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PRECEDEMTS' PLACE IN LATIN LAW

GORDON IRELAND*

"Comprehension must be the soil in which shall grow all the fruits of friendship."**

As comparative law moves in the United States toward a firm recognition in the curricula of the law schools,* the consciousness of the bar and the curiosity of the bench, there may be renewed with fresh ardour discussion of the much talked about and little understood problem of the part decided cases play in the living systems of civil law. The present notes upon some aspects of the question in the Latin-derived countries may assist toward the formulation of an answer.

To let the known scale for us the unknown, it will be useful to glance for a brief moment at what we understand to be the judging procedure. A judge has before him an actual controversy between two or more real parties who make conflicting claims as to the present status or future condition or both of persons or property. The facts are agreed to, determined with or without the aid of a jury, or assumed (as on the argument of demurrers or procedural motions), and the court has to declare what legal consequences attach to them. The judge whose function it is to administer the law must find some means of resolving the opposition between the litigants' to the end that they may step out of each other's way and resume their normal non-controversial

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** President Wilson, Mobile, Oct. 27, 1913; President F. D. Roosevelt, Washington, Dec. 28, 1933.
See Ireland, *The Use of Decisions by United States Students of Civil Law* (1934) 8 Tul. L. Rev. ——.
Borchard, *Declaratory Judgments* (1933) 7 Tul. L. Rev. 183, 185.
course of life without interfering with the rights of each other or of strangers or of the communal group of which they temporarily form a part. The steps in thus determining how to adjust conflicting claims are finding a rule of law, applying it to the facts and evolving a decision which settles the future conduct of the parties with respect to the issue. So far as the judge is responsive to good repute and wishes to avoid semblance of arbitrariness, partisanship or ignorance he will wish, as he is sometimes required, to make public record, save in the simplest and plainest matters, of the reasons impelling him to come to the conclusion he adopts. This statement of the judge's reasons for his decision becomes the opinion in the case: and is finally the product of one man, whether or not the ideas or actual words of secretaries, referees, reporters or other judges are incorporated in it (although in "per curiam" paragraphs we are not told the author's name). If there is a group who have the responsibility of deciding, that statement agreed to by all or a majority is the opinion of the court, and the others according to inclination or custom may or may not make similar public record of the reasons which seem to them to compel a different conclusion.

The opinions of the single trial judge in first instance are subject to a greater range of the natural variants of experience, skill and intelligence and usually to the practical limitation of restricted accessibility, a but they differ in weight only and not in kind from the opinions of the normal appellate tribunal, of from three to nine members, in second or third instance, in which a large measure of continuity of thought and action is preserved under ordinary circumstances by the partial changing of the personnel, one or two at a time. Thus far, the opinion making process may be recognized as identical in common law and civil law jurisdictions, but we come to the traditional parting of the ways with the next steps in our inquiry: where and how does the judge find the rule of law which applied to the facts as stated in the opinion determines his decision, and what effect does that decision have beyond the immediate case in which it is rendered? So far as we find the use of previous decisions involved in the answer to the first of these questions, it is obvious that we shall have answered a positive part of the second.

a Reports of inferior courts lower the quality of the law: Seymour, Reported Cases as Precedents (1918) 6 Ky. L. J. 112. New York has the Miscellaneous Reports, New York Supplement and even the daily New York Law Journal, the opinions in which are clipped and preserved in some offices.
Without attempting a discussion of the meanings and merits of the historical and the free law schools of juristic thought, an appraisal of the conceptions of Savigny and Jhering or a philosophical analysis of juridical ontology and teleology, our practical understanding of the common law system we see around us is that it rests upon the fundamental working basis that its authoritative exponents, the judges, find and declare the law from previous applied instances. In the absence of general statutory commands and the impossibility of detailed provisions to fit exactly every situation that can arise, common law courts are supposed to apply rules they deduce from precedents nearest in kind to the issue before them. The decision itself then actually makes, whether it creates or states, a new rule of law; and it may in its turn thereafter be used more or less compellingly by those who know of it to help them to the decision of new issues that present themselves in the future. The collapse of all conception of law as a harmonious unit that has been wrought in the last century by this idea hard at work in half a hundred final tribunals, abetted by the report publishers' and the digest makers, somewhat shied off from by our English cousins, though apparently contemplated with equanimity by a sturdy old guard, appears to be invoking a thickening cloud of criticism, ranging from viewing with alarm through pointing with scorn to the suggestion of some possible merit in limitation or even a compromise in extreme cases with

5 The True Value of American Cases (1918) 54 CAN. L. J. (n. s.) 15; 52 I. L. T. 212.
8 Gumbleton, Erroneous Precedents (1894) 56 I. T. 580, 57 ib. 6, 31.
reason⁵⁰ and justice.¹¹ The horrid facts, however, seem still to accumulate¹² while the bar prepares, and whether or not the privately supported current process of restatement¹³ is going to lead to an American codification,¹⁴ the publication with each text of complete state annotations is certainly an invitation to start at once the burial cairn with a hail of attentive decisions. Summoning explanatory conditions of time for reversed cases within a single jurisdiction, of space for simultaneous inconsistent cases in different jurisdictions and of non-being for overruled cases,¹⁵ the common law student maintains universally his contention that decisions make the law.¹⁶

The civil law system, or that part of it which descends straightest from the Roman, starts with a collection (code) of rules to be followed, methods to be observed and ends to be attained, stated wholly without the differentiations of specific facts. In theory, these generalities are to be applied, in an establishe'. hierarchy of imperativeness, by themselves without the intervention of other instances, to the solution of each problem separately as it arises. New conditions not before encountered and old situations seen in new backgrounds, alike are entitled to and will receive the benefit of a direct testing by and application of the original general precepts, unaffected by the indications of judges in the past. We have then to examine this theory in operation, to note the way it works, what it permits and what it excludes, and what tendencies it implies.

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¹² Casual current examples: Williams, Clogging the Equity of Redemption (1933) 40 W. Va. L. Q. 31; Schoene and Watson, Workmen's Compensation on Interstate Railways (1934) 47 Harv. L. Rev. 389.
¹³ History and Prospects of the Social Sciences, Foun., ch. IX, Jurisprudence (1925) 444, 478. Franklin, Book Review (1933) 8 Tul. L. Rev. 149.
¹⁶ Lincoln, The Relation of Judicial Decisions to the Law (1907) 21 Harv. L. Rev. 120.
The social interest in putting an end to litigation for its own sake, after all legitimate rights of the interested parties have been duly afforded the benefit of judicial examination has led to the establishment of a doctrine (res judicata pro veritate habetur) known in the common law as res judicata, in the civil law generally as chose jugée. In both, when a judgment rendered has become final, it is conclusive as to the issues necessarily tried and further legal controversy between the same parties as to the same subject matter will not be heard; with the differences, unimportant for the present consideration, that the common law generally includes persons claiming through the original parties, and the civil law requires the cause of action to be the same. This establishment by the public will of a final determination, with its limited scope, is of course in no way to be confused with the common law doctrine of stare decisis, by which precedents are held to be binding upon all persons in similar cases.

Remembering tales from the past, or perhaps actual abuses (which it would be fascinating to have a legal historian some day fully describe), the compilers of the French Civil Code, which is the starting point for our purposes, thought it necessary expressly to prohibit their judges from declining to decide a case before them:

Art. A. A judge who refuses to render judgment under pretense that the law is silent, obscure or insufficient may be prosecuted for the offense of denying justice.

This provision has been copied or imitated in many codes enacted since the Code Napoléon, though some state merely the prohibition without the sanction. It is a favorite subject of general remark by the Commentators in opening their discussions of the principles of civil law.

Where in the United States Article 5 of the French Code is known, with its purpose, among others, of preventing the formation of a body of precedents which should become binding upon

\[17\] CIVIL CODE (Napoleon), France, a. 1351; Belgium, a. 1351.
\[19\] Clarke v. Figgins, 27 W. Va. 663 (1886); Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302 (1886); Pyles v. Furniture Co., 30 W. Va. 123, 2 S. E. 909 (1887).
\[20\] CIVIL CODE: Belgium, a. 4; France, a. 4; Spain, a. 6; Cuba, a. 6; Dominican Rep. a. 4; Haiti, a. 9; Panama, a. 2. Philippine Ids., a. 6; Puerto Rico, a. 7; Quebec, a. 11.
\[21\] CIVIL CODE: Argentina, a. 15; Brazil, a. 5; Ecuador, a. 19; Guatemala, a. 17, 18; Mexico, a. 18; Paraguay, a. 15; Peru, a. 8, 9; Uruguay, a. 15. Code of Civil Procedure, Nicaragua, a. 443, pr.
the courts,\textsuperscript{22} it is rather the fashion, remembering the great French reports series\textsuperscript{22} to declare, with eminent authority,\textsuperscript{22} that the prevention has failed, and that decided cases have become just as important under the Code Napoléon as they are in the common law system.\textsuperscript{25} We may inquire what the French jurists themselves say as to this. A Professor of the Faculty of Law of Paris recently wrote:—

"The time is past when one discussed the value of jurisprudence as a source of positive law, and no professor of the Faculty would permit himself to-day to oppose his personal doctrine to the decisions of the Court of Cassation",\textsuperscript{25}

to which a colleague, the Dean at Lyon, replies:—

"We very much fear that one can see in this optimistic declaration only the expression of a wish rather than the statement of a reality. It is true, the divorce which formerly existed between doctrine and jurisprudence and which was vigorously denounced by A. Esmein\textsuperscript{25} seems to have weakened, thanks to a more just comprehension of juridical reality; but behold what arduous problems of responsibility a hard and persistent test imposes upon this so necessary and fruitful entente cordiale."\textsuperscript{25}

The Commentators and teachers of law have agreed that jurisprudence is important, helpful as illustrating how general statements are applied and gaps filled in the law, but

"Whatever authority may attach to it, even when it is constant on a given point of law, it never forms a rule juridically obligatory upon the citizens or the courts. . . . It is the judge's duty not to let himself be halted by precedents of which doctrine or experience has demonstrated to him the error or the inconvenience";\textsuperscript{25}

\textsuperscript{22} Wright, Trans. French Civil Code (1908), a. 5; (1932) 7 Tul. L. Rev. 100, n. 2.

\textsuperscript{23} Pandectes Francaises (1886-1905) vols. 1-59, and volumes on special subjects; Dalloz, Rep. de Leg., Docte. et Jurisp. (1845-1860), vols. 1-44 and Annuals since; Sirey, Recueil General (1851 to date), vols. 1-9 and Annuals.


\textsuperscript{25} Deak, The Place of the "Case" in the Common and the Civil Law (1934) 8 Tul. L. Rev. ——.

\textsuperscript{26} Ripert, Recueil des Sommaires, Table Quin. (1929) Preface.

\textsuperscript{27} Esmein, La Jurisprudence et la Doctrine (1902) 1 Rev. Trim. Dr. Civ. 1. (Citation reference ours).

\textsuperscript{28} Josserand, La Doctrine contre la Jurisprudence (1931) Dalloz JUR. GEN. D. H. 69.

\textsuperscript{29} 1 Aubey et Rau, Cours Dr. Civ. Fr. (5e ed. 1897) § 39 bis.
"The authority (of jurisprudence) can be, we think, only a simple authority of reason . . . and we should not consider jurisprudence as a formal source of law . . . . The judge cannot give the motive for his decision simply in a reference to a previous decision, for that would lend to the earlier decision the authority of a general regulatory disposition”,

and

"The judge remains free to adopt another principle of solution in analogous cases which may come before him in the future”.

In France it seems evident that no one has the idea, in running down, citing and discussing previous decisions that he is presenting to the judge authority which the instant decision must follow or be reversed on appeal. The previous cases on both sides are examples of logical reasoning applied to more or less similar circumstances by other trained minds; and though the conclusion reached by the judge will seem to one lawyer to be like that in the cases he produced, the other can make no effective complaint and take no appeal simply on the ground that the decision is unlike his set of cases: it did not fail to follow and is not contrary to them, but is at most different from and wholly competent to disregard them. Although great, perhaps increasing, respect is paid in France to decided cases, it is accepted that neither a decision nor a course of decision can lay down a general rule. In a line of cases proceeding from similar causes, the later ones tend inevitably to model themselves on the ones that have gone before, and after a time the jurisprudence seems to be fixed upon the question; but there is nothing obligatory, the course of progress may be changed and the rule is not certain

\[ \text{1 Baudry-Lacantinier, Traite Theor. Prat. Dr. Civ. (2e ed. 1902)} \]
\[ \text{§§ 233-250.} \]
\[ \text{1 Baudry-Lacantinier, Precis Dr. Civ. (12e ed. 1919)} \]
\[ \text{§§ 87-92. See also Laurent, Prin. Dr. Civ. Fr. (3e ed. 1878) §§ 258-260, 264-267; Gavet, Sources de L'Histoire des Institutions (1899) 443-445; 2 Geny, Methode d'Interpretation (2e ed. 1919) §§ 145-150; Capitant, Introd. A L'Etude du Dr. (5e ed. 1929) a. 5. Levy-Ullman, Note (1901) SIREY REG. GEN. 2225, at 231.} \]
\[ \text{Amos, The Code Napoleon and the Modern World (1928) 10 J. Comp. Leg. (3rd Ser.) 222.} \]
\[ \text{Pound, The Theory of Judicial Decision (1923) 36 HARV. L. REV. 641, 649.} \]
\[ \text{So that lawyers fatuously “count on the natural indolence of men for servile repetition of the decision rendered”. Ripep, op. cit. supra, n. 26.} \]
until it has been fixed in a statutory text. 25 In Louisiana26 and Quebec,27 which derive their civil codes from the French model but are now under common law appeal jurisdictions, the tendency is naturally toward assimilation of the superior technique; and citations are used with increasing frequency and precedents begin to acquire a certain compulsory effect.

The common law student, who is discontented with the law "in vacuo" which he gets by reading what is said upon imagined situations by authors in the seclusion of studies or libraries and must satisfy his desire to see the law in action by reading what is said upon presented situations by hurried authors in chambers or on the bench, will welcome here several applied instances. As might be expected, suspension (adjournment) of all proceedings in a case for a definite time is not a violation of Article 5,28 but the court must not refuse a decision on damages on the ground that the evidence (experts' report) does not permit calculation of the exact amount,29 nor return the parties to an appeal court because a modifying decree the lower court should apply is thought or said to contain obscure provisions.30 Cases of attempted or successful prosecution of any judge under Article 5 appear to be lacking.

Having thus endeavored to ensure that a judge shall act as judge, Napoleon's Commission were next concerned with seeing that he did not act as legislator. The principle of the separation of powers, often given lip service in England and the United States, has been a practical ideal elsewhere, and lent effective sup-

26 It should be noted that Louisiana, for the French origin of her code and her institutions habitually pointed at as the odd one in the family, appears to grow ever more like her sisters, despite the accepted aim of Constitution (1921) Art. III, Section 18, and its eight predecessors. Her criminal law has long been based on the common law; her tort law is to-day substantially "a body of common law rules and principles" (8 Tul. L. Rev. 53, n. 3); her law students enthusiastically reflect and replenish the efforts of her bar toward common law modes; and the opinions of her courts are written in established common law fashion. See Davidson, Stare Decisis in Louisiana (1932) 7 Tul. L. Rev. 100.
port in the constitution and the laws of France and countries copying parts of her system. The codifiers provided that

Art. B. Judges are forbidden to decide cases submitted to them by laying down general rules of conduct or according to settled decisions."

M. Portalis, supporting the Project of the Code, declared that the judge ought to comprehend the spirit of the legislation, but not himself participate in the exercise of the legislative power; and efforts to preserve the distinction have been the concern of many civil law legislators since that time. Legislation, it is pointed out, properly looks to the future and binds all persons (within the jurisdiction of the enacting body); a decision is concerned with the past, and affects only the parties (or those claiming under them): the law should be general (de his quae semel aut bis accidunt non cavent legislatores) but the decision must be limited to the particular case, and so far as it attempts or turns out to be regulatory and universal, it infringes upon the legislative power. So, some codes have been even more explicit:—

Art. C. It is for the legislator alone to explain or interpret the law in a manner generally obligatory. Judicial sentences have no obligatory force except in the causes in which they are pronounced."

Allied to the separation of powers, there may be noted a theory which has gained some support in France of the possibility of classifying judgments as declarative or constitutive. The distinction may have descended from the double faculty of the praeceptor in later Roman law to judge (jurisdiction) and to decree (imperium). Merlin, protagonist of the modern discussion, thinks a judgment is declarative when it recognizes the existence of an anterior right which has been contested, and constitutive when it creates new rights. Thus, judgments in suits for breach of contract are declarative, while one of divorce, filiation or bankruptcy

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4 Civil Code: Belgium, a. 5; France, a. 5; Colombia, a. 17; Dominican Rep., a. 5; Haiti, a. 8.
7 Civil Code: Chile, a. 3; Ecuador, a. 3; Uruguay, a. 12. First sentence only: Honduras, a. 3; Salvador, a. 3. Second sentence only: Colombia, a. 17.
is constitutive. But, as M. Mazeaud" points out, a judgment of either class has in it something of the characteristics of the other: the award of damages creates by delegation of the public power a right not before existing, the right to execution (jurisdictio sine modica coercitione nulla est); and the decree of divorce recognizes preexisting marital rights as the basis at least for the new juridical situation which it establishes. It seems probable, indeed, that every judgment would on analysis be found to contain elements of both classes, so far as they can be defined and understood; and the attempted distinction does not so much itself enlighten us as it seems to suggest a possible division among judgments which will, if valid, help materially to answer the question as to what part decisions take in making civil law.

In the beginning of any society, the judging function, though exercised by the chief or ruler was, we may suppose, a matter of deciding disputes that had arisen between two or more individuals, and concerned itself with settling the rights between them to land or personal property or the exercise of subordinate power, leaving for a different occasion operation of the functions of the ruler we should to-day generally call administrative and legislative. Even after the judging power had been delegated regularly to other persons, there remained the possibility that it might in any given case be recalled and exercised by the ruler, as old enactments show."

Looking back, now, from the divergent principles of the two modern systems, it appears that in the common law the decisions of the judges began to be taken and finally came to be considered as conclusive, for the determination of new cases arising, while in the civil law each decision became a closed episode of the cause which elicited it and rules for new cases were left to legislative creation. As this difference in habit became fixed in the repetition of usage and custom until it became a rule, by the collective will of the state, whether innately in the sovereign or implicitly delegated by the people, it gave actually separate qualities to judgments under the two systems. In the common

"Mazeaud, De la Distinction des Jugements Declaratifs et des Jugements Constitutifs de Droits (1929) 28 Rev. Trim. Dr. Civ. 17; reprinted without the notes, (Chile, 1939) 36 Rev. Der. JUR. y Cien. Soc. 120. See also Montagné, De l'Effet Déclaratif ou Constitutif des Jugements en Matière Civile (Paris, 1919) these; Esmein, Des Effets des Decisions de Justice sur la Reconnaissance et la Creation des Droits (Paris, 1914), these.

"Spain (1265) Partida 3, Title 22, Law 11; Part. 3, Title 23, Law 15.2; Part. 7, Title 33, Law 4; (1805) Nov. Recop., Lib. 3, Title 2, Law 3. So, to-day, the Pope: see Ireland, The State of the City of the Vatican (1933) 27 Amer. J. Int. Law 283.
law each decision carried a degree connected with a degree of connective relation with similar ones past and future which with respect to the whole content of the law we may call conductivity; while in the civil law the decision remained a single instance of applied legislation in a condition which resembled insulation.

These separate qualities persist in the store of jurisprudence of both systems, and definitely condition the uses made of it: the conductive decisions of the common law are absorbed in the legislative mass and become homogeneous and necessary parts of the structure; the insulated decisions of the civil law remain distinct in substance from the mass, on the surfaces of the legislative material, and may fall off and be replaced by like or unlike without effect upon the general structure. In this interpretation, in accord with the known facts, it is obvious that the civil law student, practitioner or judge may seek, examine and discuss precedents freely: he can never find in them a rule of law, nor be led by them alone to any decision. He must reason, as logically as he can, to his conclusion for himself from the legislative law given him; and at most he will be gratified to find that another mind from similar premises has independently arrived at the same conclusion. The civil law judge, moreover, makes this insulation most apparent in the casual, toneless way he inserts without comment the bald statement of the places where may be found the decisions he cites as illustrations along the course of his opinion.

Of special interest is legislation which expressly refers the judge, in the absence of applicable statutory enactment, to jurisprudence: a method of shorthand adoption by the legislators of a body of law which has the twofold advantage of making unnecessary any legislative attempt to draft or formulate its rules and of leaving them fluidly susceptible of change to suit altered conditions or include new applications without recourse to the slow process of legislative amendment. The recent Swiss Civil Code begins:—

The Code governs all matters covered by the letter or the spirit of any of its provisions. In the absence of an applicable legal provision, the judge shall decide according to customary law, and in the absence of any custom, according to the rules which he would establish if he had to act as legis-
lator. He may inspire his decision by solutions sanctioned by
discipline and jurisprudence.\textsuperscript{44}

This article appears to contemplate for the limited number of
cases in which the courts find no applicable legal provision in the
statute law\textsuperscript{45} the creation of suitable rules from custom or what
the judge would provide if he were legislating, guided by solu-
tions drawn first (as is often overlooked by common law com-
tmentators on this section) from the jurisconsults and text-writers
(discipline) and only second from decided cases (jurisprudence).
In this order, the novelty of this enactment in European practice
really lies more in its failure primarily to invoke analogy\textsuperscript{46} than
in its final reference to jurisprudence. Incorporation by reference
of custom\textsuperscript{47} as controlling when no positive written provision is
to be found is not new, in either hemisphere, and the general
principles of law quite commonly made the last resort\textsuperscript{48} are
normally looked for in the text-writers and then in the cases.
Since the going into effect in 1912 of this new Swiss Code, the
highest Federal Court has not hesitated, in the very small per-
centage of appeals in which a gap in the written law appears to
have been found, to approve its being filled according to the
analogy of rules in similar cases,\textsuperscript{49} according to customary usage,\textsuperscript{50}
what the judge would do if he were legislating\textsuperscript{51} and without any

\textsuperscript{44}Civil Code, Switzerland (1907) Introduction, a. 1. Texts: (1931) 5
Tul. L. Rev. 270, n. 28; (1932) 6 Tul. L. Rev. 402, n. 121. Comment:
Williams, The Sources of Law in the Swiss Civil Code (1923); Martin,
Observations, etc. (1901) 23 Sem. Jud. 1; Chaud, Nouveau Code
Suisse; Schuster, The Swiss Civil Code (1923) 5 J. Comp. Leg. (3rd Ser.)
216; Sperl, Case Law and the European Codified Law (1925) 19 Ill. L. Rev.
505, 5 Am. L. S. Rev. 514; Cosentini, Cod. Civ. Pan-Amer. (1932) 9, 22,
57, a. 20.

The text of the final sentence appears diverse in the trilingual original:—
Er folgt dabei bewahrter Lehre und Ueberlieferung
Il s'inspire des solutions consacrées par la doctrine et la jurisprudence
Egli si attiene alla dottrina ed alla giurisprudenza piu autoravoli.

\textsuperscript{45}In the civil law generally it has been asserted by a judge that “99% of
the cases are decided within the Codes.” Henry (1929) 15 A. B. A.
J. 11.

\textsuperscript{46}Discussed under Art. D, infra n. 76.

\textsuperscript{47}Discussed under Art. H, infra n. 89.

\textsuperscript{48}Discussed under Art. E, infra n. 78.

\textsuperscript{49}Mathis c. Obergericht de Zurich (1924) 72 Jour. Trib. I.130; Masse de
la Banque c. Kalin-Benziges (1925) 73 Jour. Trib. I.2; Ass'n de Bienne c.
Henzi (1926) 74 Jour. Trib. I.98.

\textsuperscript{50}Schauffelberger c. Milz (1922) 70 Jour. Trib. I.468; Amrhyv-Notzli c.
Chambre du Tessin (1924) 72 Jour. Trib. I.562; Luscher c. Dr. Luscher
(1928) 76 Jour. Trib. I.354.

\textsuperscript{51}Helvetia c. Pera (1921) 69 Jour. Trib. I.272.
mention of authority, but in no instance which has been found according to a rule derived from any previous decision; so that the revolutionary movement toward the common law system of precedents anticipated in some quarters from this article appears not yet in evidence.

Mexico in the latest form of its Constitutional Protection (Amparo) Law also establishes jurisprudence as a source of law, in providing that:

The judgments of the Supreme Court voted by a majority of seven or more of its members shall constitute jurisprudence, provided the decision is found in five cases not interrupted by any contrary one.

The jurisprudence of the Court in amparo cases is obligatory upon District (Federal) Judges. The Supreme Court shall respect its own decisions. It may, nevertheless, alter the established jurisprudence; but in such cases always expressing the reasons for so deciding. These reasons should refer to those which were considered in establishing the jurisprudence now changed.

Thus a determination that is followed without contradiction the required number of times (cf. legislation, such as in several States a proposal for a constitutional amendment, which has to be passed by successive legislatures before taking effect) hardens into a rule of law, which the lower courts must follow and the Supreme Court will respect, but may still change when it finds sufficient reason for so doing. The public authority in this legi-


lation, the Court finds, departs a little from the theory of the (civil) law that a decision is applicable only to the case in which it was rendered, in making the resolutive part of the judgments, sufficiently repeated, a rule of conduct for future cases; but preserves so much of that theory as makes the jurisprudence applicable only to the same class of case as that in which the precedent was formed, and this enactment does not adopt the very dangerous system of judicial construction by which the theoretical principle of one law is employed to interpret other laws. Nicaragua in civil matters requires its judges to consider the doctrines of law accepted by the jurisprudence of the courts and the most authorized opinions upheld by interpreters or expositors of the law; and Uruguay refers to the doctrines most received.

The idea that numbers may effect a technical alteration in the binding quality of decisions has been applied in a limited way to different ends elsewhere in Spanish derived law. The legislature in Colombia enacted that three uniform decisions in cassation by the Supreme Court on the same point of law should constitute the most probable legal doctrine; while in Costa Rica the courts themselves have determined that three decisions make constant jurisprudence for certain purposes. In Spain, "infracion of the law or of legal doctrine" is one of the grounds upon which an appeal may be based; and for a time the courts observed a rule of their own creation, perhaps originating as a protection against a mass of meritorious appeals, that one single decision did not establish a legal doctrine whose infractions would come within this ground. Later the rule was abandoned in Spain, but meanwhile it had been adopted in Cuba, where it is still sometimes invoked,

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23 CODE OF CIVIL PROCEDURE (1905) a. 443, subds. 2 and 4.
24 CIVIL CODE, a. 16.
25 Law No. 153 of 1887, a. 10, 12.
26 Purves v. Villalobos (Sept. 4, 1931) Corte Cas. II.251; Estrada v. Rey (Nov. 26, 1931) Corte Cas. 631.
notwithstanding vigorous protests against it.\textsuperscript{\textcopyright} Aside from these special instances, Spanish speaking jurists are unanimous in saying that even if jurisprudence ought to be,\textsuperscript{\textcopyright} it definitely is not a source of law,\textsuperscript{\textcopyright} but at most evidence of the law,\textsuperscript{\textcopyright} and so the courts hold.\textsuperscript{\textcopyright} In some jurisdictions the legislature has recognized that the courts in practice may meet problems which existing statutes will not solve, and have provided for official consultations from the lower judge, after deciding the case in hand, to the Supreme Court to obtain a certain rule for new cases which may occur,\textsuperscript{\textcopyright} in a sort of cross between an appeal de oficio and an advisory opinion; and have shown the purpose to keep the final making of new rules in the hands of the legislative power by requiring the transmission of such consultations with their report thereon by the Supreme Court to the legislature.\textsuperscript{\textcopyright}

Any given law, whether code or special act, involved in a case may be ambiguous or doubtful in its expressed language or it may be entirely lacking in provisions applicable to the points at issue. In the former case the law requires interpretation; and the civil law no less than the common law has rules therefor. The

\textsuperscript{\textcopyright} Cruz, \textit{Note} (1925) \textit{Juris. al Dia, Civ.} 403.


\textsuperscript{\textcopyright} Civil Code: Guatemala, a. 18. Cf. Spain, Partida 3, Title 22, Law 11.

\textsuperscript{\textcopyright} Civil Code: Ecuador, a. 19; Peru, a. 9, 10. And see Brazil, Miranda, \textit{op. cit. supra}, n. 70, at p. 32.
interpretation\textsuperscript{79} may be (a) authentic, by the legislator himself, ascertainable by examination of the full legislative record of the enactment, a method pursued much further, in proper case, in a civil law court than is allowed in the anglo-system; (b) doctrinal, by commentators, jurisconsults and text-writers, whose views are deemed worthy of attention and given much weight in a civil law decision; or (c) judicial, by the court in the instant case. Judicial interpretation of the law, when the preceding sources seem not to settle the matter, and judicial amplification of the law, when appropriate express provisions are lacking, may be definitely directed:—

\textit{Art. D.} When a controversy cannot be decided by a precise disposition of law it shall be determined according to the dispositions regarding analogous cases;\textsuperscript{80} and if it still remains doubtful,

\textit{Art. E.} According to the general principles of law,\textsuperscript{81} with regard to the circumstances of the case.\textsuperscript{82}

Unlike the Swiss court which, although the new Civil Code makes no mention of using analogous cases, has as we have seen\textsuperscript{83} not hesitated to apply analogy, the Spanish courts have refrained from reverting openly to a method of interpretation their code does not authorize,\textsuperscript{84} but where Latin American codes do refer to


\textsuperscript{80} \textit{Civil Code}: Italy, a. 3; Portugal, a. 16; Argentina, a. 16 (civil cases); Brazil, a. 7; Guatemala, a. 18 (after, spirit of the law); Nicaragua, a. 17; Panama, a. 13; Paraguay, a. 16 (civil cases); Peru, a. 9 (after, spirit of the law); Uruguay, a. 16 (after, spirit of the law); Venezuela, a. 4. \textit{Code of Civil Proc., Nicaragua}, a. 443, subd. 1. Louisiana, a. 17; (1931) 5 Tul. L. Rev. 270 n. 27, 663 n. 27; (1933) 7 Tul. L. Rev. 261, 582 n. 45, 683.

\textsuperscript{81} \textit{Civil Code}: Italy, a. 3; Portugal, a. 16 (natural law); Spain, a. 6 (after, local custom, not analogous cases); Argentina, a. 16; Brazil, a. 7; Cuba, a. 6 (after, local custom, not analogous cases); Guatemala, a. 18; Mexico, a. 19 (after, letter of the law or juridical interpretation, not analogous cases); Nicaragua, a. 17; Panama, a. 13 (after, constitutional doctrine); Paraguay, a. 16; Peru, a. 9; Uruguay, a. 16; Venezuela, a. 4; Louisiana, a. 21 (natural law); Philippine Isl., a. 6 (after, local custom, not analogous cases); Puerto Rico, a. 7 (as embodied in equity). \textit{Code of Civil Proc., Nicaragua}, a. 443, subd. 3 (after, doctrine accepted by jurisprudence).

\textsuperscript{82} \textit{Civil Code}: Portugal, a. 16; Argentina, a. 16; Nicaragua, a. 17; Paraguay, a. 16; Uruguay, a. 16.

\textsuperscript{83} See n. 53, supra.

analogy, usually first to be consulted, the courts have no difficulty in applying it. Reference originally or next to the general principles of law is more frequent, and the courts declare relevant some more or less trite elementary maxim and apply it without much attempt to define what principles in general are meant. What does appear unanimously from the reports, however, is that in none of these cases is there made or does it appear that it occurred to the court that there could be made reference to a previous decision or line of decisions as determining the analogy or establishing a general principle of law; so that neither of these provisions serves to indicate any binding character in jurisprudence.

Complementary to the question of creating laws is the question of ending them; and in that problem also the civil law lays down rules for its judges. It may say that

Art. F. Laws are repealed only by other later laws, or merely that

Laws may be repealed by other laws.

Whether the ban on other methods of repeal be express or implied, the courts do not seem anywhere to have assumed that they could put an end to a law, except under the American theory as to laws contrary to the constitution of the state, and then only when power to declare the unconstitutionality and consequent nullity of a legislative enactment is expressly given them by the constitution and a corresponding procedural statute. Decisions in such cases affect only the law attacked, as usually in the United States,

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61 Argentina, Puesteros c. Lagos (June 10, 1877) 17 Fallos Supr. Ct, 12a Ser. 8,463; (1913) 2 Jaru. y Leg. 761; (1920) 4 ib. 125, 5 ib. 253; (1923) 9 ib. 53, 385. Panama, Levy c. Goytia (Apr. 24, 1919) 16 Reg. Jud. 430.
63 Diokno, What are,,Los Principios Generales del Derecho,, in Art. 6 of the Spanish Civil Code? (1930) 10 Phil. L. J. 1. LAMA, COD. GIV. (Peru, 5a ed. 1920) 512, lists 82 maxims he thinks are general principles; and Robles Pozo, op. cit. supra n. 69, at p. 103, lists 48.
64 Civil Code: Italy, a. 5; Spain, a. 5; Argentina, a. 17; Brazil, a. 4; Cuba, a. 5; Guatemala, a. 11; Haiti, a. 3; Paraguay, a. 17; Uruguay, a. 9; Venezuela, a. 7; Philippine Is., a. 5; Puerto Rico, a. 5.
65 Civil Code: Chile, a. 52; Colombia, a. 71; Costa Rica, a. 12; Ecuador, a. 47; Honduras, a. 42; Mexico, a. 9; Salvador, a. 52; Louisiana, a. 23.
and sometimes even, according to the implementation, only in the actual case heard; and in any event form no body of general precedent.

It is often prescribed that

Art. G. Against the observance of the law there may not be alleged disuse, custom or contrary practice, and perhaps further specifically that

Art. H. Custom does not constitute law except when it is referred to in the statute.

In determining what may be allowed to control under these provisions, the courts seem not to have attempted to include previous decisions either as custom or as contrary practice.

It appears then to be the theory of the Roman civil law countries that the judge should always base his decision upon some legislative provision; and where such provision is lacking, he may consult analogous provisions, doctrine and jurisprudence, in that order. The jurisprudence is in no event binding upon him, but illustrative and to be used merely as an example of similar premises leading to a similar conclusion, and neither seeks nor is


Civil Code: Portugal, a. 9 (disuse only); Spain, a. 5 (from Nov. Recop. Lib. 3, Title 2, Laws 3 and 11); Argentina, a. 17; Colombia, a. 8 (disuse only); Costa Rica, a. 12; Cuba, a. 5; Guatemala, a. 6; Mexico, a. 10; Peru, a. 6 (disuse and custom only); Uruguay, a. 9; Venezuela, a. 7; Philippine Ids., a. 5; Puerto Rico, a. 5. Cf. (1932) 7 Tul. L. Rev. 102, n. 12.

Civil Code: Argentina, a. 17; Chile, a. 2; Ecuador, a. 2; Honduras, a. 2; Paraguay, a. 17; Salvador, a. 3; Uruguay, a. 9. Cf. Spain, Partida 7, Title 33, Law 4. Civil Code, Panama, a. 13 (in conformity with Christian morals). Examples are Civil Code: Spain, a. 1287, Cuba, a. 1287; Honduras (former, 1898) a. 6; Uruguay, a. 594; Louisiana, a. 1903, 1953, 2716; Philippine Ids., a. 1287; Puerto Rico, a. 1254; Quebec, a. 1016; Colombia, Law No. 153 of 1887, a. 13; Louisiana, Act No. 64 of 1904 (N. I. L.), § 196 (law merchant); Act 221 of 1908 (Warehouse Repts.) § 56 (law merchant) W. Va. Acts 1907, c. 81 (N. I. L.) § 196 (law merchant); Acts of 1917, c. 8 (Warehouse Repts.), § 56 (law merchant).

allowed to intrude in settled fields. He may, unless there are particular topics for which a different procedure is specifically prescribed by statute, disregard the previous decisions of his own court and even of any higher court, and is charged with basing each decision afresh upon the code article or other legislation. In practice, the growing quantity of reported decisions available in France and the other countries makes it possible for diligent attorneys increasingly to find and refer to previous applications and conclusions on both sides of the issue they are presenting, and the courts under this pressure will accept and sometimes themselves cite a previous decision as an example of a reasoned conclusion in accord with their own, but they use the cases as insulated and not conductive as in the common law. The courts do not feel called upon to explain, distinguish or overrule any case which seems similar but comes to a different conclusion, considering it only a non-corroborative instance. A decided case is incapable of creating a rule of law; and nowhere does the authority of precedent prevent a decision on the merits of the case at hand. Students and practitioners of the common law working in comparative law may usefully retain some degree of their accustomed interest in and discussion of decided cases, but should for correct results keep clearly in mind the true precedence of texts, doctrine and jurisprudence. They must remember the lawyer is speaking to a common law audience who says there is no power

"Can alter a decree established:
'Twill be recorded for a precedent,
And many an error, by the same example,
Will rush into the state."
### TABLE I.

**Civil Codes Article Numbers**

<table>
<thead>
<tr>
<th>Country</th>
<th>Year</th>
<th>Article Numbers</th>
<th>Standard Article of Code (as in preceding Text)</th>
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<tr>
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<td></td>
<td></td>
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<tr>
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1. From Code Napoleon, but omitting articles 4 and 5.
2. Same as Spain.
4. Same as Argentina.