SOME CONSIDERATIONS ON CASE LAW.

(By Hugh W. Harding, L.P.)

In order to deal adequately with the subject matter of this title it is necessary to preface the fundamental distinction between the two great system of law, i.e. the system of code law and the system of case law. The reason for this distinction is obvious. In countries where the law in the main, is not codified, as in England, but is, so to say judge-made, case law is, in point of fact, the law itself. As occasion arises, the particular case before the Court is tried on the authority of precedent. Any law student who is accustomed to the system of code law shudders on reading that in England there are about three quarters of a million decided cases to go by. Nor is his mind set at rest on reading that in the case of Bottomley v. Bannister (1932). 1 K. B. 458, precedents decided in 1409 and 1425 were cited to assist the judge in determining who was liable for the leakage of a gas burner installed in 1929.

The functions of case law where the laws are codified are of an ancillary, although not less important, nature. What are these functions?

It would appear at firs sight that once the law is clearly set down in so many articles in the appropriate codes, case law loses much of its signifance. However—although we should certainly not look upon the law as cynically as Bernard Shaw did when he termed it "an imperfect, rough-and-ready device of mankind to keep people from sending each other to the devil"—we must admit that the law-giver can ever be so far-sighted as to anticipate all the contingencies of human life. It is exactly in this process of applying and adapting abstract law to the concrete cases of the moment, in all their diversity of circumstances. That the functions of case law, even under the system of code law, come into play.

First and foremost, case law applies and interprets the law in particular cases. In this sense the jurist Portalis said that case law is necessary supplement to legislation. With regard to interpretation, it is important to stress that the function of the judge is, in the words of Bacon, that of *jus dicere* and not *just dare.* Two maxims are to be borne in mind on this fundamental point, viz. *statutorum verba quando sunt clara non egent observantia interpretative* and *ubi statuentes nihil distinxerunt nec judices distinguere debent.* The point was further stressed by the French jurist D`Argentre when he said *Stulta sapientia quae vult lege sapientior esse.*

The exercise of this function of interpretation produces a collection of case law which has the authority of precedent. French text-writers call it *Jurisprudence* des Arrêtes.

With regard to the word *Jurisprudence* it is interesting to note that the meaning given to this word on the Continent is different from that in which it is understood in England. In the latter place it is generally taken to be the science of law i.e. the science which has for its function to ascertain the principle son which legal rules are based. As such it is mainly based, as W. G. Byrne points out in his "Dictionary of English Law", on comparative law i.e. on the

comparative study of the legal institutions of various countries because such a study from its historical accidents. Byrne goes on to say that Jurisprudence is also used, incorrectly, as synonymous with law, and, he says. "We hear of the jurisprudence of France or Russia when nothing else is meant than the law which is in force in those countries respectively". The latter statement, in my humble opinion is not perhaps, exact because what is really meant when one speaks of French jurisprudence, Italian jurisprudence or Maltese jurisprudence is the collection of judgments or precedents interpretiung the law i.e. the authority of precedent *rerum perpetuo similiter judicatarum auctoritas* (Fr. 38, Dig Leg.)

There may be cases in which judgments are conflicting but in any such case it would be just as well to say what a distinguished Scottish, judge, gifted with a vein of irony, remarked *a pronos* of the House of Lords as a tribunal that if sometimes two of its decisions are inconsistent such inconsistency was due "to the frail vision of the observer".

Another important function of case law is that of providing for what is called a *casus omissus*. This, of course, is not possible in Criminal Law where the maxim nullum crimen sine lege is paramount and inflexible. But in Civil law very well happen that a case ,not expressly envisaged in the written rule of law, can be decided by analogy to a similar case for which express provision is made . This is an application of the rule Ubi eaaem esc legis ratio, ibi eadem est legis dispositio.

But, even supposing that provision for a casus omissus cannot be made under the eiusdem generis rule without violating the maxim that the judge can only interpret but not make the law, then a third important function of case law comes into view. By pointing out in its judgment the fact that no provision is or can be made for the particular case before the court, the judge stresses the necessity or a legislative

Enactment, in jure condendo. It was again the jurist Portains who said, in his preliminary speech on the draft of the French civil cod, "to foresee everything is impossible. How can one chain time? How can one stop the course of things? How can one foresee that which only experience discloses? How can foresight be extended to things which the mind cannot as yet have in view?"

This takes us to the next important function of case law, viz., that of helping to adapt laws to the changing needs of the age. It was in recent address to the Edinburgh University Law Faculty Society that Lord Blackburn, of the Scots Bench, took as his subject the development of the law, meaning thereby not the development of legal principles in the course of the centuries but the enact of rapid changes in social conditions upon the application of the law to particular cases. In this connection one might be pardoned to quote at length from Professor Laski's book "Studies in Law and Politics", page 295, "Law like life has its periods of change and its periods of conservation; it is not a closed system of eternal rules elevated above time and place. The respect it can win is measured by the justice it embodies and its power to embody ideals of justice depends upon its conscious effort to respond in an equal way to the widest demands it encounters. I do not deny the difficulty of the task and I am anxious to recognize its nobility. I know how tremendous is the pressure of past tradition, how urgent especially in a critical time the need for stability. The lawyer's regard for precedent has been one of the greatest preservative forces of history; I do not for a moment deny the importance of the contribution it has made;" and later on: "It is the lawyer's function to make his doctrines

keep step with the spirit of the times." The same concepts are summarized in the saying of Mr. Justice Holmes: "The life of the law is not logic but experience,"— although, of course, this sociological interpretation of law must not be stressed unduly.

Some remarks on the binding force of judicial decisions in Malta would not be out of place. It has always been well settled that our Courts of Justice cannot, without grave reasons to the contrary, discharged decisions given in previous cases, especially if a given principle has behind it the weight of align series of decisions. With regard to an Inferior court vis-à-vis a Superior land vs. Hunter, 15th December, 1939,that it is the practice in the Maltese legal system, even though there is no precise obligation, for an Inferior Court to follow the principles laid down in recent judgments of a Superior court on points of law even though the Inferior Court may not share that opinion.

This rapid survey of the functions of case law tends to stress the absolute necessity of an early resumption of the publication of our Law Reports. It is necessary that law students and practitioners should be in a position to keep themselves au courant with the most important decision given by our courts. It is perhaps interesting to note that in England, in 1936, the proprietors of the Law Journal felt that there march of legal events justified the publication of anew series of High court Reports, and in that year they started the weekly issue, as a supplement to the Law Journal, of an new series of reports "The All England law Reports— Annotated". In presenting these reports to the public the proprietors of the Law Journal, who have the experience of a hundred years behind them, stressed the demand for *full* reports of *recent* decisions *at the earliest possible opportunity*. It is, therefore, highly desirable that, consistently with the circumstances of the emergency; steps be taken to resume without delay the publication of the local Law Reports in order to help legal practitioners to unravel the problems which beset them and keep abreast of legal progress. *Hoc est in votis*.