

Stare Decisis in Commonwealth Appellate Courts, J. David Murphy and Robert Rueter, Toronto: Butterworths, 1981. Pp. xv, 117, \$40.00 (cloth).

This little book of 112 pages provides a veritable feast of information for *stare decisis* junkies. Its dishes are, however, presented in a fashion unequal to their intrinsic appeal, and initially high expectations are not fulfilled. The reader will leave this book better informed than before but, ultimately, unsatisfied.

As the title suggests, the authors have set themselves a rather more limited task than a full discussion of the *stare decisis* doctrine. They have examined only "the extent to which appellate courts regard themselves bound by their own previous decisions"¹ thus declining the opportunity of discussing fully fascinating issues such as the degree to which *obiter dicta* of superior courts is binding upon lower tribunals,² the problem of split courts,³ and so on. While a number of such issues are briefly touched upon in Chapter 5 (entitled "Stare Decisis: Collateral Issues") the treatment is too attenuated to be satisfactory. The effect, like that of the book as a whole, is to tantalize without satisfying.

If the subject itself and the research that went into this work is Olympian (some 400 plus cases are referred to in its 112 pages) its organization is pedestrian at best. The authors lack either a thesis or a clear conceptual framework and consequently have fallen back on jurisdictional and chronological groupings of cases. There is thus a chapter on England, one on Canada and one treating Australia and New Zealand together. The Canadian Chapter is in turn divided into eleven sections, one for each province and one for the Supreme Court of Canada. The Federal Court of Appeal and the Appellate Courts of the Yukon and Northwest Territories are undiscussed.

The presentation within each chapter and each section is largely chronological. This is not the same as saying the work is historical. In the section on New Brunswick for example, we are told that during the nineteenth century there were at least two occasions when "the New Brunswick Supreme Court, exercising an appellate jurisdiction, displayed a flexible approach to the doctrine of precedent, by overruling its previous decisions".⁴

¹J. David Murphy and Robert Rueter, *Stare Decisis in Commonwealth Appellate Courts*.

²This issue was raised in the Supreme Court of Canada in *Sellars v. The Queen*, [1980] 1 S.C.R. 527; (1980), 52 C.C.C. (2d) 345 over a year before publication of *Stare Decisis in Commonwealth Appellate Courts* and yet is unmentioned. See note by Geoffrey Gilbert 60 *Can. Bar. Rev.* 373.

³This problem can be of crucial importance even where odd-numbered panels are the rule if judges forming a majority decide on differing grounds. *Calder v. Attorney General of British Columbia* (1973), 34 D.L.R. (3d) 145 (S.C.C.) and *Hyam v. D.P.R.*, [1974] 2 All E.R. 41 are both crucially important cases in which this problem arose. Neither is discussed by Murphy and Rueter.

⁴*Supra*, footnote 1 at 52.

This is contrasted with the "more conservative attitude"⁵ exhibited in recent times. Such change of judicial attitude is in itself noteworthy but the authors regrettably ignore the more interesting historical question of *why* the attitude changed. This is a particularly unhappy omission in light of the starkly contrasting tendency towards more flexible approaches to *stare decisis* in England, the Supreme Court of Canada, and elsewhere. The section on Ontario is the least ahistorical and the most analytical part of the Canadian Chapter. Consequently it is the most interesting. Even here however the organizing framework is chronological rather than conceptual or causal.

Chapters six ("The Rationale of *Stare Decisis*") and seven ("Conclusion") are by far the most interesting portions of the book for it is here that the authors begin to develop a thesis, and an interesting one at that. The mechanical reporting style of previous chapters is here abandoned in favour of groupings of conceptual arguments for and against *stare decisis* in intermediate Appellate Courts and it is here that the readers initial high hopes are again revived. Unfortunately, this stimulating and thought provoking section is less than twenty pages long. Enough, perhaps, to whet the reader's revived appetite: far too little to satisfy.

Overall, this book is a valuable bringing together of a wealth of material dealing with the *stare decisis* doctrine. In addition to the numerous case authorities cited the authors make reference to a number of relevant articles in legal periodicals. The index is surprisingly thorough for a book of this size and the volume is both well produced and handsomely bound. *Stare Decisis in Commonwealth Appellate Courts* is a useful reference book albeit a disappointing text.

Although the authors have failed to make the most of a good topic their book does provide a valuable basis of research on which it is to be hoped others will build.

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⁵*Ibid.*, at 52.

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