600-601. See also his dissent in *Donoghue v Stevenson* [1932] A.C. 562 at 600-601; 1932 S.C. (H.L.) 31 at 58, where, on the matter of the neighbour principle, he departs from the majority because he is "unable to explain how … [u]pon the view which I take of … the reported cases", one might identify "material from which it is legitimate … to deduce such a principle."

[32] Lord Tomlin, "Case Law" (1934) 20 A.B.A.J. 594 at 599.

[33] For the originalist argument for overruling see *Rundle v Delaware & Raritan Canal Co.* 55 U.S. (14 How.) 80 at 99; 14 L. Ed. 335 at 343 (1852) (Daniel J, dissenting) ("[T]his is a matter involving a construction of the Constitution…. [W]herever the construction or the integrity of that sacred instrument is involved, I can hold myself trammeled by no precedent or number of precedents"); *Gamble v United States*, 139 S. Ct. 1960 at 1981 (2019); 204 L. Ed. 2d 322 at

lords, predisposed to the declaratory theory, who had their own variant on the first of these arguments. It is better that the House has the facility to overrule itself, they maintained, so that it might correct its own erroneous declarations (applying the wrong law, misunderstanding the law to be applied), given that the chances of the legislature correcting these errors will nearly always be remote. The notion that a judge has formalist inclinations might be thought to denote a preference for strict *stare decisis*. But the crystallisation era yields a subtler lesson: that if it is a tenet of formalism that judges do not make but only declare law, the preference has to be understood as subject to the condition that a final court should not have to follow its precedents when doing so necessitates endorsing *per incuriam* rulings.

III

Some crystallisation-era law lords lamented that the Appellate Committee, when confronted by its own judgments, had to reap what it had sowed.[34] Should the House already have ventured on a matter, Lord Haldane observed, its pronouncement, if judged to have "become so crystallised that only a statute can alter it", will almost certainly have settled the matter.[35] But there would be nothing to reap if a judgment could be shown, or made, not to resolve the case at hand. Although the common law rule that death cannot give rise to a damages claim "should long ago have been relegated to a museum", Lord Atkin observed in *Rose v Ford*, "it is of little purpose …

345 (2019) (Thomas J, concurring) ("In my view, the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty … because it elevates demonstrably erroneous decisions … over the text of the Constitution and other duly enacted federal law"). For an example of the living constitutionalist argument, see W.O. Douglas, "Stare Decisis" (1949) 49 Columb. L. Rev. 735 at 739 ("Precedents are made or unmade not on logic and history alone. The choices left by the generality of a constitution relate to policy…. The problem of the judge is … to be as faithful as possible to the architectural scheme. We can get from those who preceded a sense of the continuity of a society…. But we have experience that they never knew…. It is better that we make our own history than be governed by the dead").

[34] *Samuel v Jarrah* [1904] A.C. 323 at 325 (per Halsbury L.C.) and 327 (per Lord MacNaghten); (1904) 90 L.T. 731 at 731 and 732 (Halsbury was of this opinion before *London Tramways*: *Pledge v White* [1896] A.C. 187 at 190; [1895-1899] All E.R. Rep. 615 at 616-617); *West Ham Union v Edmonton Union* [1908] A.C. 1 at 4-5; (1908) 98 L.T. 1 at 2-3 per Loreburn L.C.; *Bourne v Keane* [1919] A.C. 815 at 859-860; [1918-1919] All E.R. Rep. 167 at 185 per Birkenhead L.C.; *Forth Conservancy Board v I.R.C.* [1931] A.C. 540 at 547; [1931] All E.R. Rep. 679 at 685 per Lord Dunedin; Lord Shaw, *Letters to Isabel* (New York: Doran, 1921), at pp.181-182; Devlin, *Samples of Lawmaking* (1962), at p.12 ("There is no going back now on *Allen v Flood*") and p. 115.

[35] *Rodriguez v Speyer* [1919] A.C. 59 at 81. See also *Great Western Railway v S.S. Mostyn* [1928] A.C. 57 at 73 per Lord Dunedin.

to criticise" it, since it "has the authority of this House."[36] But Atkin saw no need to criticise it, because he and his colleagues considered it eclipsed by a statute which provided that a right to damages for pain and suffering transfers to the representative of the deceased.[37] Lord Wright wondered if the common law rule really did have the authority of the House, or whether the endorsement of the rule by the Appellate Committee was actually *obiter dicta*.[38] Wright was not alone among late-nineteenth and early-twentieth century law lords in maintaining that if nothing has crystallised, there is nothing that the House could have wrongfully overruled. "I yield to no one in the importance that I attach to the rule of precedent", Lord Simonds asserted in 1959. But this was merely prefatory to his claim that another law lord's "patently wrong" interpretation of a statute in an earlier case had no precedential authority because it was "unnecessary to the decision" in that case.[39]

It is often said of the crystallisation era that some law lords were moved to perform judicial gymnastics – what Lord Denning disparaged as "distinguishing the indistinguishable" – when confronted by binding but unfortunate precedent.[40] These performances might be considered evidence of an impulse to be creative in the face of constraint. But it is perhaps more accurate to think of them as an unavoidable consequence of hearing an appeal. There is, on the face of it, no point petitioning a final court to hear an appeal if facts substantially identical to those at issue in the prospective appeal have already been the subject of a final court judgment, if the final court is bound by that judgment, and if the judgment was applied by the court

[36] *Rose v Ford* [1937] A.C. 826 at 834.

[37] *Rose v Ford* [1937] A.C. 826 at 834 (per Lord Atkin), 839 (per Lord Russell), 850-852 (per Lord Wright) and 855-857 (per Lord Roche). See also *Boy Andrew v St Rognvald* [1948] A.C. 140 at 148-149; [1947] 2 All E.R. 350 at 353 per Lord Simon ("The principle … applied by this House in *Radley v London & North Western Ry Co.* … has … been explained as … a rule … of 'last opportunity'…. [A]s the Law Revision Committee said … 'there is no such rule'").

[38] *Rose v Ford* [1937] A.C. 826 at 850.

[39] *Public Trustee v I.R.C.* [1960] A.C. 398 at 415; [1960] 1 All E.R. 1 at 9 (decided Dec. 1959). The case in question was *Cowley v I.R.C.* [1899] A.C. 198; (1899) 63 J.P. 436 and the law lord was Lord Macnaghten. See also Lord MacDermott's dissent in *Sparrow v Fairey Aviation Co.* [1964] A.C. 1019 at 1038; [1962] 3 All E.R. 706 at 712 ("[T]his House has never had to consider and decide the point now in question. The authorities relied upon by the respondents are decisions of this House on other points and their present relevance depends entirely on the applicability of their reasoning and the persuasive value of certain of the *dicta* they contain").

[40] For examples, see R. Stevens, *Law and Politics: The House of Lords as a Judicial Body* (Chapel Hill, N.C.: University of North Carolina Press, 1978), at pp.91-94, 209-216, 221-222, 276, 290-291 and 296-298. For the Denning *dictum*, see *W. & J.B. Eastwood Ltd v Herrod* [1968] 2 Q.B. 923 (C.A.) at 934; [1968] 3 All E.R. 389 at 393 ("… the endless task of distinguishing the indistinguishable…. That is the way we have had to do it in the past, and in so doing we have made confusion worse confounded. It is better to make a clean cut and to depart from prior precedent if we are satisfied that it is wrong").

from which leave to appeal is sought. Yet the Appellate Committee of the crystallisation era quite often entertained appeals which the Court of Appeal had decided by applying House of Lords precedent.[41] Why? Because the Appellate Committee was being invited to consider if the facts of the appeal genuinely did fit with the precedent – if the Court of Appeal, instead of applying the precedent, should have distinguished it.[42]

This not to suggest that law lords only ever distinguished final court precedent reluctantly. The price of reluctance, it was often acknowledged, was that a *ratio* ends up being applied to situations which it should not cover.[43] The architect of *London Tramways*, Halsbury, was invoking a get-out clause within two years of having drafted the edict: if the case before the House does not concern facts "identical" to the ones at issue in the precedent – Halsbury echoed an early-nineteenth century *dictum* of Eldon LC's[44] – then the precedent need not be considered binding on the facts of that case.[45]

The House famously took this approach to precedent in 1914 when it ruthlessly distinguished *Derry v Peek*.[46] But preventing a *ratio* from extending to facts

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[41] See, e.g., *Chancery Lane Safe Deposit Co. v I.R.C.* [1966] A.C. 85, affirming the Court of Appeal's decision applying *Central London Railway Co. v I.R.C.* [1937] A.C. 77; [1936] 2 All E.R. 375. See also *The Mediana* [1900] A.C. 113; [1900-1903] All E.R. Rep. 126, affirming the Court of Appeal's decision applying *The Greta Holme* [1897] A.C. 596; [1895-1899] All E.R. Rep. 127; and also *Herbert v Fox & Co.* [1916] 1 A.C. 405; (1916) 114 L.T. Rep. 426, affirming the Court of Appeal's decision (Phillimore L.J. dissenting) applying *Barnes v Nunnery Colliery* [1912] A.C. 44; (1912) 105 L.T. 961 and *Plumb v Cobden Flour Mills* [1914] A.C. 62; (1914) 109 L.T. 759 (Phillimore considered *Barnes* to have been superseded by statute and so not binding authority: *Herbert v Fox & Co.* [1915] 2 K.B. 81 (C.A.) at 92; (1915) 112 L.T. 883 at 837).

[42] As the Court of Appeal quite often did: see, e.g., *I.R.C. v Blott* [1920] 2 K.B. 657; (1920) 8 T.C. 101; also *Roberts v Enlayde Ltd* [1924] 1 K.B. 335; (1924) L.T. 790; and *Foley v Classique Coaches Ltd* [1934] 2 K.B. 1; [1934] All E.R. Rep. 88.

[43] See, e.g., *Caminer v Northern & London Investment Trust* [1951] A.C. 88 at 110-112 [1950] 2 All E.R. 486 at 501-502 per Lord Radcliffe, *dubitante*; *Nash v Tamplin & Sons* [1952] A.C. 231 at 258-259; [1951] 2 All E.R. 869 at 885-886 per Lord Radcliffe; *Carmarthenshire C.C. v Lewis* [1955] A.C. 549 at 560; [1955] 1 All E.R. 565 at 568 per Lord Goddard; *London Transport Executive v Betts* [1959] A.C. 213 at 246; [1958] 2 All E.R. 636 at 654-655 per Lord Denning, dissenting ("[T]here is a decision of this House … about [a] paint shop … on the particular facts of the paint shop…. The decision may be binding on your Lordships if there is another such paint shop anywhere, but it is not, in my opinion, binding for anything else"); *Close v Steel Co. of Wales* [1962] A.C. 367 at 388 per Lord Denning, dissenting; *Cartledge v Jopling & Sons* [1963] A.C. 758 at 771-772; [1963] 1 All E.R. 341 at 343 per Lord Reid; *Chancery Lane Safe Deposit Co. v I.R.C.* [1966] A.C. 85 at 128 per Lord Upjohn, dissenting.

[44] *Fletcher v Sondes* (1827) 1 Bli. N.S. 144 at 249; 4 E.R. 826 at 864.

[45] *De Nicols v Curlier* [1900] A.C. 21 at 27; (1900) L.T. 733 at 735.

[46] *Nocton v Lord Ashburton* [1914] A.C. 932 at 955-956 (per Haldane L.C.), 964-965 (per Lord Dunedin) and 969-970 (per Lord Shaw); [1914-1915] All E.R. Rep. 45 at 53, 57 and 60-61. In

which it did not cover was not the only, perhaps not even the primary, reason that the House of Lords distinguished *Derry v Peek*. Many judges and lawyers of the time saw the judgment as regrettable but, absent legislative intervention, untouchable. This was not the only occasion on which the House resorted to distinguishing as a combative measure. Law lords minimised the potentially harsh implications of a House of Lords precedent on occupier's liability involving trespass long before they were able to overrule it.[47] They confined to the facts crystallised precedent making negligent employees liable for fellow employees' injuries, determining that employers could raise common employment as a defence only if there existed an actual contract between employer and employee and only if the injured and the negligent employee were engaged in the same enterprise.[48] The House of Lords' ruling in *Hewlett v Allen* "must of course be accepted as binding in all cases where the facts are the same", Lord Macmillan remarked in *Penman v Fife*, even though he considered the House wrong to have ruled in *Hewlett* that a statute requiring discharge of a debt by payment to a creditor could be satisfied by payment to a third party.[49] But the error of the House was not an issue in *Penman*, he added, because *Penman* concerned a creditor who – having recovered the debt not by having the borrower pay it off but rather by withholding some of her wages – could not rely on the statute.[50] That the *ratio* of a House of Lords judgment might be troublesome or obscure does not alter the fact that it "must be applied to any later case which is not

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neither the official report nor any of the other reports of *Nocton v Ashburton* – [1914-1915] All E.R. Rep. 45; (1914) 111 L.T. 641; (1914) 30 T.L.R. 602 – is *Derry v Peek* explicitly recorded as having been distinguished (though the headnote in the *All England Reports* makes it easy to draw the inference). The headnote in the *Law Times Reports* states that the case was "discussed and explained". The reporter for the *Times Law Reports* records that it was one of the authorities that Haldane "reviewed … in great detail". If this was coyness, there is no reason to think it was endemic; the crystallisation-era House of Lords was quite regularly reported as having distinguished its own precedent (e.g. *Jackson v General Steam Fishing Co.* [1909] A.C. 523; 1909 S.C. (H.L.) 37; *Barber & Co. v Deutsche Bank* [1919] A.C. 304; [1918-1919] All E.R. Rep. 407; *Evans v Bartlam* [1937] A.C. 473; [1937] 2 All E.R. 646; *Miller v Glasgow C.C.* [1947] A.C. 368; 1947 S.C. (H.L.) 12).

[47] *Excelsior Wire v Callan* [1930] A.C. 404; (1930) 94 J.P. 174. The precedent, *Addie v Dumbreck* [1929] A.C. 358; 1929 S.C. (H.L.) 51, was one of the first to be overruled after the Practice Statement was issued: *British Railways Board v Herrington* [1972] A.C. 87; [1972] 2 W.L.R. 537.

[48] *Wilsons & Clyde Coal Co. v English* [1938] A.C. 57; [1937] 3 All E.R. 628; *Radcliffe v Ribble Motor Services* [1939] A.C. 215. Parliament abolished common employment doctrine in 1948.

[49] *Penman v Fife Coal Co.* [1936] A.C. 45 at 55; [1935] All E.R. Rep. 46 at 49.

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[50] *Penman v Fife* [1936] A.C. 45 at 56.

reasonably distinguishable", Lord Reid observed in 1951.[51] Overruling was certainly an option he wanted the House to have at its disposal,[52] not the least because over-reliance on distinguishing could introduce "an impenetrable maze of distinctions and qualifications" into the common law.[53] But that it was not an option hardly exercised him; while the Practice Statement ultimately gave the House "more freedom of movement … it was never intended to lead to a legal revolution."[54] The prospect of reasonably distinguishing precedents was usually – for Reid and for other law lords of his generation – perfectly feasible.[55] Even if the Practice Statement had never materialised, there would still have been "considerable scope for judges to mould the development of the common law",[56] to be "fashioners … out of the material … supplied to them."[57]

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[51] *Nash v Tamplin* [1952] A.C. 231 at 250 (decided Oct. 1951).

[52] H.L. Deb. 2 May 1957 vol. 203 cols 262-263 ("[T]he justification for the present rule is that it is supposed to lead to certainty in the law – a most desirable thing, if one can achieve it. But a good deal could be said to the effect that it has exactly the contrary effect").

[53] Lord Reid, "The Judge as Law Maker" (1972) n.s. 12 J.S.P.T.L. 22 at 24; also *Jones v South-West Lancashire Coal Owners' Association* [1927] A.C. 827 at 830; (1927) 11 T.C. 790 at 837 per Cave L.C.; *Jones v Secretary of State for Social Services* [1972] A.C. 944 at 966; [1972] 1 All E.R. 145 at 149 per Lord Reid; *Chancery Lane Safe Deposit Co. v I.R.C.* [1966] A.C. 85 at 133 per Lord Wilberforce. Although risking more legal uncertainty by allowing the final court to overrule its own judgments may seem worthwhile if it has the effect of cleansing the common law of some evidently unsatisfactory precedents, it has to be kept in mind, Reid cautioned, that the value placed on certainty varies from one area of the law to the next, and that in some areas the failure to remedy particular imperfections might be considered a fair price to pay in order to maintain certainty. Lord Reid, "Law and the Reasonable Man" (1968) 54 Proc. Brit. Acad. 189 at 193. Property and contract, he maintained, are areas in which "it seems right that we should accept some degree of possible injustice in order to achieve a fairly high degree of certainty" (p.197). See also the Practice Statement (which he had a hand in drafting), emphasising "the especial need for certainty as to the criminal law".

[54] Reid, "The Judge as Law Maker" at p.25.

[55] *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446 at 466-467 ("I would certainly not lightly disregard or depart from any *ratio decidendi* of this House. But there are at least three classes of case where I think we are entitled to question or limit it: first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision"). See Lord Simonds' observations in the same vein (A.C. 446 at 469); and also Reid's observation that, by the mid-1960s, "[m]ost of us were prepared to get round a decision that we couldn't stomach", quoted in A. Paterson, *The Law Lords* (London: Macmillan, 1982), at p.144. In *Scruttons*, Denning famously dissented and wanted the House to hold itself bound by the precedent which Reid disparaged, though he added "that I should do my best to distinguish it in some way if I was quite satisfied that it was wrong" (A.C. 446 at 487). Wright, one of the most impressive law lords of the previous generation, agreed about the feasibility of distinguishing but thought overruling "would be more dignified" ("Precedents" at p.144).

[56] Reid, "The Judge as Law Maker" at p.25; and see also (on crystallisation-era "law-making by stealth") W. Friedmann, "Judicial Law-making in England", in *Law, Justice and Equity*, ed. R.H. Code Holland & G. Schwarzenberger (London: Pitman & Sons, 1967), at pp.9-25.

IV

It is important to keep in mind, various law lords argued, that there is a deceptive simplicity to the proposition that a court is following or applying precedent. The House had long conceded that a court's precedents might be in conflict and that, when they are, judges may have to determine that one judgment loses out to another for the status of binding authority.[58] Yet, throughout the crystallisation era, law lords avoided concluding that any of the House's own precedents had to be ranked in this way.[59] Some law lords were able to avoid the conclusion because they conceived precedent to be a fluid concept. We might think of a House of Lords judgment as being every bit as much the law of the land as is an act of parliament, Lord Wright observed, but whereas a statute *is* law (with binding content which "is clearly to be seen even if it is difficult to understand it"), the text of a judgment *yields* law, and requires those who follow it as precedent to engage in the "difficult and baffling art" of discerning "what precisely is the law which it makes".[60] When a court settles on what makes for the binding content of a judgment and applies it to the case at hand, Lord Normand maintained, the precedent is not merely replicated: rather than the precedent being "a fixed rule governing each new case, … each new application enlarges its meaning and modifies the law."[61] Lord Radcliffe was of the same opinion. Even the judge committed to "the most rigid principle of adherence to precedent" will find that "when he repeats" what "his predecessors … decided before him … their words … mean something materially different in his mouth…. The context is different; the range of reference is different; and, whatever his intention, the hallowed words of authority themselves are a fresh coinage newly minted in his

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[57] Devlin, *Samples of Lawmaking* (1962), at p.3.

[58] *Darley v The Queen* (1846) 12 Cl. & Fin. 520 at 544; 8 E.R. 1513 at 1522-1523 per Lord Brougham.

[59] The Court of Appeal concluded that it did have to reach this conclusion regarding its own precedents, so that a precedent by which it was supposed to be bound would not bind it because it held itself bound by another of its precedents instead: *Young v Bristol Aeroplane Co.* [1944] K.B. 718 at 725-726; [1944] 2 All E.R. 293 at 298 per Lord Greene M.R. G. Dworkin, "*Stare Decisis* in the House of Lords" (1962) 25 M.L.R. 163 at 165 argued that the crystallisation-era House of Lords should have taken the same path, and that it had avoided doing so only by making "fine distinctions which are confusing and damaging".

[60] Wright, "Precedents" at pp.120, 129.

[61] W. Normand, *Scottish Judicature and Legal Procedure* (Birmingham: Holdsworth Club, 1941), at pp.40-41. (Normand was appointed Lord of Appeal in Ordinary in 1947.) See also Lord Wright, *Legal Essays and Addresses* (Cambridge: Cambridge University Press, 1939), at p.204.

speech."[62] Precedents, on this account, never say the same thing twice; courts, when applying them, cannot help but make them speak afresh.

Not surprisingly, law lords who thought along these lines were often able to make binding precedents speak both afresh and in ways that they found congenial. This was not tantamount to distinguishing, but rather a way of affirming that the House not only respected its own precedents but also strove to clarify and finesse legal principles. It was not unusual for law lords to maintain that when the Appellate Committee had to rule on a matter over which it had been silent (and which had not been dealt with by statute), its obligation was to decide according to principles of justice.[63] There are also plenty of *dicta* attesting to a willingness to stand precedent up against principle and find that principle carries the day.[64] In his Maccabean lecture, for example, delivered soon after the crystallisation era had ended, Lord Reid spoke of how revision of principles was integral to common law development, and of how "we appellate judges"[65] might want to undertake "some fundamental rethinking" of certain principles whenever appeals next provided opportunities.[66]

Crystallisation-era law lords had sometimes forsaken such opportunities.[67]

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[62] Lord Radcliffe, *Not in Feather Beds* (London: Hamish Hamilton, 1968), at p.271 (the passage is from a lecture delivered in 1964), and see also pp.213-214.

[63] See, e.g., *Sinclair v Brougham* [1914] A.C. 398 at 458; [1914-1915] All E.R. Rep. 622 at 651 per Lord Sumner; *India v Taylor* [1955] A.C. 491 at 514; [1955] 1 All E.R. 292 at 301 per Lord Somervell; *National Bank of Greece and Athens v Metliss* [1958] A.C. 509 at 525; [1957] 3 All E.R. 608 at 612 per Lord Simonds; also Lord Morris, "Natural Justice" (1973) 26 C.L.P. 1 at 1.

[64] e.g., *London Transport Executive v Betts* [1959] A.C. 213 at 247 per Lord Denning, dissenting; Lord Keith, *The Spirit of the Law of Scotland* (Birmingham: Holdsworth Club, 1957), at p.18; Reid, "The Judge as Law Maker" at p.26; see also O. Dixon, "Concerning Judicial Method" (1955), in his *Jesting Pilate* (Melbourne: Law Book Co., 1965), pp.154-165 at p.161. Lord Bramwell was supposedly receptive to this manoeuvre: V.V. Veeder, "A Century of English Judicature", in *Select Essays in Anglo-American Legal History*, 3 vols, ed. J.H. Wigmore et al. (Boston: Little, Brown & Co., 1907), Vol. I, pp.730-836 at p.785 ("'I am prone,' he [*sc.*, Bramwell B] once said, 'to decide cases on principles, and when I think I have got the right one I am apt … to think authorities wrong or needless'"). But Bramwell also spoke in favour of final court *stare decisis*: *New York Life Insurance Co. v Styles* (1889) 14 App. Cas. 381 at 396; (1889) 61 L.T. 201 at 204.

[65] Reid, "Law and the Reasonable Man" at p.195.

[66] Reid, "Law and the Reasonable Man" at p.198. He considered especially ripe for reassessment the principles "that … only in severely limited classes of cases" should a court be able prevent parties enforcing unfair contractual terms (p.196), "that a court cannot remake a contract" (p.196), and that proof of maliciously motivated conduct cannot give rise to an actionable wrong (pp.197-198, discussing *Allen v Flood* [1898] A.C. 1; (1898) 62 J.P. 595).

[67] See, e.g., *Read v J. Lyons & Co.* [1947] A.C. 156; [1946] 2 All E.R. 471 (no extension of *Rylands v Fletcher* (1868) L.R. 3 H.L. 330; (1868) 19 L.T. 220); *London Graving Dock Co. v*

But they took them too; and when they did, they often showed themselves to be adept at elaborating legal principles while presenting precedent in a new light. The manoeuvre was cleverly performed in *Crofter v Veitch*, where the House neither followed nor distinguished *Quinn v Leathem*, its precedent on unlawful conspiracy to injure, but instead explained how the premise central to both cases – that motive is immaterial to lawful actions – has to be understood as a neutral principle.[68] Haldane, in *Kreglinger v New Patagonia Meat & Cold Storage*, pointedly began his speech by setting out "the broad principles which must govern" the case before he turned to House of Lords precedent.[69] In *Bradley v Carritt*, the House had struck down a collateral advantage contained in a mortgage by relying on the principle that there should be no clogs or fetters on the equity of redemption.[70] It had quickly dawned on some law lords that, in *Carritt*, this principle was embraced too enthusiastically, given that borrowers challenging collateral advantages were often commercial parties who had agreed to mortgage terms freely and with their eyes wide open.[71] Haldane, seeking an escape, pronounced in *Kreglinger* that the main value of the House of Lords' previous decisions on clogs and fetters doctrine was that "they may have thrown fresh light on questions of principle."[72] Although, in *Kreglinger*, neither he nor any other law lord purported to distinguish *Carritt*, he maintained that, in that case, the formulation of the doctrine "most consonant with principle" was not the majority's view that a collateral advantage must always be understood to be an integral feature of the mortgage, but rather the position taken by Lord Lindley in his dissenting speech: that there is no reason to invalidate the advantage if its source is not the mortgage but a transaction related to but separate from it.[73] Lord Parker, who

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*Horton* [1951] A.C. 737; [1951] 2 All E.R. 1 (no extension of *Donoghue v Stevenson* [1932] A.C. 562). In *London Graving*, Lord Reid and Lord MacDermott dissented.

[68] *Quinn v Leathem* [1901] A.C. 495; [1900-1903] All E.R. Rep. 1 established that unlawful conspiracy to injure depends upon a tort giving rise to a cause of action. In *Crofter Hand Woven Harris Tweed Co. v Veitch* [1942] A.C. 435; 1942 S.C. (H.L.) 1, the House of Lords basically took the principle in a different direction: the tort does not arise if *A* proves only that *B & C*'s combined initiatives stymie *A*'s capacity to engage in free trade, for just as *A* cannot be held legally liable for injury to *B & C* just because *A* uses his superior bargaining position to negotiate with *B & C* an arrangement which causes them economic harm, so too – by virtue of the same principle – *B & C* cannot be liable if all that is established is that their combined action turns the tables on *A* and gives them the economic upper hand.

[69] *Kreglinger v New Patagonia Meat & Cold Storage Co.* [1914] A.C. 25 at 35; [1911-1913] All E.R. Rep. 970 at 973.

[70] *Bradley v Carritt* [1903] A.C. 253; [1900-1903] All E.R. Rep. 633.

[71] See, e.g., *Samuel v Jarrah* [1904] A.C. 323 at 329 per Lord Lindley.

[72] *Kreglinger v New Patagonia Meat & Cold Storage* [1914] A.C. 25 at 40.

[73] *Kreglinger* [1914] A.C. 25 at 44.

likewise endorsed Lord Lindley's dissent,[74] considered it "open to the House" to treat the case as an invitation to finesse the formulation of clogs and fetters doctrine as pertaining to collateral advantages. He proposed, with concurrence from the other four law lords, that the doctrine, appropriately re-articulated, is that "there is now no rule in equity which precludes a mortgagee … from stipulating for any collateral advantage," unless the advantage is unfair, penalises redemption, or is in some other way "inconsistent with or repugnant to the contractual and equitable right to redeem."[75] Principle was refined, and precedent left intact.

It is perhaps only to be expected that the House of Lords would, even in the crystallisation era, contrive to make some of its precedents take a back seat to legal principle. But what if a precedent was in tension with something other than principle? While development of principle is the task of a final court, it is not for judges – it is hardly possible for judges – to fashion public policy. A final court has to accept that public policy might change so as to outstrip its precedent on an issue. Without the enactment of legislation reflecting the change in policy, the precedent is still binding in the courts – including, in the crystallisation era, in the final court itself. Law lords of the era naturally appreciated that a decision of the House could seem archaic if based on a precedent belonging to a bygone age; a precedent might never fall into desuetude, one of their number observed, but the evolution of public policy might make it seem as if it has.[76] But they knew too that invoking current public policy to sideline a precedent was risky – that "public policy", as the classic *dictum* has it, "is a very unruly horse and when once you get astride it you never know where it will carry you."[77] Not long before *London Tramways*, Lord Watson explained the risk for final court *stare decisis*: no matter how eminent the tribunal, if it reaches decisions on grounds of public policy, a future court, when presented with those decisions, might refuse to accept that they have "the same binding authority as decisions which deal with and formulate principles which are purely legal."[78] Indeed, the court might simply continue the tactic, declaring that it wishes "not … to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of

[74] *Kreglinger* [1914] A.C. 25 at 60.
[75] *Kreglinger* [1914] A.C. 25 at 61.
[76] Wright, "Precedents" at pp.132-133.
[77] *Richardson v Mellish* (1824) 2 Bing. 229 at 252; 130 E.R. 294 at 303 per Burrough J. See *Fender v St John Mildmay* [1938] A.C. 1 at 10 (per Lord Atkin) and 56 (per Lord Roche); [1937] 3 All E.R. 402 at 406 and 437; *Shaw v D.P.P.* [1962] A.C. 220 at 276; [1961] 2 All E.R. 446 at 457-458 per Lord Reid.
[78] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co.* [1894] A.C. 535 at 553; [1891-1894] All E.R. Rep. 1 at 11.

policy for the then present time."[79]

Yet if it is not public policy but the authority which has become outmoded, the authority is still binding. It is good to keep the law settled, Lord Atkin remarked in 1933, though not if justice is compromised as a consequence.[80] A few years later, in *Fender v St John-Mildmay*, he rejected as "too rigid" the notion that it is never for judges to expand categories of public policy.[81] No other law lord in *Fender* was quite so adamant.[82] There was no House of Lords precedent for them to contend with, and, if there had been and it had been inconvenient, it seems inconceivable that any of them – even Atkin – would have been ready to invoke public policy as a reason for not following it. Atkin was not alone among his law lord contemporaries in believing that public policy provided opportunities for judicial creativity. But the argument tended to be subtle: not that judges fashion public policy, but that there are instances in which they are able to handle the source – develop the common law or interpret the statute – so as to keep it abreast of public policy.[83] Handling the source, as Lord Wright regularly emphasised, did not mean displacing it in favour of the policy.[84] The source remained authority.

## V

In English law, the general doctrine of binding precedent only became established in the nineteenth century, though by the end of that century it was certainly an accepted feature of the court system. As compared with the lower courts, the House of Lords perhaps had more tricks at its disposal – certainly more than just the capacity to

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[79] *Nordenfelt v Maxim Nordenfelt* [1894] A.C. 535 at 554; also *Janson v Dreifontein Consolidated Mines* [1902] A.C. 484 at 500; [1900-1903] All E.R. Rep. 426 at 433 per Lord Davey ("Public policy is always an unsafe and treacherous ground for legal decision").

[80] *Ras Behari Lal v King Emperor* (1933) 50 T.L.R. 1 (P.C.) at 2; [1933] All E.R. Rep. 723 at 726 ("Finality is a good thing, but justice is a better").

[81] *Fender v St John-Mildmay* [1938] A.C. 1 at 11. However, he was not seeking to develop public policy. He was one of a bare majority who held that there was no public policy ground for exempting from general rules on contract enforceability promises to marry made by a promisor before the dissolution of his current marriage.

[82] Thankerton insisted that courts should only ever expound and never expand public policy (*Fender v St John-Mildmay* [1938] A.C. 1 at 23). Wright doubted that there was much if any scope for development (A.C. 1 at 40). Roche, dissenting, considered the proposition that courts can have a role in developing public policy to be "debatable" (A.C. 1 at 54). The other dissenter, Russell, was silent on the matter, believing the case to raise no new public policy issue (A.C. 1 at 34).

[83] See *Rodriguez v Speyer* [1919] A.C. 59 at 79-81 per Lord Haldane; *Regazzoni v Sethia* [1958] A.C. 301 at 318-319; [1957] 3 All E.R. 286 at 289-290 per Lord Simonds; Lord Macmillan, *Law & Other Things* (Cambridge: Cambridge University Press, 1937), at p.220.

[84] See, e.g., *Radcliffe v Ribble Motor Services* [1939] A.C. 215 at 245.

distinguish – when it came to emasculating the precedents which bound it. But those law lords who endeavoured to combat what they considered to be the deleterious effects of final court *stare decisis* were essentially operating like those lower court judges who, when stuck with unwelcome precedent, accept that they cannot be destructive but might still espy ways to be creative.

Throughout the crystallisation era, law lords regularly extolled final court creativity.[85] Occasionally, they would disparage *London Tramways* as an impediment to creativity.[86] But nobody seems to have fretted a great deal over the ruling, however much it might have been disliked in some quarters. It was predicted, accurately, that rampant overruling would not ensue if the doctrine were abolished.[87] Once it was abolished, law lords remained wary of unsettling precedent unnecessarily or at considerable cost – none of them considered the *London Tramways* quietus an opportunity to cry freedom[88] – and they continued to rely on the techniques they had used to emasculate their precedents before overruling became an option.[89] Just as there was a culture of final court *stare decisis* before *London Tramways*, so too the culture persisted after the Practice Statement was issued. The House of Lords could have moved to the position that, absent any special justification for not doing so, it would overrule its own decisions whenever the opportunity arose and it had come to view the relevant law differently from how it

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[85] See, e.g., T. Shaw Craigmyle, *Legislature and Judiciary* (London: University of London Press, 1911), at p.14; *Birch Brothers v Brown* [1931] A.C. 605 at 631; [1931] All E.R. Rep. Ext. 875 at 889 per Lord Macmillan ("[W]hile the rule 'stare decisis' is binding on your Lordships, the decisions of this House in progressively construing a statute must often be stepping stones rather than halting places"); Lord Parmoor, *A Retrospect* (London: Heinemann, 1936), at p.75; Lord MacDermott, *Protection from Power under English Law* (London: Stevens & Sons, 1957), at pp. 40-41; H.L. Deb. 2 May 1957 vol. 203 cols 271-272 (Lord Kilmuir); Lord Radcliffe, "Law and Order" (1964) 61 Law Soc. Gaz. 820 at 821; *Myers v D.P.P.* [1965] A.C. 1001 at 1047 per Lord Donovan, dissenting.

[86] See, e.g., Lord Evershed, "The Judicial Process in Twentieth Century England" (1961) 61 Columb. L. Rev. 761 at 790; also his remarks at H.L. Deb. 25 April 1963 vol. 248 col. 1342, on how "the rule of precedent … in this country has become over-strict".

[87] See, e.g., Wright, "Precedents" at p.144; Devlin, *Samples of Lawmaking* (1962), at p.116.

[88] Lord Denning might be thought an exception – see, e.g., his observations on *Rookes v Barnard* in *Broome v Cassell* [1971] 2 Q.B. 354 (C.A.) at 380-382; [1971] 2 All E.R. 187 at 198-200 – though by the time of the quietus he had returned to the Court of Appeal. The year before the Practice Statement was issued, Carleton Kemp Allen lauded Denning for declaring the writing to be on the wall for *London Tramways*, but also dismissed the prognostication as too optimistic: C.K. Allen, "Precedent Limps On" (1965) 81 L.Q.R. 86 at 86-87.

[89] See, among the many examples, *Cassell v Broome* [1972] A.C. 1027 at 1098; [1972] 1 All E.R. 801 at 846 per Lord Morris; *Knuller v D.P.P.* [1973] A.C. 435 at 455 (per Lord Reid) and 486 (per Lord Simon); [1972] 3 W.L.R. 143 at 147 and 176; *Miliangos v George Frank* [1976] A.C. 443 at 476 (per Lord Simon) and 496 (per Lord Cross); [1975] 3 W.L.R. 758 at 778-779 and 837; *R v Khawaja* [1984] A.C. 74 at 106; [1983] 2 W.L.R. 321 at 339 per Lord Scarman.

viewed it when the precedent case was decided. But it presumed in the opposite direction: that, absent a compelling reason for overruling (the most obvious such reason being that a case was wrongly decided), the House would leave its precedent, even precedent which had met with considerable criticism, undisturbed.[90]

When the crystallisation era came to an end, many jurists were quick to adjudge it an obvious wrong turn, the rectification of which had been long overdue.[91] The conclusion seems slightly awry. *London Tramways* was not a decision reached on a whim but the culmination of a century's worth of to-ing and fro-ing over the question of whether *stare decisis* applied in the House of Lords when it sat in a judicial capacity.[92] The decision could certainly look like a thorn in the law lords' side when they were confronted with the House's own troublesome but judicially unassailable judgments. But they appreciated why the rule against overruling had come to exist. And while they eventually decided that the rule had to go, the era in which they abided by it yields a range of instances in which they managed to domesticate it – instances in which their facility for slipping free of the House's own judgments reinforces the lesson that "binding precedent" is an easily exaggerated concept.[93] When law lords were inclined not to follow these judgments, they did not necessarily believe that it would be better if the authority of a final court precedent were negated. That they did prefer that such authority be negated, moreover, did not always mean that they favoured judge-made law.

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[90] See *Willers v Joyce* [2016] UKSC 44; [2018] A.C. 843 at [7] per Lord Neuberger.

[91] See, e.g., R.W.M. Dias, "Precedents in the House of Lords – A Much Needed Legal Reform" (1966) 24 C.L.J. 153; J.H. Langbein, "Modern Jurisprudence in the House of Lords: The Passing of *London Tramways*" (1968) 53 Cornell L. Rev. 807. There was also the doubly-damning line of critique: that the House was not only wrong to have shackled itself as it had but also wrong to think that the use of a practice statement to remove the shackles was constitutionally or logically supportable. See J. Stone, "1966 and All That! Loosing the Chains of Precedent" (1969) 69 Columb. L. Rev. 1162 (the constitutional argument); R.L. Stone, "The Compleat Wrangler" (1966) 50 Minnesota L. Rev. 1001 (the argument from logic).

[92] See Pollock, *A First Book of Jurisprudence* (1896), at pp.309-317.

[93] See R. Cross, "*Stare Decisis* in Contemporary England" (1966) 82 L.Q.R. 203 at 214; A.W.B. Simpson, "The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent", in *Oxford Essays in Jurisprudence*, ed. A.G. Guest (Oxford: Oxford University Press, 1961), pp.148-175 at p.155.

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