Julius Stone, PRECEDENT AND LAW: THE DYNAMICS OF COMMON LAW GROWTH, Sydney: Butterworths, 1985, pp. xx+289.

In *The Province and Function of Law* (1946) the late Julius Stone made an important contribution to the development of 20th century legal theory [1] Probably he most noted section of that book was Chapter VII, 'Fallacies of the logical form in legal reasoning' There Stone analysed critically various arguments which common law courts were wont to advance as logically conclusive grounds for their decisions when hey "followed precedent" (pp 171 89) The analysis consisted of detailed demonstrations of how particular judgments had revealed a number of categories of logical fallacies

Stone's arguments developed certain perceptions of the American realists They had contended that judicial decision making consisted of, at the least, rather less of the logically necessary reasoning than judicial presentation and orthodox jurisprudence often implied They had asserted emphatically that 'general propositions do not decide con crete cases' (Justice Holmes in *Lochner v New York* 198 US 45 (1905)), and that 'rules will not directly decide [most] cases in any given way, nor authoritative y compel the judges to decide those cases in any given way (J K Frank, *Law and the Modern Mind* (1930), p 127) Stone consolidated these assertions by demonstrating incis vely the falsity of judicial claims of logical necessity

In 1964 in *Legal System and Lawyers Reasoning* Chapters VI and VII, he worked through the same categories of fallacies which he had identified in 1946, using much the same material For example, in 1946 he had discussed *Haseldine v Daw* ([1941] 2 K B 343), an English case concerning the liability of the lessor of a block of offices to a visitor injured using the common lift which the lessor had reserved He had identified the issue as being whether the lift controlling lessor's duty of care was to be measured by the standard of a common carrier to a passenger or that of an owner of realty to a licensee His discussions of this case and of *inter alia* the New York *Springboard Case (Hynes v NYCRR* (1922) N Y 229) and the English *Fibrosa Case* ([1943] A C 32) were designed to reveal what he called the fallacy of 'legal categories of compe ing reference' By this he meant that each case could have been placed into either of two categories, with different results, and that logic provided no grounds for choosing one rather than the other (p 177) The 1964 book contained similar discussions of the same cases (pp 56 58, 248-52) The later volume merely refined and elaborated the arguments, a was explained in effect (p 1) to be its intention

The volume now under review does the same again It acknowledges its antecedents in the author's earlier books, but claims to be 'the first systematic and integrated account of the sources from which [the] illusory elements in precedent law spring, of the refinements and elaborations of their operations, and of the social and political problems which their operations create' (p v) The claim is apparently that this analysis is fuller and that the book discusses some further issues as to its implications In some respects it is fuller The discussions at various places of the case law on negligence, for example, are lengthy and take account of relatively recent cases such as the English case *McLoughlin v O'Brian* ([1981] A C 410) These are superior to the discussions in the Torts textbooks, and will be useful reading for both those following their first courses in Torts,

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1 Its publication has recently been called an honourable exception to Australian law publishers general refusal at that time to accept academic, non professional books M Chesterman and D Weisbrot, 'Legal Scholarship in Australia (1987) 50 *MLR* 709, 714

and more advanced students. Moreover, a few new issues are discussed. There is, for example, a lengthy survey of the prospective overruling debate (pp.186-94), and a useful commentary on Atiyah's discussion of "principles" and "pragmatism" (pp.237-71, *passim*).[2] However, one also finds that "the categories of competing reference" are explained yet again, and that yet again they are illustrated by *Haseldine v. Daw,* and *Springboard Case,* and the *Fibrosa Case,* and on this occasion by no other decisions (p.63).

Furthermore, at the third time of reading these arguments, one experiences some doubts about their strength. For example, one wonders whether *Haseldine v. Daw* was in truth a case of 'categories of competing reference'. The basis of Stone's argument in each discussion is that there were two rules applicable to the facts of that case: that a landowner was not liable in the circumstances for injury caused by defectively maintained machinery on the premises; and that a carrier was liable for a defectively maintained carriage. But it is doubtful whether the first rule existed. While there was indeed a rule that a landowner was *liable* in certain, narrowly defined circumstances (which were not present in *Haseldine v. Daw),* there was no rule that he was *not liable* in the *absence* of such circumstances. The judgment of the trial court ([1941] 1 All E.R. 525), which was tacitly accepted as correct in this respect by the Court of Appeal, demonstrated this. It first held that the plaintiff was a licensee, not an invitee, and therefore that his claim *under this head* failed. It then proceeded to consider his claim against the defendant as a carrier, which it regarded as *an alternative head,* and held that this claim succeeded. Thus the defendant was *both* a landowner and a carrier. These were not "competing categories".

A careful and critical reading reveals many such instances in the book. They lead one to wonder whether Stone, like his predecessors the realists, may have been affected by over-enthusiasm in his desire to demonstrate the existence of leeways in the judicial function and the absurdity of the reasons advanced by orthodox jurisprudence for judicial decisions. Moreover, when he does make additions to his earlier discussions the arguments seem to become still more questionable. He avers, for example, that 'it is open to the court to choose, as the premise from which to draw its legal conclusion, a proposition which is often not a pre-existing legal proposition at all', but a proposition about 'social, economic, psychological, ethical or physical facts' (p.28). While no doubt such facts (and also ethical propositions: the notion of "ethical facts" is puzzling) are often among those which a court needs to consider, it is questionable whether they should be regarded as major premises, rather than as portions of minor premises. Stone's prime example here is the dissenting speech of Lord Radcliffe in *Lister v. Romford Ice & Cold Storage Co.* ([1957] A.C.555), arguing that the insurer's right to be subrogated to the insured for a claim against a negligent causer of loss 'would [as Stone summarises it] be grossly dysfunctional if it extended to areas of vicarious liability between masters and workers' (p.26). But in this speech (which, it must be recalled, was in any case wrong law in the view of the majority) Lord Radcliffe was not arguing from a factual major premise. His argument at this point was that the established rule was merely a manifestation of a general principle that insurers had such rights as were commercially and socially functional. Then, with this principle as a major premise, and taking the facts of common contracts of labour as a minor premise, he concluded that the rule, correctly stated, was subject to an exception. That conclusion, as a reformulated legal rule, in turn

2. P.S. Atiya, *From Principles to Pragmatism: Changes in the Function of the Judicial Process* (1978). See now his *Pragmatism and Theory in English Law* (1987) (published after Stone's book). Most of Stone's comments had been previously published in 'From Principles to Principles' (1981) 97 *L.Q.R.* 224.

provided a major premise for the next stage of his argument, which led to his own preferred decision in the case. It is suggested that every example which Stone gives here is susceptible of and requires revision in such a manner.

A wider question about this work is, what assessment are we to make of its contribution to Jurisprudence, in so far as it does elaborate and illustrate a new Stone's earlier arguments? In making this assessment it needs to be noted that, since his major contribution of 1946, there has been great activity in this field. The problem of judicial leeway has been confronted by many writers. (Admittedly it continues to be ignored by most writers of textbooks on substantive law areas, but it is a long time since they advanced theory.) Llewellyn sought to mitigate the effects of rule-scepticism by further investigation of "steadying factors" in "period styles" of judging (K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960)). Hart and others have responded by acknowledging an area of judicial discretion, inevitable but relatively limited they say, in which policy, or some sort of "principled" considerations, are applied (H.L.A. Hart, *The Concept of Law* (1961), Chap.VII; N. MacCormick, *Legal Reasoning and Legal Theory* (1978), Chap.V). Dworkin has developed a theory which denies that judges do have leeway, or "strong discretion" as he calls it, on the ground that they can always find conclusive guidance in legal "principles" when the rules do not suffice.[3] And most recently and stridently of all, the Critical Legal Studies movement has sought both to assert the indeterminancy of law and to explore its implications for the researcher, teacher and practitioner.[4]

Stone notes some of these writings, especially in the first pages of the volume (pp.1-2), in a brief discussion of Llewellyn's *The Common Law Tradition* (pp.88-89), and in the final Chapter 15, entitled 'Tradition and Challenge in the 1980's'. He suggests that most of them neglect his own object of study. Perhaps the truth is rather that they agree with Stone's contentions, but, regarding them as sufficiently established, have proceeded to seek further discoveries. Accepting that logical argument from precedent or rule does not determine the outcome of all (or perhaps any) cases, they have sought other bases for consistency in judicial decision-making. Stone seems rarely to move beyond his earliest perceptions. When he does, he omits, despite that last chapter, to use some of the work which could have assisted him. For example, he compares the distinction between judicial "self-restraint" and "activism" with that between "conservative" and "liberal" judicial polices, arguing that there is no necessary connection between self-restraint and conservatism or between activism and liberalism (pp.6-13). He does not refer to recent work on these questions in the US, especially that of Kennedy (e.g. D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harv. L.R.* 1685).

This book, by adhering for its greater part to the now largely redundant task of showing that syllogistic logic does not produce decisions out of precedent, misses an opportunity. Today's discussion of the judicial function in hard cases, although voluminous, is scarcely progressing. There is little effective challenge to the extreme assertion that the law expressed in the courts judgments has no bearing whatever on their decisions. Some of us have views as to where we might go next. I would tentatively suggest that there

3. R. Dworkin, *Taking Rights Seriously* (1977); 'No right Answer?' in P.M.S. hacker and J. Raz (eds.), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (1977), pp.58-84; *Law's Empire* (1986). A great deal of discussion has resulted. See e.g. the papers in 1977 11 *Ga L. Rev.*

4. The literature is vast, and expanding exponentially. In the present context only that available when Stone completed his book is relevant. For this, see A. Hunt, 'Critical Legal Studies: A Bibliography' (1984) 47 *M.L.R.* 369.

may be a possibility of developing Dworkin's right answer thesis, by interpreting his account of legal principles as a recognition of a form of customary law, existing partly in the social field of the legal profession and partly in a wider social field, standing behind and supplementing the rules of law.[5] This development can perhaps be best undertaken by scholars familiar with legal systems which expressly apply customary law. If successful, it could free us finally from excessive concern with the logical element in judicial reasoning: an element which Stone thrice proved to be less decisive than had once been thought, but our obsession with which he did not finally exercise because he did not provide a satisfactory alternative account of the process.

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5. There is a valuable development of the idea in A.W.B. Simpson, 'The Common Law and Legal Theory', in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence* (2nd series, 1973), 77-99; republished revised in W. Twining (ed.), *Legal Theory and Common Law* (9186), 8-25.