

4 — Judicial Decisions.

When a judge decides a case he issues an order giving effect to his decision which is entered on the record of the court. This is a judicial decision or judgment in the strict sense, and is binding only on the parties to the case (*res judicata*). But the judgment will have been based on some legal principle. Is it, therefore, to be expected that the legal principle is to be applicable to all cases of a similar kind? Is it inevitable that judges should to a greater or less degree follow the former decisions of themselves and their colleagues and predecessors? An affirmative answer to these two questions makes judicial decisions a legal source of law, and, so, the doctrine of the 'binding force of judicial precedents' will have to occupy a prominent place in the judicial system. This is the case in England, and, generally, all Anglo-Saxon legal systems. On the other hand, a negative answer to the two questions formulated above renders judicial decisions to be of a mere interpretative interest. Judicial law becomes a supplementary source of law. This is the approach of Continental legal systems, from which we shall choose the French for consideration. A reference to the English approach will be made first.

English Practice. The English doctrine of binding precedent in its developed form is comparatively modern. It grew up in common law courts and was extended by analogy to courts administering equity and admiralty law. The English theory is stated briefly as follows:-

A judge, when called upon to decide a case, is obliged to follow the previous decisions which bear upon the matter in issue. He must seek to extract from the previous decisions by which he is bound the rule upon which the decisions proceeded and he must apply that rule to the case before him. But he is not bound by all the statements laid down in the course of previous judgments except so far as they were really necessary for the decisions. Thus, statements of legal principles which were not necessary to the decision in a particular case that was tried, such as things said by way of explanation or illustration or analogy (known as *obiter dicta*) are not binding. It is only the rule upon which the decisions actually depend (known as the *ratio decidendi*) by which the judge is bound. It is possible that he may find in the facts of the case before him facts which serve to distinguish it from previous similar cases and his opinion take the case before him out of the operation of the rules involved in the former decisions. He must weigh all the facts which seem to have some bearing upon the case before him and the rule which he eventually applies will thenceforth have the authority attaching to his decisions, so far as it is in fact required for the decision of the case. Of course, while appearing to follow the rules involved in previous decisions he is frequently in fact building up new law. Little by little the results of old rules are worked out, and their operation is extended or restricted as cases arise which call for their application. So an English judge makes law by applying it, whence his work has obtained the name of 'Judicial Legislation'.