FORMS OF PRACTICE, OR, AMERICAN PRECEDENTS IN PERSONAL AND REAL ACTIONS pdf

1: CLEBC - Precedent Collection

Forms of practice; or, American precedents, in personal and real actions, interspersed with annotations.

Binding precedent[change change source] Precedent that must be applied or followed is known as binding precedent alternately mandatory precedent, mandatory or binding authority, etc. Under the doctrine of stare decisis , a lower court must honor findings of law made by a higher court that is within the appeals path of cases the court hears. In the United States state and federal courts, jurisdiction is often divided geographically among local trial courts, several of which fall under the territory of a regional appeals court, and all regional courts fall under a supreme court. By definition decisions of lower courts are not binding on each other or any courts higher in the system, nor are appeals court decisions binding on each other or on local courts that fall under a different appeals court. Further, courts must follow their own proclamations of law made earlier on other cases, and honor rulings made by other courts in disputes among the parties before them pertaining to the same pattern of facts or events, unless they have a strong reason to change these rulings. One law professor has described mandatory precedent as follows: Given a determination as to the governing jurisdiction, a court is "bound" to follow a precedent of that jurisdiction only if it is directly in point. In the strongest sense, "directly in point" means that: His oath is not to precedent, but at least for federal judges, is to "the constitution and the laws of the United States". The Canons of Judicial Ethics do not mention obedience to precedent, but to "the federal Constitution and that of the state whose laws they administer. In most cases, precedent is the most reasonable interpretation of the Constitution and our laws, in which cases the oath to the constitution is most faithfully observed by following precedent. In a ruling where Judge Roy Moore saw such a distinction, he acknowledged its authority as precedent, but said "[The] interpretation of the Constitution [by the Supreme Court majority] is their interpretation. Citizens trying to obey the law need a sense of what the law is. Persuasive precedent[change change source] Precedent that is not mandatory but which is useful or relevant is known as persuasive precedent or persuasive authority or advisory precedent. In a case of first impression , courts often rely on persuasive precedent from courts in other jurisdictions that have previously dealt with similar issues. Persuasive precedent may become binding through the adoption of the persuasive precedent by a higher court. Custom[change change source] Long-held custom , which has traditionally been recognized by courts and judges, is the first kind of precedent. Custom can be so deeply entrenched in the society at large that it gains the force of law. There need never have been a specific case decided on the same or similar issues in order for a court to take notice of customary or traditional precedent in its deliberations. Case law[change change source] The other type of precedent is case law. In common law systems this type of precedent is granted more or less weight in the deliberations of a court according to a number of factors. Most important is whether the precedent is "on point," that is, does it deal with a circumstance identical or very similar to the circumstance in the instant case? Second, when and where was the precedent decided? A recent decision in the same jurisdiction as the instant case will be given great weight. Next in descending order would be recent precedent in jurisdictions whose law is the same as local law. Least weight would be given to precedent that stems from dissimilar circumstances, older cases that have since been contradicted, or cases in jurisdictions that have dissimilar law.

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2: Precedent and Analogy in Legal Reasoning (Stanford Encyclopedia of Philosophy)

*Forms of Practice, Or, American Precedents in Personal and Real Actions: Interspersed with Annotations [Benjamin Lynde Oliver] on www.enganchecubano.com *FREE* shipping on qualifying offers. This is an EXACT reproduction of a book published before*

She also has experience in matters involving administrative law issues and defence of class actions, and she works closely with a group of senior counsel at the firm. Anastasija enjoys working with a variety of clients, ranging from large corporations and public organizations to individuals. Stephanie De Caria, Miller Thomson LLP Stephanie has an active practice in insolvency and restructuring, insolvency litigation and commercial litigation. She has acted as counsel to creditors, debtors and court-appointed receivers in various insolvency and commercial proceedings before the Court. She has experience working with clients in a variety of industries, including securities, mining, manufacturing, retail and technology. Stephanie is a member of various professional associations, and currently sits on the Membership Committee of the Legal Marketing Association, Eastern Canada Region. Prior to joining LexisNexis, Hariklia was an associate at a boutique litigation firm in Toronto. He has a broad-based practice focused principally in the areas of construction litigation, domestic arbitrations and commercial litigation. His practice also involves a broad range of commercial litigation matters including contract disputes and real estate arbitrations. Kayla has a practice that includes a diverse range of civil, commercial and competition law matters. He specializes in municipal and public entity law. He is preferred counsel of the Province of Ontario, upper and lower tier municipalities across the province, police boards, school boards and various other public entities. He specializes in the areas of construction law and commercial litigation. Howard is retained as counsel by owners, general contractors, subcontractors, material suppliers and lenders in large construction disputes, including construction liens, contract claims and negligence claims. He has also acted for owners and contractors in negotiating complex construction contracts including design build agreements and EPC contracts. He is regularly retained to act in large multi-partied disputes, including acting for owners, general contractors, subcontractors, financiers and design professionals. From a general corporate and commercial standpoint, John has negotiated and closed many transactions involving, among other things, the sale, purchase and leasing of assets, shares and real estate. In terms of his litigation practice, John has appeared as counsel in all levels of Court in Ontario on numerous occasions, acting on behalf of municipalities, individuals and corporations in pursuit and defence of claims. As well, John has appeared before Committees of Council and Councils of various municipalities to provide both general and file specific advice. Deirdre has a dynamic and broad legal background, which includes corporate-commercial litigation, research and writing for both the private and public sector. She went on to work on two public inquires and for a boutique litigation firm, Investigation Counsel P. He focuses on complex commercial litigation; commercial fraud; anti-piracy, anti-counterfeiting and technology litigation; injunctions and extraordinary preliminary, provisional and interlocutory remedies including Anton Piller civil search , Mareva asset freezing and Norwich Pharmacal equitable discovery orders ; and international and multi-jurisdictional dispute resolution. Every company has directors and officers, contracts and financial obligations, opportunities and challenges. Having guided numerous clients to a successful resolution of their business disputes, Anna takes a big-picture approach in creating and implementing solutions that allow our clients to achieve practical outcomes. As a passionate litigator, Karen has extensive experience representing clients at contested motions and trials. Karen provides her clients with timely, cost-effective legal solutions that make the litigation process easy to understand. During law school, Megan was an active participant in various student-run legal clinics. Megan also participated in the Philip C. Jeffrey Feiner, Corman Feiner LLP Jeff has a broad range of experience in commercial litigation, health law, and professional liability and regulatory disputes. He has conducted trials, arbitrations, and hearings for institutions, large and small corporate clients and individuals. Jamie Dunbar, Global Resolutions Inc. Andrew uses the skills he developed

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3: Legal Glossary | Learn | Unified Judicial System of Pennsylvania

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First page of the edition of the Napoleonic Code. Civil law is the legal system used in most countries around the world today. In civil law the sources recognised as authoritative are, primarily, legislationâ€”especially codifications in constitutions or statutes passed by governmentâ€”and custom. Modern civil law systems essentially derive from the legal practice of the 6th-century Eastern Roman Empire whose texts were rediscovered by late medieval Western Europe. Roman law in the days of the Roman Republic and Empire was heavily procedural, and lacked a professional legal class. Decisions were not published in any systematic way, so any case law that developed was disguised and almost unrecognised. From â€” AD the Byzantine Emperor Justinian I codified and consolidated Roman law up until that point, so that what remained was one-twentieth of the mass of legal texts from before. As one legal historian wrote, "Justinian consciously looked back to the golden age of Roman law and aimed to restore it to the peak it had reached three centuries before. Western Europe, meanwhile, relied on a mix of the Theodosian Code and Germanic customary law until the Justinian Code was rediscovered in the 11th century, and scholars at the University of Bologna used it to interpret their own laws. Both these codes influenced heavily not only the law systems of the countries in continental Europe e. Greece , but also the Japanese and Korean legal traditions. Common law and equity[edit] Main article: Common law King John of England signs Magna Carta In common law legal systems , decisions by courts are explicitly acknowledged as "law" on equal footing with statutes adopted through the legislative process and with regulations issued by the executive branch. The "doctrine of precedent", or stare decisis Latin for "to stand by decisions" means that decisions by higher courts bind lower courts, and future decisions of the same court, to assure that similar cases reach similar results. In contrast , in " civil law " systems, legislative statutes are typically more detailed, and judicial decisions are shorter and less detailed, because the judge or barrister is only writing to decide the single case, rather than to set out reasoning that will guide future courts. Common law originated from England and has been inherited by almost every country once tied to the British Empire except Malta, Scotland , the U. In medieval England, the Norman conquest the law varied-shire-to-shire, based on disparate tribal customs. The concept of a "common law" developed during the reign of Henry II during the late 12th century, when Henry appointed judges that had authority to create an institutionalized and unified system of law "common" to the country. The next major step in the evolution of the common law came when King John was forced by his barons to sign a document limiting his authority to pass laws. In , for instance, while the highest court in France had fifty-one judges, the English Court of Common Pleas had five. From the time of Sir Thomas More , the first lawyer to be appointed as Lord Chancellor, a systematic body of equity grew up alongside the rigid common law, and developed its own Court of Chancery. In developing the common law, academic writings have always played an important part, both to collect overarching principles from dispersed case law, and to argue for change. William Blackstone , from around , was the first scholar to collect, describe, and teach the common law. Religious law Religious law is explicitly based on religious precepts. Examples include the Jewish Halakha and Islamic Sharia â€”both of which translate as the "path to follow"â€”while Christian canon law also survives in some church communities. Often the implication of religion for law is unalterability, because the word of God cannot be amended or legislated against by judges or governments. For instance, the Quran has some law, and it acts as a source of further law through interpretation, [88] Qiyas reasoning by analogy , Ijma consensus and precedent. This is mainly contained in a body of law and jurisprudence known as Sharia and Fiqh respectively. This contains the basic code of Jewish law, which some Israeli communities choose to use. Nevertheless, Israeli law allows litigants to use religious laws only if they choose. A trial in the Ottoman Empire, , when religious law applied under the Mecelle Main article: Since the mids, efforts have been made, in country after country,

to bring Sharia law more into line with modern conditions and conceptions. The constitutions of certain Muslim states, such as Egypt and Afghanistan, recognise Islam as the religion of the state, obliging legislature to adhere to Sharia. I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou givest up, thy right to him, and authorise all his actions in like manner. Thomas Hobbes, Leviathan, XVII The main institutions of law in industrialised countries are independent courts , representative parliaments, an accountable executive, the military and police, bureaucratic organisation, the legal profession and civil society itself. John Locke, in his Two Treatises of Government , and Baron de Montesquieu in The Spirit of the Laws , advocated for a separation of powers between the political, legislature and executive bodies. Judiciary A judiciary is a number of judges mediating disputes to determine outcome. Most countries have systems of appeal courts, answering up to a supreme legal authority. The European Court of Human Rights in Strasbourg allows citizens of the Council of Europe member states to bring cases relating to human rights issues before it. For example, in Brown v. Board of Education , the United States Supreme Court nullified many state statutes that had established racially segregated schools, finding such statutes to be incompatible with the Fourteenth Amendment to the United States Constitution. In most countries judges may only interpret the constitution and all other laws. But in common law countries, where matters are not constitutional, the judiciary may also create law under the doctrine of precedent. The UK, Finland and New Zealand assert the ideal of parliamentary sovereignty , whereby the unelected judiciary may not overturn law passed by a democratic legislature. By the principle of representative government people vote for politicians to carry out their wishes. Although countries like Israel, Greece, Sweden and China are unicameral , most countries are bicameral , meaning they have two separately appointed legislative houses. In the UK the upper house is appointed by the government as a house of review. One criticism of bicameral systems with two elected chambers is that the upper and lower houses may simply mirror one another. The traditional justification of bicameralism is that an upper chamber acts as a house of review. This can minimise arbitrariness and injustice in governmental action. Normally there will be several readings and amendments proposed by the different political factions. If a country has an entrenched constitution, a special majority for changes to the constitution may be required, making changes to the law more difficult. A government usually leads the process, which can be formed from Members of Parliament e. However, in a presidential system, the government is usually formed by an executive and his or her appointed cabinet officials e. The executive in a legal system serves as the centre of political authority of the State. In a parliamentary system , as with Britain, Italy, Germany, India, and Japan, the executive is known as the cabinet, and composed of members of the legislature. The executive is led by the head of government , whose office holds power under the confidence of the legislature. Because popular elections appoint political parties to govern, the leader of a party can change in between elections. Examples include the President of Germany appointed by members of federal and state legislatures , the Queen of the United Kingdom an hereditary office , and the President of Austria elected by popular vote. The other important model is the presidential system , found in the United States and in Brazil. In presidential systems, the executive acts as both head of state and head of government, and has power to appoint an unelected cabinet. Under a presidential system, the executive branch is separate from the legislature to which it is not accountable. In presidential systems, the executive often has the power to veto legislation. Most executives in both systems are responsible for foreign relations , the military and police, and the bureaucracy. Military and police[edit] U. Customs and Border Protection officers While military organisations have existed as long as government itself, the idea of a standing police force is a relatively modern concept.

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4: Law - Wikipedia

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Precedent and analogy in legal reasoning Arguments from precedent and analogy are characteristic of legal reasoning. Legal reasoning differs in a number of ways from the sort of reasoning employed by individuals in their everyday lives. It frequently uses arguments that individuals do not employ, or that individuals employ in different ways. Precedent is a good example of this. In individual reasoning we do not normally regard the fact that we decided one way in the past as raising some presumption that we should decide the same way in the future. Of course there can be special circumstances that have this effectâ€"someone may have relied on what we did before, or may have had their expectations raised that we would do so againâ€"but absent these special considerations we do not regard ourselves as being committed in the future to make the same decision. It is always open to us to reconsider a decision and change our minds if we no longer think our original judgement was correct. Law of course is not alone in attributing a special significance to precedent. Many institutional and quasi-institutional practices place weight on what they have done previously in determining what they should do now. Individuals, by contrast, will often disregard what they did on an earlier occasion. If they do make reference to the past, this will normally be due to their belief that what they did in the past was the right thing to do, or at least is a good guide to what is the right thing to do now. Normally, then, individuals will merely be using their past decisions in the belief that they are a reliable short-cut to working out what is the right thing to do. If they harbour doubts as to the correctness of the earlier decision then they will reopen the matter and consider it afresh on the merits. In institutional settings, on the other hand, decision-makers will often refer to what has been decided in the past as constraining what should be done now, regardless of whether they think the original decision was correct. Equally, institutional decision-makers often regard earlier decisions as being relevant even when the decision at hand is different from the original ones, by citing them as analogies. They will argue that since an earlier decision was made on some matter, it would be inconsistent now to decide the present case differently. Individuals, by contrast, will often simply attend to the merits of the particular question before them and try to get the decision right. If it is pointed out that their current decision seems to be inconsistent with how they treated an earlier question, this may prompt them to reconsider, but is not in itself a reason to change their decision. At the end of the day they may conclude that their earlier decision was a mistake, or they may even embrace the apparent inconsistency, believing that both the earlier and the later decisions are correct even though they are not sure how they can be reconciled. Legal reasoning, then, gives a weight to what has been decided in the past that is usually absent from personal decision-making. We care about whether we made the right decisions in the past, but we seek to make the right decisions now, unconstrained by our earlier views. Precedent Arguments from precedent are a prominent feature of legal reasoning. A precedent is the decision of a court or other adjudicative body that has a special legal significance. A decision has theoretical authority if the circumstances in which it was made the identity of the decision-makers, those involved in arguing the case, the availability of evidence or time provide good reasons for believing the decision to be correct in law. If there are good reasons to believe that an earlier case was correctly decided, and if the facts in a later case are the same as those in the earlier case, then there are good reasons for believing that the same decision would be correct in the later case. In some legal systems earlier decisions are, officially, treated in just this way: As a consequence the decision in an earlier case is not in itself regarded as a justification for reaching a decision in a later case. Simplifying somewhat, the law is what the court stated it to be because the court stated it to be such. Putting the matter in these terms is over-simplified, however, because a it may be that what the court did, rather than what it said, that alters the law, and b there are normally a number of limitations on the capacity of a decision to constitute the law

depending upon the content of the decision and the status of the body making them. This is commonly known as the doctrine of precedent, or stare decisis i. It should be noted that the modern Common Law endorses a particularly strong version of stare decisis, one that requires later courts to follow earlier decisions even if those cases were wrongly decided according to the pre-existing law. It is often assumed by Common Lawyers that a doctrine of stare decisis necessarily requires that later courts be bound by such erroneous decisions. This follows from the following line of thought. But an earlier correct judgment simply reaches the conclusion that the law already supported when it was delivered. So to direct courts to follow cases that were not erroneous would simply be to direct them to do what they are legally bound to do anyway i. The flaw in this argument lies in the assumption that in every case there must be a single legally correct outcome, with other outcomes being wrong. This overlooks the possibility of cases in which the merits of the dispute are legally indeterminate, so that there is more than one possible outcome that would not be wrong. In cases such as these the decision alters the law without making any error. The Common Law, then, might have limited its doctrine of stare decisis by holding that later courts were not bound by earlier decisions that were wrongly decided. Nonetheless the idea of being bound to follow even erroneous decisions is a common feature of many institutions decision-making, and will be the focus of this entry. The precise operation of stare decisis varies from one legal system to another. It is common for courts lower in a judicial hierarchy to be strictly bound by the decisions of higher courts, so that Federal Court judges in the United States are bound by decisions of the Federal Court of Appeals for their circuit, and the English Court of Appeal is bound by decisions of the House of Lords. Equally, most appeal courts are bound by their own earlier decisions, though they are generally entitled in certain circumstances to overrule those decisions. There is enormous variation in the circumstances that are necessary for a court to overrule one of its own decisions: Finally, courts are generally not bound by the decisions of lower courts: It is agreed on all sides that if two cases are the same then the precedent applies, whereas if they are different it does not. What makes two cases the same, however, is a matter of considerable debate, and goes to the root of the question of the nature of precedent in legal reasoning. In saying that two cases are the same, it cannot be that they are identical. It is obvious that no two situations are identical in every respect: In practice the differences between any two cases will be much more significant than this, and yet they mayâ€”legally speakingâ€”still be the same. This problem is easier to understand if a number of distinct aspects of legal cases are taken into account. Most cases do not create precedents: In these cases the job of the court is to decide on the evidence before it whose version of the facts to endorse. The parties in such cases agree about the law that applies to their dispute, they simply disagree about what actually happened. In other cases there can be a dispute over the applicable lawâ€”one side claiming that on the facts the appropriate law supports a decision in their favour and the other side disputing this account of the law and arguing that on those facts the law supports a decision in favour of them. It goes without saying that there are also cases with disputes over both the facts and the law. Precedents are those cases which require the courts to resolve a dispute over the law. A precedent is the decision on the law in a case before a court or some similar legal decision-maker such as a tribunal. Paradigmatically in Common Law legal systems a judicial decision is given in a judgment which has five aspects to it: For a more detailed discussion, see MacCormick , ff. To take an example, the court may be faced with a case in which the trustee of property held on behalf of the plaintiff has wrongfully transferred that property to the defendant. The plaintiff sues the defendant to recover the property which was transferred in breach of trust. The plaintiff argues that since i the defendant has received trust property ii in breach of trust and iii has not paid for the property, she should restore the property to the trust. The defendant argues, on the other hand, that since iv the trustee had a good title to the property, v the power to transfer it and vi the defendant acted in good faith, unaware of the breach of trust, she is entitled to retain it. The court will assess the situation and may rule that factors i â€” iii do give the plaintiff a good action, i. In its reasoning the court will explain why the fact that the defendant received the property as a gift means that it should be restored to the trust, despite the trustee having the legal power to transfer the title. The identification of the subset of factors i â€” iii that constitute the ruling is not always a straightforward task: In particular it

can be difficult to ascertain the appropriate level of abstraction of the descriptions of factors i â€" iii. A person is made ill by drinking an opaque bottle of ginger beer containing a decomposing snail. What is the key characterisation of the vehicle of harm on these facts? The bottle of ginger beer is a beverage, but it is also a consumable, an article for human use and something capable of causing injury if negligently produced. See further Stone , Generally the judgment needs to be read as a whole to determine the appropriate level: In some cases, however, the level of generality will not be clear and it will not be possible to give a very precise account of the ruling. In other cases the category may be incompletely characterised: This point brings out an important aspect of the study of precedent. Lawyers are mostly preoccupied with two issues: The most interesting philosophical questions, however, concern how precedents operate when, as is often the case, there is no doubt about what the precedent is authority for, and the later court is not free or is unwilling to overrule the earlier decision. There are three ways in which it has been argued that precedents should be understood: For versions of this view, see Raz ; MacCormick especially 82â€"6, â€"28 and ; Alexander ; and Schauer , â€"71 and , â€" The case decides a particular dispute, but the court creates a rule to deal with that type of dispute and applies it to the case at hand. On this view, then, precedents are akin to statutes in that they lay down rules which apply to later cases whose facts satisfy the conditions for application. Obiter dicta, by contrast, represent other statements and views expressed in the judgment which are not binding on later courts. On this view of precedent, the rule laid down in the earlier case is represented by the ratio. There are a range of criticisms of the rule-making account of precedent which argue that it does not fit legal practice very well see e. Two issues stand out: Judgments are highly discursive texts and very rarely identify their own rationes. What is more, even if a court chooses to explicitly formulate the ratio of its decision, this precise formulation is not itself regarded as binding on later courts. It is often said that this creates a marked contrast with statutes, where a canonical formulation of the legal rule being laid down is provided. Given the flexibility open to later courts to determine the ratio of the earlier decision, it is misleading to think that decisions lay down binding rules for later courts. However, although there is a contrast with legislation here, it can be exaggerated. In both situations the propositions of law for which a case or statutory provision is authority must be derived from the case or statute and is not identical with the text of either. The real difference between precedent and statute lies in the fact that in the case of statutes legal systems have elaborate conventions of interpretation to assist in the process of deriving the law from a legislative text, whereas in the case of precedents they do not. But this simply shows that the law derived from precedents may be vaguer and more indeterminate than that derived from many statutes; it does not establish that precedents do not create legal rules. Distinguishing involves a precedent not being followed even though the facts of the later case fall within the scope of the ratio of the earlier case. As the later case falls within the scope of the earlier ratio i. In legal reasoning using precedents, however, the later court is free not to follow the earlier case by pointing to some difference in the facts between the two cases, even though those facts do not feature in the ratio of the earlier case. Take the trust example: The later court may hold that the recipient is entitled to retain the property and justify its decision by ruling that where i the defendant has received trust property ii in breach of trust and iii has not paid for the property, but has vii relied upon the receipt to disadvantageously alter her position, then the defendant is entitled to retain the property.

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Forms of practice; or, American precedents in actions, personal and real, interspersed with annotations Item Preview.

The words originate from the phrasing of the principle in the Latin maxim Stare decisis et non quieta movere: Unlike most civil-law systems, common-law systems follow the doctrine of stare decisis, by which most courts are bound by their own previous decisions in similar cases, and all lower courts should make decisions consistent with previous decisions of higher courts. Generally speaking, higher courts do not have direct oversight over day-to-day proceedings in lower courts , in that they cannot reach out on their own initiative sua sponte at any time to reverse or overrule decisions of the lower courts. Normally, the burden rests with litigants to appeal rulings including those in clear violation of established case law to the higher courts. If a judge acts against precedent and the case is not appealed , the decision will stand. A lower court may not rule against a binding precedent, even if the lower court feels that the precedent is unjust; the lower court may only express the hope that a higher court or the legislature will reform the rule in question. If the court believes that developments or trends in legal reasoning render the precedent unhelpful, and wishes to evade it and help the law evolve, the court may either hold that the precedent is inconsistent with subsequent authority, or that the precedent should be "distinguished: If that decision goes to appeal, the appellate court will have the opportunity to review both the precedent and the case under appeal, perhaps overruling the previous case law by setting a new precedent of higher authority. This may happen several times as the case works its way through successive appeals. Lord Denning , first of the High Court of Justice , later of the Court of Appeal , provided a famous example of this evolutionary process in his development of the concept of estoppel starting in the High Trees case: Central London Property Trust Ltd v. High Trees House Ltd [] K. Judges may refer to various types of persuasive authority to reach a decision in a case. Some bodies are given statutory powers to issue guidance with persuasive authority or similar statutory effect, such as the Highway Code. In federal or multijurisdictional law systems, conflicts may exist between the various lower appellate courts. Sometimes these differences may not be resolved and distinguishing how the law is applied in one district , province, division or appellate department may be necessary. Usually, only an appeal accepted by the court of last resort will resolve such differences, and for many reasons, such appeals are often not granted. Any court may seek to distinguish its present case from that of a binding precedent, to reach a different conclusion. The validity of such a distinction may or may not be accepted on appeal. An appellate court may also propound an entirely new and different analysis from that of junior courts, and may or may not be bound by its own previous decisions, or in any case may distinguish the decisions based on significant differences in the facts applicable to each case. Or, a court may view the matter before it as one of " first impression ", not governed by any controlling precedent. For example, if a member court splits in four different opinions on several different issues, whatever reasoning commands seven votes on each specific issue, and the seven-judge majorities may differ issue-to-issue. All may be cited as persuasive though of course opinions that concur in the majority result are more persuasive than dissents. Quite apart from the rules of precedent, the weight actually given to any reported opinion may depend on the reputation of both the court and the judges with respect to the specific issue. For example, in the United States, the Second Circuit New York and surrounding states is especially respected in commercial and securities law, the Seventh Circuit in Chicago , especially Judge Posner, is highly regarded on antitrust, and the District of Columbia Circuit is highly regarded on administrative law, Categories and classifications of precedent, and effect of classification[edit] Verticality[edit] Generally, a common law court system has trial courts , intermediate appellate courts and a supreme court. The inferior courts conduct almost all trial proceedings. The inferior courts are bound to obey precedent established by the appellate court for their jurisdiction, and all supreme court precedent. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and

municipal courts and upon all the superior courts of this state , and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court. The application of the doctrine of stare decisis from a superior court to an inferior court is sometimes called vertical stare decisis. Horizontality[edit] The idea that a judge is bound by or at least should respect decisions of earlier judges of similar or coordinate level is called horizontal stare decisis. In the United States federal court system , the intermediate appellate courts are divided into thirteen "circuits," each covering some range of territory ranging in size from the District of Columbia alone up to seven states. Each panel of judges on the court of appeals for a circuit is bound to obey the prior appellate decisions of the same circuit. When a court binds itself, this application of the doctrine of precedent is sometimes called horizontal stare decisis. The state of New York has a similar appellate structure as it is divided into four appellate departments supervised by the final New York Court of Appeals. Decisions of one appellate department are not binding upon another, and in some cases the departments differ considerably on interpretations of law. Federalism and parallel state and federal courts[edit] In federal systems the division between federal and state law may result in complex interactions. In the United States, state courts are not considered inferior to federal courts but rather constitute a parallel court system. When a federal court rules on an issue of state law, the federal court must follow the precedent of the state courts, under the Erie doctrine. Binding precedent[edit] Precedent that must be applied or followed is known as binding precedent alternately metaphorically precedent, mandatory or binding authority, etc. Under the doctrine of stare decisis, a lower court must honor findings of law made by a higher court that is within the appeals path of cases the court hears. In state and federal courts in the United States of America, jurisdiction is often divided geographically among local trial courts, several of which fall under the territory of a regional appeals court. All appellate courts fall under a highest court sometimes but not always called a "supreme court". By definition, decisions of lower courts are not binding on courts higher in the system, nor are appeals court decisions binding on local courts that fall under a different appeals court. Further, courts must follow their own proclamations of law made earlier on other cases, and honor rulings made by other courts in disputes among the parties before them pertaining to the same pattern of facts or events, unless they have a strong reason to change these rulings see Law of the case re: In law , a binding precedent also known as a mandatory precedent or binding authority is a precedent which must be followed by all lower courts under common law legal systems. In English law it is usually created by the decision of a higher court, such as the Supreme Court of the United Kingdom , which took over the judicial functions of the House of Lords in In Civil law and pluralist systems precedent is not binding but case law is taken into account by the courts. Binding precedent relies on the legal principle of stare decisis. Stare decisis means to stand by things decided. It ensures certainty and consistency in the application of law. Existing binding precedent from past cases are applied in principle to new situations by analogy. One law professor has described mandatory precedent as follows: Given a determination as to the governing jurisdiction, a court is "bound" to follow a precedent of that jurisdiction only if it is directly in point. In the strongest sense, "directly in point" means that: At the top of the federal or national system is the Supreme Court, and underneath are lower federal courts. The state court systems have hierarchy structures similar to that of the federal system. Supreme Court has final authority on questions about the meaning of federal law, including the U. For example, when the Supreme Court says that the First Amendment applies in a specific way to suits for slander, then every court is bound by that precedent in its interpretation of the First Amendment as it applies to suits for slander. If a lower court judge disagrees with a higher court precedent on what the First Amendment should mean, the lower court judge must rule according to the binding precedent. Until the higher court changes the ruling or the law itself is changed , the binding precedent is authoritative on the meaning of the law. Lower courts are bound by the precedent set by higher courts within their region. Thus, a federal district court that falls within the geographic boundaries of the Third Circuit Court of Appeals the mid-level appeals court that hears appeals from district court decisions from Delaware, New Jersey, Pennsylvania, and the

Virgin Islands is bound by rulings of the Third Circuit Court, but not by rulings in the Ninth Circuit Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington , since the Circuit Courts of Appeals have jurisdiction defined by geography. The Circuit Courts of Appeals can interpret the law how they want, so long as there is no binding Supreme Court precedent. One of the common reasons the Supreme Court grants certiorari that is, they agree to hear a case is if there is a conflict among the circuit courts as to the meaning of a federal law. There are three elements needed for a precedent to work. Firstly, the hierarchy of the courts needs to be accepted, and an efficient system of law reporting. Binding precedent in English law[edit] Judges are bound by the law of binding precedent in England and Wales and other common law jurisdictions. This is a distinctive feature of the English legal system. In Scotland and many countries throughout the world, particularly in mainland Europe, civil law means that judges take case law into account in a similar way, but are not obliged to do so and are required to consider the precedent in terms of principle. Under the English legal system, judges are not necessarily entitled to make their own decisions about the development or interpretations of the law. They may be bound by a decision reached in a previous case. Two facts are crucial to determining whether a precedent is binding: The position in the court hierarchy of the court which decided the precedent, relative to the position in the court trying the current case. Whether the facts of the current case come within the scope of the principle of law in previous decisions. In a conflict of laws situation, jus cogens erga omnes norms and principles of the common law such as in the Universal Declaration of Human Rights , to a varying degree in different jurisdictions, are deemed overriding which means they are used to "read down" legislation, that is giving them a particular purposive interpretation , for example applying European Court of Human Rights jurisprudence of courts case law. It may be viewed as one extreme in a range of precedential power, [15] or alternatively, to express a belief, or a critique of that belief, that some decisions should not be overturned. In , Richard Posner and William Landes coined the term "super-precedent" in an article they wrote about testing theories of precedent by counting citations. The term "super-precedent" later became associated with different issue: Casey for endorsing the idea that if one side can take control of the Court on an issue of major national importance as in Roe v. Wade , that side can protect its position from being reversed "by a kind of super-stare decisis". The concept of super-stare decisis or "super-precedent" was mentioned during the interrogations of Chief Justice John Roberts and Justice Samuel Alito before the Senate Judiciary Committee. He revisited this concept during the hearings, but neither Roberts nor Alito endorsed the term or the concept. In a " case of first impression ", courts often rely on persuasive precedent from courts in other jurisdictions that have previously dealt with similar issues. Persuasive precedent may become binding through its adoption by a higher court. In civil law and pluralist systems, as under Scots law , precedent is not binding but case law is taken into account by the courts. Higher courts in other circuits[edit] A court may consider the ruling of a higher court that is not binding. Horizontal courts[edit] Courts may consider rulings made in other courts that are of equivalent authority in the legal system. For example, an appellate court for one district could consider a ruling issued by an appeals court in another district. Statements made in obiter dicta[edit] Courts may consider obiter dicta in opinions of higher courts. Dicta of a higher court, though not binding, will often be persuasive to lower courts. The phrase obiter dicta is usually translated as "other things said", but due to the high number of judges and individual concurring opinions, it is often hard to distinguish from the ratio decidendi reason for the decision. For these reasons, the obiter dicta may often be taken into consideration by a court. A litigant may also consider obiter dicta if a court has previously signaled [20] that a particular legal argument is weak and may even warrant sanctions if repeated. Dissenting opinions[edit] A case decided by a multijudge panel could result in a split decision. While only the majority opinion is considered precedential, an outvoted judge can still publish a dissenting opinion.

FORMS OF PRACTICE, OR, AMERICAN PRECEDENTS IN PERSONAL AND REAL ACTIONS pdf

6: Law Practice Management Forms

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Editorial Note Editorial Note In common with most lawyers John Adams maintained a collection of pleading forms to help in future drafting. A number of such forms exist in the Adams Papers as loose sheets among the case notes and other legal materials, but the majority of those which have survived were entered by Adams or one of his clerks in an untitled small quarto volume bound in law calf, which is referred to in the present edition as the Pleadings Book. The rest are the work of his contemporaries at the bar. The forms are printed here as they appear in the manuscript, except that the editors have given each case an identifying roman numeral and have supplied descriptive captions and titles where Adams omitted them. For each case, the facts and disposition, so far as they are known, and a brief summary of any matters of historical or legal significance are given in footnotes. At first glance a collection of pleading forms looks like dull reading. The facts that lie behind the forms are seldom dull, however. For example, many of the cases presented here involve important historical events and personalities. The declarations in Richards v. Doble Form VI and Gailer v. Trevett Form VII , for all their stilted technical phraseology, offer grisly accounts of the Boston mob in action, with particular emphasis on the mechanics of tarring and feathering. These two pleadings, with Palmes v. Greenleaf Form XVI , serve as footnotes to several major Adams cases dealt with elsewhere in these volumes. Braytons, Robinsons, Needhams, Kingsburys, Metcalfs, Halls, Greens, and Lorings were all involved in feuds that found expression in the courts. He is widely and justly known for his defense of the British soldiers after the Boston Massacre Nos. These and other similar matters made up only a small proportion of his cases. Day in and day out during his fifteen active years at the bar, even while occupied with affairs of great public significance, he was constantly concerned with a vast flow of actions on the order of those which make up the Pleadings Book. They ranged from minor loan transactions to the relatively large sums involved in the management of an estate or the winding up of a major business, and they involved all of the activities of colonial life. Here are cases arising from shipping, commerce, agriculture, the use and conveyance of land, the paper and iron industries, retail trade, crafts, death, and taxes. Such matters were the materials from which a lawyer gained his livelihood. Pleading was the heart of the traditional common-law jurisprudence under which Adams practiced. No claim could be redressed unless the facts giving rise to it could be made to fit one of the common law forms of action, the centuries-old classifications in which the substantive law of England had grown up. It was through the pleadings that substantive rights were stated in terms appropriate to one of these forms. Many of the decided cases that make up the common law are determinations of the adequacy of such statements. Further, it was the pleadings which determined the facts which the parties had to establish at the trial. Great numbers of other cases concern the relations between pleadings and facts. The 18th century marked the zenith of the formulary system. There are declarations in most of the usual English actions, including account, special and general assumpsit, several varieties of debt, ejectment, replevin, trespass to person and to lands, trespass on the case for various wrongs, and writs of entry asserting title to lands. The most significant changes were in the last class of actions, where only the rudiments of the ancient and complex English forms were retained in a simplified system that served as the basis of the Massachusetts law of real actions for a century afterward. A study of other Massachusetts cases indicates that this was generally so. The rejoinders and surrejoinders, rebutters and surrebutters that were the glory of the English system were virtually unknown in Massachusetts. Since occasional examples of special pleading are found, 8 it would seem that a taste for simplicity and a desire to get on with the matter, rather than ignorance, account for the Massachusetts practice. In Theophilus Parsons Jr. Only a few of the leading lawyers pretended to be good pleaders; and the inaccuracy or insufficiency of the pleading was one of the causes of the disorder and confusion which prevailed in the courts. Commentators found a few of the old forms confused and oversimplified, 11 and the lack of special pleading was a defect at what even American lawyers of this period

considered the heart of the matter. Even Parsons presumably would have found at least some of the Pleadings Book forms acceptable. When he had students, every one was expected to write out, in a book prepared for that purpose, declarations, pleas, and forms, which my father had prepared or adopted. I have some of these books now; and the volumes of precedents, afterwards published for the use of the profession, by Anthon, Story, Oliver, and others, were compiled in a good degree from these books. The volume contained the declarations in Holden v. Conner Form I , Waldo v. Gridley Form II , Hill v. Whiting Form IV , and Richards v. In the fifth revised edition of Forms of Practice, published in when the old system had all but run its course, those forms still appeared. At the same time the native tradition of simplicity and adaptability derived from the 18th-century forms was preserved in American Precedents and its successors. Native jurists like Stearns and Dane cited the work. In at least one instance, one of the Adams pleadings appearing in it was discussed at some length as a useful and unique Massachusetts practice still followed there. Adams Papers, Microfilms, Reel No. Inside the front cover of the Pleadings Book JA wrote this motto: Pages 2â€”31 of the volume were numbered by JA. The remainder of the volume is largely blank, but toward the middle are some additional pleading forms, which from internal evidence seem to have been copied in after the Revolution. These forms and a few pages of notes on astronomy are all in a later, unidentified hand, possibly in more than one hand. The separate pleadings forms found in the Adams Papers include Roby v. Stone declaration in trespass for mesne profits ; Reading v. Framingham plea to complaint under the poor laws ; Potter v. Burchsted double pleas of justification by leave of court in suit by widow of non compos mentis: Brown declaration in case against deputy sheriff for failure to keep vessel under attachment ; Apthorp v. Stanbridge plea of tender in indebitatus assumpsit ; Capen v. Spear declaration in trespass for cutting trees and plea of justification ; Church v. Bunney form of summons where goods are attached ; Epes v. Flagg Latin form of plea of non cepit, the general issue in replevin. Pleadings from the Adams Papers and the court files are printed as documents in the following cases in the present work: As to the forms of action generally, see Frederic W. Plucknett, Concise History of the Common Law, 5th edn. See, for example, the pleadings in Ware v. See Parsons, Memoir 23â€” See notes 1 , 40 , 77 , below. As to the technical rules in Massachusetts, see No. American Precedents of Declarations N. Perham â€” , Harvard , had assistance from an unnamed young lawyer who was probably Joseph Story.

7: Litigation & Dispute Resolution - Lexis Practice Advisor(Â®) Canada, pr

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8: Precedent - Wikipedia

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9: Legal precedent - Simple English Wikipedia, the free encyclopedia

See Benjamin L. Oliver, Forms of Practice; or, American Precedents, in Actions, Personal and Real vi (Boston,); MH-Ar. Anthon (), Columbia , was a leader of the New York bar who assisted in founding the New York Law Institute in

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