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Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55

Court of Appeal
8 December 1975
Lord Denning M R., Ormrod and Shaw LJJ

Cur. adv. vult.

Dec. 8. The following judgments were delivered. **LORD DENNING MR**

During the last 18 months the judges of the Chancery Division have been making orders of a kind not known before. They have some resemblance to search warrants. Under these orders, the plaintiff and his solicitors are authorised to enter the defendant's premises so as to inspect papers, provided the defendant gives permission.

Now this is the important point: The court orders the defendant to give them permission. The judges have been making these orders on ex parte applications without prior notice to the defendant. None of the cases have been reported except the one before Templeman J. on December 3, 1974, E.M.I. Ltd. v. Pandit [1975] 1 W.L.R. 302 . But in the present case Brightman J. refused to make such an order.

On appeal to us, Mr. Laddie appears for the plaintiffs. He has appeared in most of these cases, and can claim the credit - or the responsibility - for them. He represented to us that in this case it was in the interests of justice that the application should not be made public at the time it was made. So we heard it in camera. It was last Tuesday. After hearing his submissions, we made the order. We now come to give our reasons in public. But at the outset I must state the facts, for it is obvious that such an order can only be justified in the most exceptional circumstances.

Anton Piller KG ("Pillers"), the plaintiffs, are German manufacturers of high repute. They make electric motors and generators. They play an important part in the big new computer industry. They supply equipment for it. They have recently designed a frequency converter specially for supplying the computers of International Business Machines.

Since 1972 Pillers have had, as their agents in the United Kingdom, a company here called Manufacturing Processes Ltd. ("M.P.L."), which is run by Mr. A. H. S. Baker and Mr. B. P. Wallace, their two directors. These agents are dealers who get machines from Pillers in Germany and sell them to customers in England. Pillers supply M.P.L. with much confidential information about the machines, including a manual showing how they work, and drawings which are the subject of copyright.

Very recently Pillers have found out - so they say - that these English agents, M.P.L., have been in secret communication with other German companies called Ferrostaal and Lechmotoren. The object of these communications is that M.P.L. should supply these other German companies with drawings and materials and other confidential information so that they ***59** can manufacture power units like Pillers. Pillers got to know of these communications through two "defectors," if I may call them so. One was the commercial manager of M.P.L., Mr. Brian Firth; the other was the sales manager, Mr. William Raymond Knight. These two were so upset by what was going on in M.P.L. that on their own initiative, without any approach by Pillers whatever, on October 2, 1975, one or both flew to Germany. They told Pillers what they knew about the arrangements with Ferrostaal and Lechmotoren. They disclosed also that M.P.L. was negotiating with Canadian and United States firms. In making these disclosures, both Mr. Firth and Mr. Knight were putting themselves in a perilous position, but Pillers assured them that they would safeguard their future employment.

The disclosures - coming from defectors - might have been considered untrustworthy. But they were supported by documents which emanated from both Ferrostaal and Lechmotoren. They showed that M.P.L. was in regular communication with those German companies. They were sending them drawings and arranging for inspection of the Piller machine, for the express purpose that the Lechmotoren company might manufacture a prototype machine copied from Pillers. One of the most telling communications was a telex from a representative of Ferrostaal to Mr. Wallace saying:

"It is the opinion of Mr. S. (of Lechmotoren) that the best way to find a final solution for the ... prototype is to send Mr. Beck (also of Lechmotoren) to you as soon as the ... latest design of P. (Piller) has arrived in your factory. In this case it is guaranteed that the Lech prototype will have exactly the same features as the P-type. We hope you will agree to this proposal and we ask you to let us have your telex in order to arrange Mr. Beck's visit accordingly."

On getting this information, Pillers were extremely worried. They were about to produce a fine new frequency converter called the "Silent Block." They feared that M.P.L., in co-operation with the German manufacturers, would make a copy of their "Silent Block" and ruin their market. They determined to apply to the court for an injunction to restrain M.P.L. and their directors, the defendants, from infringing their copyright or using confidential information or making copies of their machines. But they were fearful that if the defendants were given notice of this application, they would take steps to destroy documents or send them to Germany or elsewhere, so that there would be none in existence by the time that discovery was had in the action.

So, on Wednesday, November 26, 1975, Pillers' solicitors prepared a draft writ of summons and, with an affidavit, they went before Brightman J. and asked, first, for an interim injunction to restrain infringement, etc., and, secondly, for an order that they might be permitted to enter the defendants' premises so as to inspect the documents of the plaintiffs and remove them, or copies of them. Brightman J. granted an interim injunction, but refused to order inspection or removal of the documents. He said:

"There is strong prima facie evidence that the defendant company is now engaged in seeking to copy the plaintiffs' components for its own financial profit to the great detriment of the plaintiffs and in breach of the plaintiffs' rights."

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He realised that the defendants might suppress evidence or misuse documentary material, but he thought that that was a risk which must be accepted in civil matters save in extreme cases.

"Otherwise," he said, "it seems to me that an order on the lines sought might become an instrument of oppression, particularly in a case where a plaintiff of big standing and deep pocket is ranged against a small man who is alleged on the evidence of one side only to have infringed the plaintiffs' rights."

Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say "Get out." That was established in the leading case of Entick v. Carrington (1765) 2 Wils.K.B. 275 . None of us would wish to whittle down that principle in the slightest. But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not

authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: It brings pressure on the defendants to give permission. It does more. It actually orders them to give permission - with, I suppose, the result that if they do not give permission, they are guilty of contempt of court.

This may seem to be a search warrant in disguise. But it was fully considered in the House of Lords 150 years ago and held to be legitimate. The case is United Company of Merchants of England, Trading to the East Indies v. Kynaston (1821) 3 Bli.(O.S.) 153. Lord Redesdale said, at pp. 163-164:

"The arguments urged for the appellants at the Bar are founded upon the supposition, that the court has directed a forcible inspection. This is an erroneous view of the case. The order is to permit; and if the East India Company should refuse to permit inspection, they will be guilty of a contempt of the court.... It is an order operating on the person requiring the defendants to permit inspection, not giving authority of force, or to break open the doors of their warehouse."

That case was not, however, concerned with papers or things. It was only as to the value of a warehouse; and that could not be obtained without an inspection. But the distinction drawn by Lord Redesdale affords ground for thinking that there is jurisdiction to make an order that the defendant "do permit" when it is necessary in the interests of justice.

Accepting such to be the case, the question is in what circumstances ought such an order be made. If the defendant is given notice beforehand and is able to argue the pros and cons, it is warranted by that case in the House of Lords and by R.S.C., Ord. 29, r. 2 (1) and (5) . But it is a far stronger thing to make such an order ex parte without giving him ***61**

notice. This is not covered by the Rules of the Supreme Court and must be based on the inherent jurisdiction of the court. There are one or two old precedents which give some colour for it, Hennessy v. Rohmann, Osborne & Co. [1877] W.N. 14 , and Morris v. Howell (1888) 22 L.R.Ir. 77 , an Irish case. But they do not go very far. So it falls to us to consider it on principle. It seems to me that such an order can be made by a judge ex parte, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties: and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated: and when the inspection would do no real harm to the defendant or his case.

Nevertheless, in the enforcement of this order, the plaintiffs must act with due circumspection. On the service of it, the plaintiffs should be attended by their solicitor, who is an officer of the court. They should give the defendants an opportunity of considering it and of consulting their own solicitor. If the defendants wish to apply to discharge the order as having been improperly obtained, they must be allow to do so. If the defendants refuse permission to enter or to inspect, the plaintiffs must not force their way in. They must accept the refusal, and bring it to the notice of the court afterwards, if need be on an application to commit.

You might think that with all these safeguards against abuse, it would be of little use to make such an order. But it can be effective in this way: It serves to tell the defendants that, on the evidence put before it, the court is of opinion that they ought to permit inspection - nay, it orders them to permit - and that they refuse at

their peril. It puts them in peril not only of proceedings for contempt, but also of adverse inferences being drawn against them; so much so that their own solicitor may often advise them to comply. We are told that in two at least of the cases such an order has been effective. We are prepared, therefore, to sanction its continuance, but only in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed.

On the evidence in this case, we decided last Tuesday that there was sufficient justification to make an order. We did it on the precedent framed by Templeman J. It contains an undertaking in damages which is to be supported (as the plaintiffs are overseas) by a bond for £10,000. It gives an interim injunction to restraint the infringement of copyright and breach of confidential information, etc. It orders that the defendants do permit one or two of the plaintiffs and one or two of their solicitors to enter the defendants' premises for the purpose of inspecting documents, files or things, and removing those which belong to the plaintiffs. This was, of course, only an interim order pending the return of the summons. It is to be heard, we believe, tomorrow by the judge.

ORMROD LJ

I agree with all that Lord Denning M.R. has said. The proposed order is at the extremity of this court's powers. Such orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the applicant.

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There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

The form of the order makes it plain that the court is not ordering or granting anything equivalent to a search warrant. The order is an order on the defendant in personam to permit inspection. It is therefore open to him to refuse to comply with such an order, but at his peril either of further proceedings for contempt of court - in which case, of course, the court will have the widest discretion as to how to deal with it, and if it turns out that the order was made improperly in the first place, the contempt will be dealt with accordingly - but more important, of course, the refusal to comply may be the most damning evidence against the defendant at the subsequent trial. Great responsibility clearly rests on the solicitors for the applicant to ensure that the carrying out of such an order is meticulously carefully done with the fullest respect for the defendant's rights, as Lord Denning M.R. has said, of applying to the court, should he feel it necessary to do so, before permitting the inspection.

In the circumstances of the present case, all those conditions to my mind are satisfied, and this order is essential in the interests of justice.

I agree, therefore, that the appeal should be allowed.

SHAW LJ

I agree with both judgments. The overriding consideration in the exercise of this salutary jurisdiction is that it is to be resorted to only in circumstances where the normal processes of the law would be rendered nugatory if some immediate and effective measure was not available. When such an order is made, the party who has procured the court to make it must act with prudence and caution in pursuance of it.

Representation

Solicitors: Collyer-Bristow & Co. for Band, Hatton & Co., Coventry.

Interim order allowing appeal affirmed.

(A. H. B.)

INCOME TAX ASSESSMENT ACT 1936
Commonwealth of Australia (No 27 of 1936)

SECTION 48

In calculating the taxable income of a taxpayer, the total assessable income derived by him during the year of income shall be taken as a basis, and from it there shall be deducted all allowable deductions.

SECTION 51(1)

(1) All losses or outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private, or domestic nature, or are incurred in relation to the gaining or production of exempt income.

(2) Expenditure incurred or deemed to have been incurred in the purchase of stock used by the taxpayer as trading stock shall be deemed not to be an outgoing of capital or of a capital nature.

SECTION 260

Contracts to evade tax void

(1) Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly:

(a) altering the incidence of any income tax;

(b) relieving any person from liability to pay any income tax or make any return;

(c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or

(d) preventing the operation of this Act in any respect;

be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.

(2) This section does not apply to any contract, agreement or arrangement made or entered into after 27 May 1981.

SECTION 82KH

Interpretation

agreement" means any agreement, arrangement, understanding or scheme, whether formal or informal, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings.

J. Berryman et al, "Origins of Equity" *Remedies, Cases, and Materials* (1988) 517-519

As S F C Milsom points out (*Historical Foundations of the Common Law* (London: Butterworths, 1981)), the origins of "equity" are shrouded in mystery; and certainly the notion that equity was originally a substantive body of law, different from and more "just" than the common law, is something of a romantic fiction. Equity, like common law, had its origin in petitions addressed to the king, requesting the exercise of his prerogative powers to resolve some conflict or correct some abuse, inadequacy or injustice. By the fourteenth century, the administration of justice had largely been established through the formal institutions of common law. The three superior courts, King's Bench, Common Pleas and Exchequer, administered the law of the land. But the jurisdiction of these courts was neither exhaustive nor exclusive. The law remained grounded in the king's justice and the sovereign did not relinquish his ultimate authority to consider individual petitions and dispense justice (though the scope of this residual jurisdiction was to become a source of considerable political controversy). Thus, in addition to the three courts, citizens had the legal right to petition the king directly where it was alleged that justice could not be obtained in the common law courts.

The Chancery was not originally a "court". Rather it was a department of government that did the "paperwork" of the state. The Chancellor, historically a cleric, was the custodian of the royal seal used for the authentication of all government documents (including the common law writs), and was responsible for many of the internal affairs of the country. As petitions to the king became more numerous they were frequently referred to the Chancellor who, exercising delegated powers, gradually assumed a prominent role in the administration of royal justice. As the Chancellor's judicial role became better established, individuals alleging some defect or abuse in the common law courts would petition him directly for assistance. Such petitions might allege the dishonesty of local judicial officers or juries, the poverty of the petitioner or, more frequently with the increasing inflexibility of the common law writ system, some unfairness in the substantive or procedural law. Where satisfied of the justice of the petitioner's case,

the Chancellor might issue a new common law writ to direct the courts to provide some redress or , with increasing frequency, would issue an appropriate order directly to the offender to abide by the dictates of conscience.

The Chancellor's "conscience" often inclined in a direction opposite to the result reached by the common law. In fact, one of the earliest uses of the injunction was to restrain unfair proceedings in the common law courts. Of equal importance was the enforcement by the Chancellor of uses or trusts, which the common law refused to recognise. However, the Chancellor was not thought to be administering a separate system of rules, or overriding the common law, but instead was simply "perfecting" the administration of the king's justice. And while the orders of the Chancellor might, at times, run counter to the results reached in the common law courts these orders, directed only to the affected parties and not a matter of record, did not alter the general rules of common law. The explanation eventually adopted to explain the relationship between the common law and equity rested on the Aristotetian notion that equitable justice is a necessary correction of the defects of legal justice resulting from the universality of the latter. General rules will, on occasion, work injustice and it would be against conscience to allow this to occur. As Lord Ellesmere said in *Earl of Oxford's Case* (1615), 1 Rep. Ch. 1 at p 6: 21 E R 485 at p 486:

That men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of what nature so ever they be, and to soften and mollify the extremity of the law.

Nevertheless, the relationship between law and equity did not remain a harmonious one. As J H Baker points out, "[t]he anomaly that a politician should hold the highest judicial office in the land was compounded by the undefined nature of the Chancellor's jurisdiction" (*An Introduction to English Legal History* (London: Butterworths, 2nd ed., 1979) at p 86). Perhaps not surprisingly, common law lawyers began to object to the apparently arbitrary nature of the Chancellor's jurisdiction and the relationship between the common law courts and the chancellor became

increasingly uneasy. The mounting antagonism (which may also have had something to do with the fact that judicial revenues depended upon the volume of litigation) eventually assumed the proportions of a constitutional crisis in 1616 in the form of a clash between the Chancellor, Lord Ellesmere, and the Chief Justice of the King's Bench, Sir Edward Coke. While Coke lost the battle, the stage was set for the formalization of the relationship between law and equity. Equity was said to be superior to common law, in that where the two conflicted equity would prevail, but subsequent Chancellors took greater care to define their jurisdiction and to introduce greater certainty and predictability into equity. The increasing appointment of common lawyers (particularly Lord Nottingham, 1673-1682) to the position of Chancellor further accelerated the trend to delineate the jurisdiction of Chancery by rules and principles and to rely on binding precedent. The familiarity with, and deference to, the common law by the Chancellors further cemented the principle that while equity is superior to common law, it is but corrective and supplementary. The reporting of the Chancellor's decisions also played a role in the transformation of equity from an expression of subjective conscience to a body of rules. By the time of the publication of *Blackstone's Commentaries* (1765 to 1769) equity, no less than common law, was considered to be a part of the positive substantive law of the land and capable of systematic exposition.

The reconciliation of law and equity was achieved at a price. As you will see, the "regularization" of equitable principles has arguably resulted in the same type of inflexibility in this area of law that equity was originally designed to remedy. At the very least, there remains a tension in equity between "conscience" and "rule" and the nature of equitable discretion is an important jurisprudential question (see, for example, R Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) at pp 14-15).

Perhaps of greater historical importance, the growing number of Chancery petitions, the increasing formalization of equity, and the institutional and procedural limitations of Chancery procedure led eventually to the dismal situation described by Dickens in *Bleak House* (though this book was not published until some time after the darkest hours of Chancery). Under the tutelage of the

unfortunate Lord Eldon (1801-1827), the Chancery had become unworkable. A series of reforms beginning in the early nineteenth century allowed for the appointment of more judges to assist the belaboured Chancellor (until 1813 there had been only two judges in Chancery). Sweeping changes to Chancery procedure in the middle of the century widened the powers of the Chancery and streamlined its procedures. As we shall see, one of the most important of these reforms was *Lord Cairns' Act (Chancery Amendment Act, 1858,* 21 & 22 Vict., c.27*)* which gave the Chancery jurisdiction to award damages. Similarly, common law courts were given the power to take notice of certain equitable principles and to award equitable remedies. The increasing similarity of procedure in common law and equity and the overlapping powers of the two systems of courts paved the way finally for the reforms of the *Judicature Acts* in 1873 and 1875 whereby both systems of courts were abolished and the Supreme Court of Judicature was established having authority to administer both bodies of law.

Bradford v Pickles [1895] AC 587 (HL)

House of Lords
29 July 1895
Lord Halsbury L.C., Lord Watson, Lord Ashbourne and Lord Macnaghten.

Watercourse—Water percolating underground—Interference with flow of percolating Water—Mala Fides—Lawful act done with malicious Motive—Bradford Waterworks Act 1854 (17 & 18 Vict. c. cxxiv.) s. 49.

No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.

The owner of land containing underground water, which percolates by undefined channels and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it: Chasemore v. Richards (7 H. L. C. 349). And his right is the same whatever his motive may be, whether bonâ fide to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out.

By Lord Watson: The law of Scotland on this point is not accurately stated by Lord Wensleydale in Chasemore v. Richards (7 H. L. C. at p. 388).

The decision of the Court of Appeal ([1895] 1 Ch. 145) affirmed.

THE following statement of the facts is taken from the judgment of Lord Watson:—

The appellants have purchased under statutory powers, and ***588** are now vested with the whole undertaking of the Bradford Waterworks Company incorporated by an Act passed in 1854 (17 & 18 Vict. c. cxxiv.), which transferred to that company the undertaking of a corporation, having the same name, created by statute in 1842 (5 Vict. Sess. 2, c. vi.), together with all rights and privileges thereto belonging. The older of these companies acquired, for the purposes of their undertaking, a parcel of land known as Trooper Farm, and also certain springs and streams arising in or flowing through the farm. From these springs and streams the appellants and their predecessors have hitherto obtained a valuable supply of water for the domestic use of the inhabitants of Bradford.

Trooper Farm is bounded on the west and north by lands belonging to the respondent which are about 140 acres in extent. The first of these boundaries, on the west, which is alone of importance in the present case, is a public highway called Doll Lane. The respondent's land to the west of that boundary is on a higher level than Trooper Farm, and has a steep slope downwards to the lane. Its substrata are intersected by two faults running from east to west, one from each end of the boundary, which prevent the escape of percolating water either to the north or south; and the nature and the inclination of the strata are such that the subterranean water which they contain must, by the natural force of gravitation, eventually find its way to Trooper Farm.

The sources from which the appellants derive a supply of water near to the western boundary of Trooper Farm are two in number. The first of these is a large spring, known as Many Wells, which issues from their ground twenty or thirty yards to the east of Doll Lane. The second is a stream to the south of Many Wells, which has its origin in a smaller spring on the respondent's land, close to Doll Lane, at a point known as the Watering Spot, from which the water runs in a definite channel into Trooper Farm.

It is an admitted fact that neither the appellants nor either of the companies

whose undertaking is now vested in them ever acquired from the respondent or his predecessors in title any part of their legal right to or interest in the water in their land,*589whether above or below the ground; and also that the statutes, to the benefit of whose provisions the appellants are now entitled, make no provision for compensating the respondent, in the event of such right or interest being prejudicially affected by the appellants' undertaking.

In the year 1892 the respondent began to sink a shaft on his land adjoining the lane, and to the west of the Many Wells Spring, and also to drive a level through his land for the professed purpose of draining the strata, with a view to the working of his minerals. These operations had the effect of occasionally discolouring the water in the Many Wells Spring, and also of diminishing to some extent the amount of water in that spring, and in the stream coming from the Watering Spot; and it became apparent that, if persevered in, they would result in a considerable and permanent diminution of the water supply obtainable from these sources. The appellants then brought the present suit, in which they crave an injunction to restrain the respondent from continuing to sink the shaft or drive the level, and from doing anything whereby the waters of the spring and stream might be drawn off or diminished in quantity, or polluted, or injuriously affected.

The appellants alleged in their statement of claim that the respondent had not a bonâ fide intention to work his minerals, and that his intention was to injure the appellants and so to endeavour to induce them either to purchase his land or to give him some other compensation.

North J. being of opinion that the respondent's acts were prohibited by statute granted an injunction [1]. The Court of Appeal (Lord Herschell L.C., Lindley and A. L. Smith L.JJ.) reversed this decision and declared that the appellants were not entitled to any of the relief claimed in the action [2].

The Act of 1854 incorporated among others sect. 14 of the Waterworks Clauses Act 1847.

Sect. 49 of the Act of 1854 was almost identical in terms with sect. 234 of the Act of 1842 and ran as follows:—

"It shall not be lawful for any person other than the company to divert alter or appropriate in any other manner than by law*590 they may be legally entitled any of the waters supplying or flowing from certain streams and springs called 'Many Wells,' arising or flowing in and through a certain farm called 'Trooper' or Many Wells Farm in the township of Wilsden in the parish of Bradford, or to sink any well or pit or do any act matter or thing whereby the waters of the said springs might be drawn off or diminished in quantity; and if any person shall illegally divert alter or appropriate the said waters or any part thereof or sink any such well or pit or shall do any such act matter or thing whereby the said waters may be drawn off or diminished in quantity, and shall not immediately on being required so to do by the company repair the injury done by him, so as to restore the said springs and the waters thereof to the state in which they were before such illegal act as aforesaid, he shall forfeit to the company any sum not exceeding five pounds for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by or by the authority of such person, in addition to the damage which the company may sustain by reason of their supply of water being diminished."

May 9. *Cozens-Hardy* Q.C. and *B. Eyre* for the appellants:—

The respondent in diverting this water is not making a reasonable use of the land. He is acting maliciously, and the cases shew that a user which would otherwise be justifiable ceases to be so when the

object is to injure another. This principle was applied in the early case of Keeble v. Hickeringill [3], in which a decoy was disturbed by shooting. In Acton v. Blundell [4], in which the right to intercept underground water was established, this limitation is expressed. Tindal C.J. at p. 353 quotes Marcellus: "Si non animo vicini nocendi, sed suum agrum meliorem faciendi"; and the same passage is quoted by Lord Wensleydale in Chasemore v. Richards[5]. Lord Wensleydale says: "Every man has a right to the natural advantages of his soil. … But according to the rule of reason and law 'Sic utere tuo ut alienum non laedas,' it seems right to hold that he ought to exercise his ***591*** right in a reasonable manner with as little injury to his neighbour's rights as may be." In Smith v. Kenrick [6] the same limitation on freedom of action is imposed; and Maule J. says that if a man in the legitimate use of his own land "acts negligently or capriciously and injury results, no doubt he is liable." In Mogul Steamship Co. v. Macgregor, Gow & Co. [7] Bowen L.J. after saying that a man is legally justified in the bonâ fide use of his property or the exercise of his trade, even if what he does seems selfish or unreasonable, adds: "But such legal justification would not exist where the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain or the lawful enjoyment of one's own rights." The respondent's conduct comes distinctly within the exceptions there expressed.

[They also contended that the respondent's conduct was forbidden by the Bradford Waterworks Act 1854 s. 49.]

Everitt Q.C., *Tindal Atkinson* Q.C., *Butcher* and A. P. Longstaffe for the respondent were not heard.

The House took time for consideration.

LORD HALSBURY LC

My Lords, in this action the plaintiffs seek to restrain the defendant from doing certain acts which they allege will interfere with the supply of water which they want, and which they are incorporated to collect for the purpose of better supplying the town of Bradford. North J. ordered the injunction to issue, but the Court of Appeal, consisting of Lord Herschell, Lindley L.J. and A. L. Smith L.J., reversed his judgment.

The facts that are material to the decision of this question seem to me to lie in a very narrow compass. The acts done, or sought to be done, by the defendant were all done upon his own land, and the interference, whatever it is, with the flow of water is an interference with water, which is underground and not shewn to be water flowing in any defined stream, but is percolating water, which, but for such interference, would undoubtedly ***592*** reach the plaintiffs' works, and in that sense does deprive them of the water which they would otherwise get. But although it does deprive them of water which they would otherwise get, it is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant has no right to do what he is doing.

My Lords, I am of opinion that neither of those propositions can be established. Apart from the consideration of the particular Act of Parliament incorporating the plaintiffs, which requires separate treatment, the question whether the plaintiffs have a right to the flow of such water appears to me to be covered by authority. In the case of Chasemore v. Richards [8], it became necessary for this House to decide whether an owner of land had a right to sink a well upon his own premises, and thereby abstract the subterranean water percolating through his own soil, which would otherwise, by the natural force of gravity, have found its way into springs which fed the River Wandle, the flow of which the plaintiff in that action had enjoyed for upwards of sixty years.

The very question was then determined by this House, and it was held that the landowner had a right to do what he had done whatever his object or purpose might be, and although the purpose might be wholly unconnected with the enjoyment of his own estate.

It therefore appears to me that, treating this question apart from the particular Act of Parliament, and, indeed, apart from the 49th section of the Act of Parliament upon which the whole question turns, it would be absolutely hopeless to contend that this case is not governed by the authority of Chasemore v. Richards [9].

This brings me to the 49th section of the statute 17 & 18 Vict. c. cxxiv., upon which reliance has been placed. [His Lordship read it.]

Whatever may be said of the drafting of this section, two things are clear: first, that the section in its terms contemplates that persons other than the company may be legally entitled to divert, alter, or appropriate the waters supplying or flowing from ***593** the streams and springs; and, secondly, that the acts against which the section is directed must be illegal diversion, alteration, or appropriation of the said waters.

The natural interpretation of such language seems to me to be this: that whereas the generality of the language of the section might apply to any alteration or appropriation of waters supplying or flowing from the streams and springs called "Many Wells," the section only intended to protect such streams and springs and supplies as the company should have acquired a right to by purchase, compensation, or otherwise, but in such-wise as should vest in them the proprietorship of the waters, streams, springs, &c. And lest the generality of the language should give them more than that to which they had acquired the proprietary right, the legal rights of all other persons were expressly saved; and upon this assumption the latter part of the section makes penal the illegal diversion, alteration, or appropriation of any streams, &c., of which, by the hypothesis, the company had become the proprietor.

I do not think that North J. does justice to the language of the section when he says that "the section enacts that a man is not to do certain specified things except so far as he may lawfully do them." The fallacy of that observation (with all respect to North J.) resides in the phrase "certain specified things." If my reading of the section be correct, the thing that is prohibited is taking or diverting water which has been appropriated and paid for by the company; but the thing which is not prohibited is taking water which has not reached the company's premises, to the property in which no title is given by the section, and which, by the very act complained of, never can reach the company's premises at all. To use popular language, therefore, what is prohibited is taking what belongs to the company, and what is not prohibited is taking what does not belong to the company.

My Lords, I have used popular language because I have no doubt that the draftsman who drew the section was encountered with the proposition in his own mind that you could not absolutely assert property of percolating water at all. You may have a right to the flow of water; you may have a property in the ***594** water when it is collected and appropriated and reduced into possession; but, in view of the particular subject-matter with which the draftsman was dealing, it seems to me intelligible enough why he adopted the phraseology now under construction.

It appears to me that this is the true construction of the section from the language itself. But I confess I can entertain no doubt that the mere fact that the section, as construed by the plaintiffs, affords no right to compensation to those whose rights might be affected, is conclusive against the construction contended for by the plaintiffs.

The only remaining point is the question of fact alleged by the plaintiffs, that the acts done by the defendant are done, not with any view which deals with the use of his own land or the percolating water through it, but is done, in the language of the pleader, "maliciously." I am not certain that I can understand or give any intelligible construction to the word so used. Upon the supposition on which I am now arguing, it comes to an allegation that the defendant did maliciously something that he had a right to do. If this question were to have been tried in old times as an injury to the right in an action on the case, the plaintiffs would have had to allege, and to prove, if traversed, that they were entitled to the flow of the water, which, as I have already said, was an allegation they would have failed to establish.

This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant. But I am not prepared to adopt Lindley L.J.'s view of the moral obliquity of the person insisting on his right when that right is challenged. It is not an uncommon thing to stop up a path which may be a convenience to everybody else, and the use of which may be no inconvenience to the owner of the land over which the path goes. But when the use of it is insisted upon as a right, it is a familiar mode of testing that right to stop the permissive use, which the owner of the land ***595** would contend it to be, although the use may form no inconvenience to the owner.

So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which would otherwise go into the possession of this trading company, I see no reason why he should not insist on their purchasing his interest from which this trading company desires to make profit.

For these reasons, my Lords, I am of opinion that this appeal ought to be dismissed with costs, and that the plaintiffs should pay to the defendant the costs both here and below.

LORD WATSON (after stating the facts given above)

My Lords, it is clear that, apart from any privilege which may have been conferred upon them by statute, the respondent, as in a question with the appellants, has a legal right to divert or impound the water percolating beneath the surface of his land, so as to prevent its reaching Trooper Farm, and feeding, or assisting to feed, the Many Wells Spring or the stream flowing from the Watering Spot. Upon that point there can be no doubt since Chasemore v. Richards [10] was decided by this House in the year 1859. But the appellants pleaded at your Lordships' Bar, as they did in both Courts below, that the principle of Chasemore v. Richards [11] is inapplicable to the present case, because, in the first place, the operations contemplated and commenced by the respondent are by statute expressly prohibited; and, in the second place, these operations were designed and partly carried out by the respondent, not with the honest intention of improving the value of his land or minerals, but with the sole object of doing injury to their undertaking.

The statutory provisions upon which the appellants rely as supporting the first of these pleas are to be found in sect. 234 of the Act of 1842, and in sect. 49 of the Act of 1854, which is a mere repetition of the previous enactment. The clause relates to the Many Wells Springs, an expression which, as the context shews, includes the stream coming from the Watering Spot. It contains two separate enactments, the one of them prohibitory and the ***596** other

penal. First of all, it declares that it shall not be lawful"for any person other than the said company to divert, alter, or appropriate, in any other manner than by law they may be legally entitled," any of the waters "supplying or flowing from" these springs, or to sink any well or pit, or to do any act, matter, or thing whereby "the waters of the said springs" may be drawn off or diminished in quantity. That declaration is followed by the provision that "if any person shall illegally divert, alter, or appropriate the said waters, or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing whereby the said waters shall be drawn off or diminished in quantity," and shall not on being required to do so by the company, immediately restore the springs and waters to the same condition in which they were before the illegal act, they shall be liable to pay five pounds to the company for each day until restoration is made, besides compensating the company for any damage sustained through their illegal act.

The appellants endeavoured to construe the prohibitory clause as effecting a virtual confiscation in their favour of all water rights in or connected with the respondent's land lying to the vest of Trooper Farm. It appears to me to be exceedingly improbable that the Legislature should have intended to deprive a landowner of part of his property for the benefit of a commercial company without any provision for compensating him for his loss. But it is not necessary to rely upon probabilities, because, in my opinion, the language of the clause is incapable of bearing such an interpretation. I think the plain object of the statutory prohibition, which has two distinct branches, was to give protection to the supply of water which had been acquired by or belonged to the company for the time being; and that it was not meant to forbid, and does not prevent, any legitimate use made by a neighbouring proprietor of water running upon or percolating below his land before it reached the company's supply and became part of their undertaking.

The first branch makes it unlawful for any person other than the company to divert, alter, or appropriate any of the "waters now supplying" the Many Wells Springs, which appear to include sources of supply existing upon lands adjacent to Trooper*597 Farm. Had the prohibition been absolute, it would have struck against the operations of the respondent; but it is subject to the qualification that the respondent, or any landowner similarly situated, may lawfully divert those waters which ultimately feed the Many Wells Springs, so long as he does so in any manuer which is not in excess of his common law rights. The respondent's operations, of which the appellants complain, are within his proprietary right, and are therefore not obnoxious to that part of the prohibition.

The second branch, which prohibits the sinking of wells and other operations, has, in my opinion, no reference to outside waters more or less distant which might ultimately find their way to the Many Wells Springs. It relates to "the waters of the said springs" - an expression which can only denote the waters which have actually reached the Many Wells Springs, or some channel or reservoir which has been prepared for their reception upon their issuing from these springs. The prohibition gives effective protection against the withdrawal or diminution, either by an adjacent proprietor or any other person, of waters which have come within the dominion of the appellants. But it does not prevent the diversion or impounding by an adjacent proprietor of water in his own land which has never reached that point, so long as his operations are such as the law permits. For these reasons, in so far as concerns the. first plea urged for the appellants, I concur in the judgment of the Court of Appeal.

The second plea argued by the appellants, which was rejected by both Courts below, was founded upon the text of the Roman law (Dig. lib. 39, tit. 3, art. 1, s. 12), and also, somewhat to my surprise, upon the law of Scotland. I venture to doubt whether the doctrine of Marcellus would assist the appellants' contention in this case; but it is unnecessary to consider the point, because the noble and learned Lords who took part in the decision of Chasemore v. Richards [12] held that the doctrine had no place in the law of England.

I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Wensleydale in Chasemore v. Richards.[13] The noble and learned lord appears to have*598 accepted a passage in Mr. Bell's Principles (sect. 966), which is expressed in very general terms, and is calculated to mislead unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase "in aemulationem vicini" was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being in aemulationem, where it was not attended with offence or injury to the legal rights of his neighbour. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landowner proceeded to burn limestone close to his march so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal or greater convenience to himself and without giving cause of offence, the Court would probably grant an interdict. But the principle of aemulatio has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same with the law of England. No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD ASHBOURNE

My Lords, I concur. To my mind the case is clear, and turns upon considerations sufficiently simple and far from obscure.

The plaintiffs have no case unless they can shew that they are entitled to the flow of the water in question, and that the defendant has no right to do what he is doing. Putting aside the statutes, the defendant's rights cannot be seriously contested. The law stated by this House in Chasemore v. Richards [14] cannot be questioned. Mr. Pickles has acted within his legal rights throughout; and is he to forfeit those legal rights and be punished for their legal exercise because certain motives are*599 imputed to him? If his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal. If his motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal.

It is to be noted that the defendant or his predecessors in title never parted with any of their legal rights; it is not suggested that the plaintiffs, by agreement or otherwise, ever acquired them; and no indication is given that there is any intention to compensate the defendant for his legal rights sought to be appropriated or injuriously affected by the plaintiffs.

The appellants' contention on the construction of the statutes would practically confiscate the defendant's water rights. I see nothing in the statutes to interfere with or prejudice his legal rights. Very clear words would be required to support the contention that legal rights have been swept away without compensation. Waters that have come under the control of the appellants are fully protected; but there is not a word to

hinder or cramp the action of Mr. Pickles unless he acts "illegally," or proceeds "in any other manner than by law he may be legally entitled."

I therefore concur in the order proposed.

LORD MACNAGHTEN

My Lords, for forty years the corporation of Bradford have supplied their town with water. They were empowered to do so by an Act of Parliament passed in 1854, which authorized and required them to purchase the undertaking of a then existing company called "The Bradford Waterworks Company."

The chief source of their water supply was taken over from the company. It comes from a cluster of springs known as "The Many Wells." These springs issue from the lower slope of a hillside some distance from the town. Above them, in the immediate neighbourhood, there is a tract of land belonging to Mr. Pickles, the respondent. Owing to the fall of the ground and the nature and lie of the strata beneath the surface, Mr. Pickles' land forms a sort of gathering-room or reservoir for ***600** subterranean water. Two faults, nearly parallel to each other, run downwards through it, and there is a bottom of impermeable clay. At present there is no way of escape for the imprisoned waters except by the Many Wells Springs.

Within the ambit of his own land Mr. Pickles has set about making a tunnel or drift which, apparently, is intended to pierce one of the two faults that keep the underground water within bounds. If this is done the result, it is said, will be to allow the water to run off in some other direction.

The corporation claim an injunction to restrain Mr. Pickles from going on with the proposed work. They put their case in two ways. They say that under the circumstances the operation which Mr. Pickles threatens to carry out is something in excess of his rights as a landowner. Failing that ground, they maintain that his proceedings are in contravention of the express terms of their special Act.

As regards the first point, the position of the appellants is one which it is not very easy to understand. They cannot dispute the law laid down by this House in Chasemore v. Richards. [15] They do not suggest that the underground water with which Mr. Pickles proposes to deal flows in any defined channel. But they say that Mr. Pickles' action in the matter is malicious, and that because his motive is a bad one, he is not at liberty to do a thing which every landowner in the country may do with impunity if his motives are good. Mr. Pickles, it seems, was so alarmed at this view of the case that he tried to persuade the Court that all he wanted was to unwater some beds of stone which he thought he could work at a profit. In this innocent enterprise the Court found a sinister design. And it may be taken that his real object was to shew that he was master of the situation, and to force the corporation to buy him out at a price satisfactory to himself. Well, he has something to sell, or, at any rate, he has something which he can prevent other people enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a store-room for a commodity which the corporation dispense, probably not ***601** gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr. Pickles has no spite against the people of Bradford. He bears no ill-will to the corporation. They are welcome to the water, and to his land too, if they will pay the price for it. So much perhaps might be said in defence or in palliation of Mr. Pickles' conduct. But the real answer to the claim of the corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from motive,

gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.

On this point both North J. and the Court of Appeal decided against the corporation. And the decision, as it seems to me, is plainly right.

On the second point, on which North J. was in favour of the corporation and the Court of Appeal against them, there is certainly more to be said. I quite agree with the Court of Appeal in the result at which they have arrived. But, speaking for myself, I rather take leave to doubt whether the section of the special Act on which the question turns is so unsatisfactory, so ill-drawn, and so difficult to construe as it seemed to be to the Court of Appeal.

The old waterworks company was incorporated by an Act passed in 1842. It was dissolved and re-incorporated in 1854 in view of the immediate transfer of the undertaking to the corporation.

In the Act of 1854, the provisions of which were kept in force for the benefit of the corporation, the section in question is the 49th. But that section is merely a reproduction of sect. 234 in the Act of 1842. And it will be more convenient to deal with the earlier Act.

The Act of 1842 scheduled certain lands which the company were empowered to take. Among them was part of a farm belonging to one Seth Wright, which was known as Trooper or Many Wells Farm. By sect. 233 the company were authorized ***602** to divert or alter the course of a certain beck called Hewenden Beck, which is a tributary of the River Aire, "and also to divert and take the water from" the Many Wells Springs, described as"the springs and streams of water called Many Wells, arising or flowing in and through … Trooper or Many Wells Farm."

At the date of the passing of the Act, the waters issuing from the Many Wells Springs in Trooper Farm, and a stream which rose in the adjoining land, flowed in several defined channels through Trooper Farm into Hewenden Beck, which forms one of the boundaries of the farm. The scheduled portion of the farm comprised apparently some but not all of those channels. However, after the Act was passed, the company purchased the whole of Trooper Farm; and, as required by the Act, they made compensation to the millowners on Hewenden Beck for the loss of the waters of the Many Wells Springs.

Sect. 234 is a protective clause corresponding in the main with sect. 14 in the Waterworks Clauses Act 1847. It was to come into operation after the purchase of the Many Wells Springs.

According to the ordinary course of legislation in this country, a clause of that sort is intended to protect property, rights, and interests which have been acquired by purchase, not to transfer arbitrarily from one person to another property and rights for which nothing has been paid, and for which no compensation is provided.

In the first place, the section says that, "After the Many Wells Springs have been purchased by the company, it shall not be lawful for any person other than the said company to divert, alter, or appropriate in any other manner than by law they may be legally entitled any of the waters now supplying or flowing from the same." Both as regards the underground sources of the springs and as regards the streams flowing from them in their natural course it forbids any act by any person in excess of his legal rights. At that time it must be remembered that the rights of landowners in regard to underground water had not been finally determined. If the view which commended itself to the Court of Exchequer in Dickinson v. Grand Junction Canal Company [16] had been established, the proposed action of ***603** Mr. Pickles would, no doubt, have been illegal. As it is, there is nothing in the first part of the prohibition to restrict or curtail his rights as a landowner in dealing with underground water

percolating through his land in unknown channels.

In the second place, the section declares that no person but the company is "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity." What is the meaning of the expression, "The waters of the said springs"? The natural and obvious meaning seems to me to be the waters issuing from the springs, such as they happen to be in quantity and volume, at the point of issue, or in one case at the point of entry, into Trooper Farm. The expression cannot include the underground sources which serve to feed the springs. Otherwise you would have this singular result, that things which by reason of the saving of existing rights are treated as legal and permissible in one part of the clause are treated as illegal and prohibited by another. It must mean the water which the company were authorized to "divert and take from" those springs which the section at its commencement assumes the company to have purchased - not the waters which supply the springs, but the waters which the springs supply. A comparison of other sections in the Act will confirm this view if any confirmation is required. The expression, "The waters of the said 'Many Wells'" occurs in sect. 275, and then it is evidently synonymous with the following words in a parallel passage in sect. 238:

"The water issuing from the springs of water before mentioned called 'Many Wells,' and which is hereby authorized to be taken and diverted for the purposes of this Act."

After the company had compensated the mill-owners on Hewenden Beck and purchased Trooper Farm, the waters of the Many Wells Springs at and from the point of issue in Trooper Farm, and the water of the stream which rose in the adjoining land at and from the point of its entry into Trooper Farm, became the absolute property of the company, and it was the duty of the company to carry those waters to Bradford. No one was to interfere with them. Any such interference is characterised, in a later part of the section, as an illegal act.***604*** And, indeed, it seems to me very difficult to conceive how such an act could in any case be legal, unless the company constructed their works in a perverse and foolish manner. No one from whom the company acquired land or even an easement for the purposes of their works could lawfully let down those works. No one else, it may be assumed, would be in a position to do so. No one could lawfully tap their aqueducts or conduits.

I am of opinion that the act which Mr. Pickles proposes to do is not within either of the two classes of prohibited acts mentioned in sect. 234. It is not within the first class, because at the time of the passing of the Act his predecessor was legally entitled, and he is now legally entitled, to do the thing which is complained of. It is not within the second class, because Mr. Pickles does not propose to do anything which can have the effect of drawing off or diminishing in quantity the waters of the Many Wells Springs, such as they may be at the point of issue in Trooper Farm, or as regards the stream which does not rise in Trooper Farm at the point of its entry into that farm.

It was argued somewhat faintly that sect. 49 of the Act of 1854 must have a wider meaning than that which I think ought to be attributed to sect. 234 of the Act of 1842, because the Act of 1854 incorporates the Waterworks Clauses Act of 1847, and sect. 14 of that Act covers, it is said, everything which is covered by sect. 234 of the Act of 1842 if it be construed as it seems to me it ought to be construed. There would be very little in such an argument under any circumstances, because it is only natural that the promoters of the legislation of 1854 would, on the reconstruction of the company, desire to retain or re-enact

every clause in the former Act which could make for their protection. But the truth is, that the section of the Waterworks Clauses Act of 1847, which corresponds with sect. 49 of the Act of 1854, does not apply to the Many Wells Springs. They were purchased under the Act of 1842. The Act of 1854, which incorporates the Waterworks Clauses Act 1847, declares that in construing that Act the expression "the special Act" shall mean the Act of 1854. It does not mean or include the Act of 1842.

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I am, therefore, of opinion that this appeal should be dismissed with costs.

Representation

Solicitors for appellants: Cann & Son for W. T. McGowen, Bradford.

Solicitors for respondent: Ullithorne, Currey & Currey for W. & G. Burr & Co., Keighley.

Order appealed from affirmed and appeal dismissed with costs here and below: Action dismissed. Lords' Journals 29th July 1895.

1. [1894] 3 Ch. 53.
2. [1895] 1 Ch. 145.
3. 11 Mod. 74, 131; 11 East, 574, n.
4. 12 M. & W. 324.
5. 7 H. L. C. 349, 387.
6. 7 C. B. 515, 559.
7. 23 Q. B. D. 598, 618.
8. 7 H. L. C. 349.
9. 7 H. L. C. 349.
10. 7 H. L. C. 349 .
11. 7 H. L. C. 349.
12. 7 H. L. C. 349 .
13. 7 H. L. C. at p. 388.
14. 7 H. L. C. 349.
15. 7 H. L. C. 349.
16. 7 Ex, 282.

Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256

In the Court of Appeal.
7 December 1892
Lindley , Bowen and A L Smith , LJJ.

Contract—Offer by Advertisement—Performance of Condition in Advertisement—Notification of Acceptance of Offer—Wager—Insurance— 8 & 9 Vict. c. 109 — 14 Geo. 3, c. 48, s. 2 .

The defendants, the proprietors of a medical preparation called "The Carbolic Smoke Ball," issued an advertisement in which they offered to pay 100l. to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisement bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—

Held, affirming the decision of Hawkins, J., that the above facts established a contract by the defendants to pay the plaintiff 100l. in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict. c. 109 , nor a policy within 14 Geo. 3, c. 48, s. 2 ; and that the plaintiff was entitled to recover.

APPEAL from a decision of Hawkins, J. [1]

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the*Pall Mall Gazette* of November 13, 1891, and in other ***257*** newspapers, the following advertisement:

"100l. reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000l. is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27, Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the 100l. The defendants appealed.

Finlay, Q.C., and *T. Terrell* , for the defendants. The facts shew that there was no binding contract between the parties. The case is not like Williams v. Carwardine [2] , where the money was to become payable on the performance of certain acts by the plaintiff; here the plaintiff could not by any act of her own establish a claim, for, to establish her right to the money, it was necessary that she should be attacked by influenza - an event over which she had no control. The words express an intention, but do not amount to a promise: Week v. Tibold . [3] The present case is similar to Harris v. Nickerson . [4] The advertisement is too vague to be the basis of a contract; there is no limit as to time, and no means of checking the use of the ball. Anyone who had influenza might come forward and depose that he had used the ball for a fortnight, and it would be

*258 impossible to disprove it. Guthing v. Lynn [5] supports the view that the terms are too vague to make a contract, there being no limit as to time, a person might claim who took the influenza ten years after using the remedy. There is no consideration moving from the plaintiff: Gerhard v. Bates [6] . The present case differs from Denton v. Great Northern Ry. Co. [7] , for there an overt act was done by the plaintiff on the faith of a statement by the defendants. In order to make a contract by fulfilment of a condition, there must either be a communication of intention to accept the offer, or there must be the performance of some overt act. The mere doing an act in private will not be enough. This principle was laid down by Lord Blackburn in Brogden v. Metropolitan Ry. Co. [8] The terms of the advertisement would enable a person who stole the balls to claim the reward, though his using them was no possible benefit to the defendants. At all events, the advertisement should be held to apply only to persons who bought directly from the defendants. But, if there be a contract at all, it is a wagering contract, as being one where the liability depends on an event beyond the control of the parties, and which is therefore void under 8 & 9 Vict. c. 109 . Or, if not, it is bad under 14 Geo. 3, c. 48, s. 2 , as being a policy of insurance on the happening of an uncertain event, and not conforming with the provisions of that section.

Dickens, Q.C., and *W. B. Allen* , for the plaintiff. [THE COURT intimated that they required no argument as to the question whether the contract was a wager or a policy of insurance.] The advertisement clearly was an offer by the defendants; it was published that it might be read and acted on, and they cannot be heard to say that it was an empty boast, which they were under no obligation to fulfil. The offer was duly accepted. An advertisement was addressed to all the public - as soon as a person does the act mentioned, there is a contract with him. It is said that there must be a communication of the acceptance; but the language of Lord Blackburn, in Brogden v. Metropolitan Ry. Co. [9] , shews that merely doing the acts indicated is an acceptance of the proposal. It never was intended *259 that a person proposing to use the smoke ball should go to the office and obtain a repetition of the statements in the advertisement. The defendants are endeavouring to introduce words into the advertisement to the effect that the use of the preparation must be with their privity or under their superintendence. Where an offer is made to all the world, nothing can be imported beyond the fulfilment of the conditions. Notice before the event cannot be required; the advertisement is an offer made to any person who fulfils the condition, as is explained in Spencer v. Hardin . [10] Williams v. Carwardine . [11] shews strongly that notice to the person making the offer is not necessary. The promise is to the person who does an act, not to the person who says he is going to do it and then does it. As to notice after the event, it could have no effect, and the present case is within the language of Lord Blackburn in Brogden v. Metropolitan Ry. Co. [12] It is urged that the terms are too vague and uncertain to make a contract; but, as regards parties, there is no more uncertainty than in all other cases of this description. It is said, too, that the promise might apply to a person who stole any one of the balls. But it is clear that only a person who lawfully acquired the preparation could claim the benefit of the advertisement. It is also urged that the terms should be held to apply only to persons who bought directly from the defendants; but that is not the import of the words, and there is no reason for implying such a limitation, an increased sale being a benefit to the defendants, though effected through a middleman, and the use of the balls must be presumed to serve as an advertisement and increase the sale. As to the want of restriction as to

time, there are several possible constructions of the terms; they may mean that, after you have used it for a fortnight, you will be safe so long as you go on using it, or that you will be safe during the prevalence of the epidemic. Or the true view may be that a fortnight's use will make a person safe for a reasonable time. Then as to the consideration. In Gerhard v. Bates [13] , Lord Campbell never meant to say that if there was a direct invitation to take shares, and shares were taken on the faith of it, there was **260* no consideration. The decision went on the form of the declaration, which did not state that the contract extended to future holders. The decision that there was no consideration was qualified by the words "as between these parties," the plaintiff not having alleged himself to be a member of the class to whom the promise was made.

Finlay, Q.C., in reply. There is no binding contract. The money is payable on a person's taking influenza after having used the ball for a fortnight, and the language would apply just as well to a person who had used it for a fortnight before the advertisement as to a person who used it on the faith of the advertisement. The advertisement is merely an expression of intention to pay 100l. to a person who fulfils two conditions; but it is not a request to do anything, and there is no more consideration in using the ball than in contracting the influenza. That a contract should be completed by a private act is against the language of Lord Blackburn in Brogden v. Metropolitan Ry. Co. [14] . The use of the ball at home stands on the same level as the writing a letter which is kept in the writer's drawer. In Denton v. Great Northern Ry. Co. [15] the fact was ascertained by a public, not a secret act. The respondent relies on Williams v. Carwardine [16] , and the other cases of that class; but there a service was done to the advertiser. Here no service to the defendants was requested, for it was no benefit to them that the balls should be used: their interest was only that they should be sold. Those cases also differ from the present in this important particular, that in them the service was one which could only be performed by a limited number of persons, so there was no difficulty in ascertaining with whom the contract was made. It is said the advertisement was not a legal contract, but a promise in honour, which, if the defendants had been approached in a proper way, they would have fulfilled. A request is as necessary in the case of an executed consideration as of an executory one: Lampleigh v. Braithwait [17] ; and here there was no request. Then as to the want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some **261* limit, and three limitations have been suggested. The limitation "during the prevalence of the epidemic" is inadmissible, for the advertisement applies to colds as well as influenza. The limitation "during use" is excluded by the language "after having used." The third is, "within a reasonable time," and that is probably what was intended; but it cannot be deduced from the words; so the fair result is that there was no legal contract at all.

LINDLEY LJ

[The Lord Justice stated the facts, and proceeded:—] I will begin by referring to two points which were raised in the Court below. I refer to them simply for the purpose of dismissing them. First, it is said no action will lie upon this contract because it is a policy. You have only to look at the advertisement to dismiss that suggestion. Then it was said that it is a bet. Hawkins, J., came to the conclusion that nobody ever dreamt of a bet, and that the transaction had nothing whatever in common with a bet. I so entirely agree with him that I pass over this contention also as not worth serious attention.

Then, what is left? The first observation I will make is that we are not dealing with any inference of fact. We are dealing with an express promise to pay 100l. in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable —

"100l. reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the iufluenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball."

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "1000l. is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in **262* aid by the advertiser as proof of his sincerity in the matter - that is, the sincerity of his promise to pay this 100l. in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay 100l. to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is Williams v. Carwardine [18] , which has been followed by many other decisions upon advertisements offering rewards. But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required - which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of Brogden v. Metropolitan Ry. Co. [19] - if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he **263* does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise - that the vagueness of the language shews that a legal promise was never intended or contemplated. The language is vague and uncertain in some respects, and particularly in this, that the

100l. is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the "increasing epidemic" (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to ***264** any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, What is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that 100l. will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention - that is, the consideration. It has been argued that this is nudum pactum - that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing ***265** to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

We were pressed upon this point with the case of Gerhard v. Bates [20] , which was the case of a promoter of companies who had promised the bearers of share warrants that they should have dividends for so many years, and the promise as alleged was held not to shew any consideration. Lord Campbell's judgment when you come to examine it is open to the explanation, that the real point in that case was that the promise, if any, was to the original bearer and not to the plaintiff, and that as the plaintiff was not suing in the name of the original bearer there was no contract with him. Then Lord Campbell goes on to enforce that view by shewing that there was no consideration shewn for the promise to him. I cannot help thinking that Lord Campbell's observations would have been very different if the plaintiff in that action had been an original bearer, or if the declaration had gone on to shew what a société anonyme was, and had alleged the promise to have been, not only to the first bearer, but to anybody who should become the bearer. There was no such allegation, and the Court said, in the absence of such allegation, they did not know (judicially, of course) what a société anonyme was, and, therefore, there was no consideration. But in the present case, for the reasons I have given, I cannot see the slightest difficulty in coming to the conclusion that there is consideration.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

BOWEN LJ

I am of the same opinion. We were asked to say that this document was a contract too vague to be enforced.

The first observation which arises is that the document itself is not a contract at all, it is only an offer made to the public. ***266**The defendants contend next, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. It was urged also, that if you look at this document you will find much vagueness as to the persons with whom the contract was intended to be made - that, in the first place, its terms are wide enough to include persons who may have used the smoke ball before the advertisement was issued; at all events, that it is an offer to the world in general, and, also, that it is unreasonable to suppose it to be a definite offer, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense. It is also contended that the advertisement is rather in the nature of a puff or a proclamation than a promise or offer intended to mature into a contract when accepted. But the main point seems to be that the vagueness of the document shews that no contract whatever was intended. It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading

this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had pre- ***267*** viously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: "100l. will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks." And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward. Then again it was said: "How long is this protection to endure? Is it to go on for ever, or for what limit of time?" I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. That is the way in which I should naturally read it, and it seems to me that the subsequent language of the advertisement supports that construction. It says: "During the last epidemic of influenza many thousand carbolic smoke balls were sold, and in no ascertained case was the disease contracted by those using" (not "who had used") "the carbolic smoke ball," and it concludes with saying that one smoke ball will last a family several months (which imports that it is to be efficacious while it is being used), and that the ball can be refilled at a cost of 5s. I, therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be ***268*** sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Was it intended that the 100l. should, if the conditions were fulfilled, be paid? The advertisement says that 1000l. is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100l. would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

But it was said there was no check on the part of the persons who issued the advertisement, and that it would be an insensate thing to promise 100l. to a person who used the smoke ball unless you could check or superintend his manner of using it. The answer to that argument seems to me to be that if a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.

It was also said that the contract is made with all the world - that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate - offers to receive offers - offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition. ***269** That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century; and it cannot be put better than in Willes, J.'s, judgment in Spencer v. Harding . [21] "In the advertisement cases," he says, "there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract, of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons." As soon as the highest bidder presented himself, says Willes, J., the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law - I say nothing about the laws of other countries - to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without

communicating ***270*** acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L.J., in Harris's Case [22] , and the very instructive judgment of Lord Blackburn in Brogden v. Metropolitan Ry. Co. [23] , in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

A further argument for the defendants was that this was a ***271*** nudum pactum - that there was no consideration for the promise - that taking the influenza was only a condition, and that the using the smoke ball was only a condition, and that there was no consideration at all; in fact, that there was no request, express or implied, to use the smoke ball. Now, I will not enter into an elaborate discussion upon the law as to requests in this kind of contracts. I will simply refer to Victors v. Davies [24] and Serjeant Manning's note to Fisher v. Pyne [25] , which everybody ought to read who wishes to embark in this controversy. The short answer, to abstain from academical discussion, is, it seems to me, that there is here a request to use involved in the offer. Then as to the alleged want of consideration. The definition of "consideration" given in Selwyn's Nisi Prius, 8th ed. p. 47, which is cited and adopted by Tindal, C.J., in the case of Laythoarp v. Bryant [26] , is this: "Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff, with the consent, either express or implied, of the defendant." Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all - that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think, therefore, that it is consideration enough that the plaintiff

took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

Then we were pressed with Gerhard v. Bates . [27] In Gerhard v. Bates [28] , which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the *272 promise was made to the class of which alone the plaintiff was a member, and that therefore there was no privity between the plaintiffs and the defendant. Then Lord Campbell went on to give a second reason. If his first reason was not enough, and the plaintiff and the defendant there had come together as contracting parties and the only question was consideration, it seems to me Lord Campbell's reasoning would not have been sound. It is only to be supported by reading it as an additional reason for thinking that they had not come into the relation of contracting parties; but, if so, the language was superfluous. The truth is, that if in that case you had found a contract between the parties there would have been no difficulty about consideration; but you could not find such a contract. Here, in the same way, if you once make up your mind that there was a promise made to this lady who is the plaintiff, as one of the public - a promise made to her that if she used the smoke ball three times daily for a fortnight and got the influenza, she should have 100l., it seems to me that her using the smoke ball was sufficient consideration. I cannot picture to myself the view of the law on which the contrary could be held when you have once found who are the contracting parties. If I say to a person, "If you use such and such a medicine for a week I will give you 5l.," and he uses it, there is ample consideration for the promise.

A L SMITH LJ

The first point in this case is, whether the defendants' advertisement which appeared in the Pall Mall Gazette was an offer which, when accepted and its conditions performed, constituted a promise to pay, assuming there was good consideration to uphold that promise, or whether it was only a puff from which no promise could be implied, or, as put by Mr. Finlay, a mere statement by the defendants of the confidence they entertained in the efficacy of their remedy. Or as I might put it in the words of Lord Campbell in Denton v. Great Northern Ry. Co. [29] , whether this advertisement was mere waste paper. That is the first matter to be determined. It seems to me that this advertisement reads as follows: "100l. reward will be paid *273 by the Carbolic Smoke Ball Company to any person who after having used the ball three times daily for two weeks according to the printed directions supplied with such ball contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold. The ball will last a family several months, and can be refilled at a cost of 5s." If I may paraphrase it, it means this: "If you" - that is one of the public as yet not ascertained, but who, as Lindley and Bowen, L.JJ., have pointed out, will be ascertained by the performing the condition — "will hereafter use my smoke ball three times daily for two weeks according to my printed directions, I will pay you 100l. if you contract the influenza within the period mentioned in the advertisement." Now, is there not a request there? It comes to this: "In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you 100l." It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, 1000l. is actually lodged at the bank wherewith to satisfy any possible demands which might be made in the event of the

conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the 100l. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise. The defendants have contended that it was a promise in honour or an agreement or a contract in honour - whatever that may mean. I understand that if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and nudum pactum; but if anything else is meant, I do not understand it. I do not understand what a bargain or a promise or an agreement in honour is unless it is one on which an action cannot be brought because it is nudum pactum, and about nudum pactum I will say a word in a moment.

**274*

In my judgment, therefore, this first point fails, and this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay.

In the next place, it was said that the promise was too wide, because there is no limit of time within which the person has to catch the epidemic. There are three possible limits of time to this contract. The first is, catching the epidemic during its continuance; the second is, catching the influenza during the time you are using the ball; the third is, catching the influenza within a reasonable time after the expiration of the two weeks during which you have used the ball three times daily. It is not necessary to say which is the correct construction of this contract, for no question arises thereon. Whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account.

Then it was argued, that if the advertisement constituted an offer which might culminate in a contract if it was accepted, and its conditions performed, yet it was not accepted by the plaintiff in the manner contemplated, and that the offer contemplated was such that notice of the acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is, that there is no such clause in the advertisement, and that, in my judgment, no such clause can be read into it; and I entirely agree with what has fallen from my Brothers, that this is one of those cases in which a performance of the condition by using these smoke balls for two weeks three times a day is an acceptance of the offer.

It was then said there was no person named in the advertisement with whom any contract was made. That, I suppose, has taken place in every case in which actions on advertisements have been maintained, from the time of Williams v. Carwardine [30] , and before that, down to the present day. I have nothing to add to what has been said on that subject, except that a person becomes a persona designata and able to sue, when he performs the conditions mentioned in the advertisement.

Lastly, it was said that there was no consideration, and that **275* it was nudum pactum. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them. There is ample consideration to support this promise. I have only to add that as regards the policy

and the wagering points, in my judgment, there is nothing in either of them.

Representation

Solicitors: J. Banks Pittman ; Field & Roscoe .

Appeal dismissed. (H. C. J.)

1. [1892] 2 Q. B. 484 .
2. 4 B. & Ad. 621 .
3. 1 Roll. Abr. 6 (M.) .
4. Law Rep. 8 Q. B. 286 .
5. 2 B. & Ad. 232 .
6. 2 E. & B. 476 .
7. 5 E. & B. 860 .
8. 2 App. Cas. 666 .
9. 2 App. Cas. 666 .
10. Law Rep. 5 C. P. 561 .
11. 4 B. & Ad. 621 .
12. 2 App. Cas. 666 .
13. 2 E. & B. 476 .
14. 2 App. Cas. 692 .
15. 5 E. & B. 860 .
16. 4 B. & Ad. 621 .
17. 1 Sm. L. C. 9th ed. pp. 153, 157, 159 .
18. 4 B. & Ad. 621 .
19. 2 App. Cas. 666, 691 .
20. 2 E. & B. 476 .
21. Law Rep. 5 C. P. 561, 563 .
22. Law Rep. 7 Ch. 587 .
23. 2 App. Cas. 666, 691 .
24. 12 M. & W. 758 .
25. 1 M. & G. 265 .
26. 3 Scott, 238, 250 .
27. 2 E. & B. 476 .
28. 2 E. & B. 476 .
29. 5 E. & B. 860 .
30. 4 B. & Ad. 621 .

Cecil Bros. Pty. Ltd. v Federal Commissioner of Taxation

(1964) 111 CLR 430 (HCA)

[Judgments of Dixon CJ, Kitto, Taylor and Windeyer JJ omitted]

Menzies J.

Here we are concerned, not with the usual application of s. 260 of the Income Tax and Social Services Contribution Assessment Act (Cth) to increase a taxpayer's assessable income by bringing into that income what the arrangement, unless avoided, would exclude, but to increase a taxpaying company's taxable income by denying to it an outgoing from assessable income to which it is entitled unless the tax-avoiding arrangement is avoided. In the course of the judgment under appeal, Owen J. said: "Section 260 is being called in aid to reduce the amount of the taxpayer's outgoings and thus increase its taxable income, but I can see no reason why it should not be invoked for that purpose"[1]. With this general statement I agree-vide *Jaques v. Federal Commissioner of Taxation*.[2] The point of this case, however, as it seems to me, is whether the application of s. 260 does show that in truth the taxpayer's actual outgoings were smaller than any arrangement which was avoided had made them to appear.

The appellant company is a retailer of boots and shoes, so that what it pays for its stock is an outgoing which s. 51 makes an allowable deduction. Normally, in the sort of business carried on by the taxpayer company, the retailer buys at the best price available, but the taxpayer here chose not to do so. It preferred to buy some of its stock from Breckler Pty. Ltd. interposed between it and its usual suppliers at prices higher than those that would have been charged to it by those suppliers. The shareholders in Breckler Pty. Ltd. were the children, grandchildren and other relatives of the shareholders in the taxpayer company and what happened was that Breckler Pty. Ltd. made profits by buying the taxpayer company's requirements as ordered at the prices the taxpayer ***440** would itself have had to pay the suppliers and reselling what it bought to the taxpayer company at higher prices. When I say that Breckler Pty. Ltd. was "interposed" in this way, I am not suggesting that it was formed to be the intermediary between the taxpayer company and its suppliers. In fact, it was formed before the taxpayer company and at a time when that company's business was carried on by a partnership for which it had bought and to which it had sold in the same fashion. I use the term, however, to emphasize that it was at all material times open to the taxpayer company to buy directly from its usual suppliers at lower prices or to order its requirements from Breckler Pty. Ltd. at higher prices so that the latter could make profits. When it bought from Breckler Pty. Ltd., therefore, it chose to pay more than was necessary for the purpose of allowing that company to make a profit.

The Commissioner applied s. 260 of the Act in the assessment of the taxpayer's taxable income and tax for the year ended 30th June 1960, disallowing £19,777 of its deductions and increasing its taxable income to £72,148. The £19,777 disallowed was the difference between what the taxpayer company paid Breckler Pty. Ltd. for boots and shoes and what Breckler Pty. Ltd. paid for those boots and shoes. From that assessment the taxpayer company appealed to this Court and Owen J. dismissed its appeal and confirmed the assessment. The appeal to the Full Court from that decision was upon the grounds that the learned trial judge was wrong in holding (a) that the appellant was party to an arrangement within the meaning of s. 260 of the above Act and (b) that the application of the said s. 260 to that arrangement justified the assessment.

I propose to decide this appeal upon the second ground of appeal for, assuming without deciding that the arrangement which did exist between the taxpayer and Breckler Pty. Ltd. fell within s. 260, I have come to the conclusion that application of the section in the circumstances stated does not show that the taxpayer company's real outgoings for stock were £19,777 less than it had paid to its suppliers, including Breckler Pty. Ltd. The

[1] (1962) 111 C.L.R., at p. 436.
[2] (1924) 34 C.L.R. 328.

application of s. 260 here could not be regarded as invalidating the contracts between Breckler Pty. Ltd. and the taxpayer or as substituting the taxpayer for Breckler Pty. Ltd. in the contracts which that company made with the suppliers. The contracts, as made, stand, as his Honour recognized. His critical findings were expressed as follows: "What he" (i.e. the Commissioner) "has done is to treat as having no legal efficacy so much of the arrangement between the two companies as required the taxpayer to pay Breckler Pty. Ltd. amounts in excess of the price which it would have paid if it ***441** had made the purchases direct from the manufacturer or wholesaler and to regard those excess payments as though they had not been made. In my opinion he was entitled to do so in the circumstances of this case. The effect of the transactions was to relieve the taxpayer from a liability to tax which it would otherwise have incurred and the Commissioner was entitled to proceed upon the footing that the steps taken to produce this result had not been taken".[3] This means that s. 260 has been regarded as a warrant for disregarding part of the price actually paid for goods pursuant to contracts, the validity of which remains unaffected. I do not think that section authorizes the Commissioner to substitute a different price for that actually paid in accordance with those contracts. Indeed, s. 260 does not authorize the Commissioner to do anything; it avoids as against the Commissioner arrangements, etc. as specified and so leaves him to assess taxable income and tax on the facts as they appear when the avoided arrangements, etc. are disregarded. Here, it is not revealed that the taxpayer company's real outgoings for its supplies were £19,777 less than the price it paid or that the additional £19,777 was not paid or was a gift to Breckler Pty. Ltd. To arrive at any such conclusion would, I think, be an unauthorized reconstruction of what occurred and, moreover, would not be in accordance with the true facts. All that does appear is that the taxpayer company could have bought its requirements for £19,777 less than it did, but the disregard of what his Honour regarded as the tax-avoiding arrangement does not seem to me to warrant reducing whatever deduction is permitted by s. 51. The Commissioner did argue unsuccessfully before Owen J. that, independently of s. 260, the amount of £19,777 should not be regarded as an outgoing necessarily incurred in gaining or producing the taxpayer's assessable income. His Honour rejected this submission, relying upon *Ronpibon Tin N.L. and Tongkah Compound N.L. v. Federal Commissioner of Taxation*.[4] With this I agree. Moreover, if the application of s. 260 could have any effect in this case, it is at this point that one would expect to find that effect in revealing that what had been made to appear as a necessary outgoing was really something different. As I have said, however, I have not found any basis for such a conclusion. Accordingly, it seems to me that his Honour's decision that the purchase money paid by the taxpayer to Breckler Pty. Ltd. could not be apportioned really disposed of this appeal because any possible application of s. 260 did not expose any new situation affecting that conclusion. Although not so expressed, his Honour's decision really amounted, ***442** as between the Commissioner and the taxpayer, to avoiding the contracts between the taxpayer and Breckler Pty. Ltd. and to substituting the taxpayer for Breckler Pty. Ltd. in the contracts made by that company with the taxpayer's suppliers. If the result is looked at in this way, it again illustrates that s. 260 has been treated as giving the Commissioner some power to modify when its sole function is to destroy.

His Honour also rejected the Commissioner's contention that the dealings between the taxpayer and Breckler Pty. Ltd. were sham transactions. Again I agree with his Honour.

For the foregoing reasons I consider this appeal should be allowed and that the assessment should be amended by allowing as a deduction from assessable income an additional sum of £19,777.

[3] (1962) 111 C.L.R., at p. 436.

[4] (1949) 78 C.L.R. 47.

CRIDLAND v. FEDERAL COMMISSIONER OF TAXATION [1977] HCA 61; (1977) 140 CLR 330 Income Tax (Cth)

HIGH COURT OF AUSTRALIA
Barwick C.J.(1), Stephen(2), Mason(3), Jacobs(4) and Aickin(5) JJ.

…
HEARING
Sydney, 1977, August 17, 18: November 30. 30:11:1977
APPEAL from the Supreme Court of New South Wales.

DECISION
Nov. 30.
MASON J. In the Supreme Court of New South Wales, Mahoney J. dismissed the appellant's appeals against assessments to income tax for the years ended 30th June 1970, 1971 and 1972. The issue in the appeals was whether the appellant was entitled to the benefit of the averaging provisions contained in Div. 16 of Pt III of the Income Tax Assessment Act 1936, as amended ("the Act"). The appellant claimed the benefit of these provisions on the ground that he was an income beneficiary under certain trusts the trustee of which carried on the business of primary production. The appellant relied particularly on s. 157 (3) of the Act which provides: "(3) For the purposes only of determining whether a person is carrying on a business of primary production, a beneficiary in a trust estate shall, to the extent to which he is presently entitled to the income or part of the income of that estate, be deemed to be carrying on the business carried on by the trustees of the estate which produces that income." His Honour held that s. 260 of the Act applied so as to deny to the appellant the benefit of the averaging provisions on the ground that the appellant was party to an arrangement which had both the purpose and the effect of altering the incidence of income tax, or which would have that effect if it operated according to its terms. (at p335)

2. The principal issue in the appeals to this Court is whether the primary judge was correct in so deciding. A second question ….

3. According to the undisputed findings of the primary judge, Mr. D. P. O'Shea, a Brisbane accountant versed in the arts of tax minimization, who was anxious to engage in primary production through companies controlled by himself and his family, hit upon a plan which would advantage him and his companies and minimize the income tax payable by those who joined in the plan. This plan involved the acquisition of land by an O'Shea company and the creation of a trust or trusts by which the trustee would be authorized to carry on the business of primary production. The moneys required were to be lent by way of the O'Shea companies. On the termination of the trusts their assets would pass to the O'Shea interests. The trusts were to be so drawn and the business so conducted that the income derived from it would be available for distribution to persons who were interested in obtaining the benefit of the averaging provisions and who would be willing to pay for that benefit. (at p335)

4. To attract persons to become income beneficiaries pamphlets were distributed among university students in New South Wales, Queensland and Victoria. More than 5,000 university students became registered under the No. 1 trust. A number of trusts were established in execution of the plan. (at p335)

5. The appellant became registered as

an income beneficiary under the No. 2 trust and under the No. 4 trust. The No. 2 trust was constituted by a deed dated 13th January 1969, a sum of $1,000 being paid to the trustee, Glenrich Ranch Pty. Ltd., by the settlor to be held and applied in accordance with the trusts constituted in the deed. The trusts were to endure for twenty-one years and on their expiration the assets were to be held in trust for D. P. O'Shea (cl. 2 (a)). The right to receive income was divided into 5,000 units which were to be allotted in the first instance to Helen Audrey Meredith 4,999 units and Neville Keith Meredith one unit. The rights of income beneficiaries were expressed to be assignable by an instrument in approved form (cll. 2 (c) and 4 (d)) but the trustee was only required to account to an income beneficiary registered at any particular date and was not required to be concerned with equities or other interests of other persons (cl. 2 (c)). The registration of an income beneficiary could not be effected unless and until he satisfied the trustee that he had donated a sum of not less than one dollar to an institution, fund or body as defined by s. 78 of the Act or which had been approved by a students' representative council of a university (cl. 4 (f)). (at p336)

6. The trustee had the right to distribute to the income beneficiaries the whole or any part of the trust or to retain and accumulate the whole or any part of the income of the trust (cl. 5 (a)). In the event that the trustee decided to distribute the income, it had a discretion to distribute the income between any one or more of the income beneficiaries and in such shares as it in its absolute and uncontrolled discretion might think fit (cl. 5 (b)). (at p336)

7. The No. 4 trust was constituted by a deed dated 16th January 1970. Glenrich Ranch Pty. Ltd. was again constituted as the trustee and the settlor paid to it the sum of $100 to be held and applied upon the trusts set forth in the deed. The terms of the No. 4 trust were substantially similar to those of the No. 2 trust. However, there were some differences. The income units numbered 10,000 and the initial unit holders were to be Mr. R. M. O'Shea as to 4,972 units and a large number of selected individuals who were to hold one unit each. It was also provided that the beneficiaries should be those persons registered in the books of the trust (cl. 4 (a)). No person was to be registered in the books of the trust as an income beneficiary unless and until the trustee was satisfied that the transfer of the unit in question had been made to him (cl. 4 (f)). (at p336)

8. The provision as to the payment of income to income beneficiaries was differently expressed in cl. 5. It provided that the registered holder of each income unit should be entitled to be paid in each income year a one ten-thousandth part of the net annual income of the trust. (at p336)

9. Mahoney J. observed that it was not altogether clear what advantage Mr. D. P. O'Shea and his associates sought to obtain from the plan. It does not seem to have been thought that the sum of one dollar to be paid by persons acquiring a unit under the No. 2 trust would result in any benefit to the O'Shea interests. In fact the sum was seldom collected. To overcome this gap in the execution of the plan Mr. O'Shea and his associates paid $500 to a body of the kind mentioned in s. 78 to cover those persons who failed to make such a payment. (at p337)

10. In the pamphlets mention was made of the payment by subscribers of an annual fee which was calculated after the first year by reference to the amount of tax saved. However, it was

pointed out in the pamphlets that there was no means by which the fee could be legally recovered and that the promoters were relying on the honesty of the beneficiaries. Needless to say no fees have been paid. (at p337)

11. In the early part of 1969 the Glenrich company as trustee set in motion preparations for the carrying on of the business of a primary producer. In June 1969 the appellant applied for an income unit in the No. 2 trust. He stated that he joined the trust so as to be able to average his income for tax purposes. He agreed that he did not expect to receive any substantial sum by way of income from the trust. He did not pay the sum of one dollar or any other sum in connexion with his application. Following receipt of his application Mr. R. M. O'Shea purported to transfer an income unit in the No. 2 trust to the appellant. It is not in dispute that Mr. O'Shea held an income unit in the trust and that the appellant was entered as a registered holder of the unit in the books of the trust. Later in June 1969 the appellant received one dollar from the trustee and it is not disputed that this payment is to be regarded as a distribution of income by the trustee from the business of primary production which it carried on. (at p337)

12. In January 1970 the No. 4 trust was established and at about this time the No. 2 trust ceased to operate. In June 1970 the taxpayer received from the trustee of the No. 4 trust the sum of one dollar and it is not disputed that this represented a distribution of income by the trustee from the business of primary production which it carried on. In July 1971 a further distribution of this kind was made by the trustee of the No. 4 trust. (at p337)

13. Although the very restricted operation conceded to s. 260 by the course of judicial decision and the generality of the language in which the section is expressed stand in high contrast, the construction of the section is now settled. It is therefore a source of some surprise that it continues to be relied upon when its defects and deficiencies have been apparent for so long. More than twenty years ago Kitto J. said in Federal Commissioner of Taxation v. Newton [1957] HCA 99; (1956) 96 CLR 577, at p 596 : "Section 260 is a difficult provision, inherited from earlier legislation, and long overdue for reform by someone who will take the trouble to analyse his ideas and define his intentions with precision before putting pen to paper." This message, despite its clarity, seems not to have reached its intended destination. (at p338)

14. It was recently decided in Mullens v. Federal Commissioner of Taxation [1976] HCA 47; (1976) 135 CLR 290 that even if a transaction has been entered into for the purpose of diminishing a taxpayer's liability to tax by securing to the taxpayer a benefit or advantage conferred by a specific provision of the Income Tax Assessment Act, e.g. an allowable deduction, which but for the transaction would not have accrued to the taxpayer, the transaction will not be caught by s. 260 if it satisfies the provision in question. (at p338)

15. Barwick C.J. said (1976) 135 CLR, at p 298 : "The Court has made it quite plain in several decisions that a taxpayer is entitled to create a situation to which the Act attaches taxation advantages for the taxpayer. Equally, the taxpayer may cast a transaction into which he intends to enter in a form which is financially advantageous to him under the Act. W. P. Keighery Pty. Ltd. v. Federal Commissioner of Taxation [1957] HCA 2; (1957) 100 CLR 66 and Federal Commissioner of Taxation v. Casuarina Pty. Ltd. [1970] HCA 30;

(1971) 127 CLR 62 amply demonstrate this and are, in my opinion, very relevant to the resolution of this case." Later, the Chief Justice said (1976) 135 CLR, at p 302 : ". . . there will be no relevant alteration of the incidence of tax if the transaction, being the actual transaction between the parties, conforms to and satisfies a provision of the Act even if it has taken the form in which it was entered into by the parties in order to obtain the benefit of that provision of the Act. It would be otherwise if there had been some antecedent transaction between the parties, for which the transaction under attack was substituted in order to obtain the benefit of the particular provisions of the Act." In the same case Stephen J. said (1976) 135 CLR, at p 318 : "The principle in W. P. Keighery Pty. Ltd. v. Federal Commissioner of Taxation [1957] HCA 2; (1957) 100 CLR 66 is not to be confined to cases where the Act offers to the taxpayer a choice of alternative tax consequences either of which he is free to choose; it was there held that merely because the taxpayer chose, quite deliberately, the alternative most advantageous to it from a tax standpoint it did not thereby attract s. 260. So, too, if no question arises of a choice between two courses of conduct but, instead, the Act offers certain tax benefits to taxpayers who adopt a particular course of conduct; the adoption of that course does not establish any purpose or effect such as is described in s. 260." (at p338)

16. The primary judge, whose judgment was delivered on 13th May 1976, did not have the benefit of this Court's decision in the Mullens Case (1976) 135 CLR 290, which was handed down subsequently on 9th September 1976. His Honour decided this case by reference to what he described as the "choice principle" for which he treated the Keighery Case [1957] HCA 2; (1957) 100 CLR 66 as authority. There the Court decided that s. 260 has no application to a case in which the Act offers to the taxpayer a choice of alternative tax consequences either of which he is free to choose, as for example, in the case of a company whether it should be constituted as a private or non-private company with the different taxation consequences appropriate to each class of company. His Honour went on to say that s. 157 does not present to a taxpayer an alternative in the sense in which that term was used in the Keighery Case because in his opinion the section is merely a machinery provision and does not constitute an element in the prescription of two different and alternative bases of taxation between which the taxpayer is free to choose. (at p339)

17. The decision in the Mullens Case and the passages from the judgments to which I have referred show that the principle which underlies the Keighery Case is not as narrow as the primary judge supposed it to be. It is not confined to cases in which the Act offers two alternative bases of taxation; it proceeds on the footing that the taxpayer is entitled to create a situation by entry into a transaction which will attract tax consequences for which the Act makes specific provision and that the validity of the transaction is not affected by s. 260 merely because the tax consequences which it attracts are advantageous to the taxpayer and he enters into the transaction deliberately with a view to gaining that advantage. (at p339)

18. The distinction drawn by Lord Denning in Newton v. Federal Commissioner of Taxation [1958] UKPCHCA 1; (1958) 98 CLR 1, at p 8 (1958) AC 450, at p 466 , between arrangements implemented in a particular way so as to avoid tax and transactions capable of explanation by

reference to ordinary business or family dealing has not been regarded as the expression of a universal or exclusive criterion of operation of s. 260. Lord Denning's observations were applied neither in the Mullens Case [1976] HCA 47; (1976) 135 CLR 290 nor in the subsequent case of Slutzkin v. Federal Commissioner of Taxation [1977] HCA 20; (1977) 138 CLR 164 . (at p339)

19. The Newton Case [1958] UKPCHCA 1; (1958) 98 CLR 1, at p 8 (1958) AC 450, at p 466 and Ellers Motor Sales Pty. Ltd. v. Federal Commissioner of Taxation (1969) 121 CLR 665; [1972] HCA 17; (1972) 128 CLR 602 were cases in which it was held that the moneys received by the taxpayers were or were deemed to be dividends, the impugned transactions being designed to endow the moneys received with a different character and failing in this purpose by reason of the destructive operation of s. 260. The conclusion that the receipts were dividends must be treated as a finding of fact or as resting on the use of s. 260 as a charging provision, for the receipts would not have been liable to tax under the ordinary provisions of the Act unless they could be characterized as dividends. (at p340)

20. Two points may be made. The first is that the observations of Lord Denning to which I have referred were made in a case in which the Privy Council and this Court appear to have thought that the impugned transactions were cloaking payments which were otherwise income because they were dividends or because they had that character by virtue of s. 260, once the transactions were annihilated. The second is that s. 260 is not a charging provision, as Lord Diplock has had occasion to note more recently in speaking for the Judicial Committee in Europa Oil (N.Z.) Ltd. v. Inland Revenue Commissioner (1976) 1 WLR 464, at p 475; (1976) 1 All ER 503, at p 511 . (at p340)

21. The transactions into which the appellant entered in the present case by acquiring income units in the trust funds in question were not, I should have thought, transactions ordinarily entered into by university students. Nor could they be accounted as ordinary family or business dealings. They were explicable only by reference to a desire to attract the averaging provisions of the statute and the taxation advantage which they conferred. But these considerations cannot, in light of the recent authorities, prevail over the circumstance that the appellant has entered into transactions to which the specific provisions of the Act apply, thereby producing the legal consequences which they express. (at p340)

22. Accordingly, it is my view that s. 260 has no application to this case. (at p340)

23. The respondent's second submission is ….

24. In the result I would allow the appeals. (at p 341)

[Barwick CJ, Stephen J, Jacobs J, and Aickin J agreed,]

ORDER

Appeals allowed with costs.

Orders of the Supreme Court of New South Wales set aside and in lieu thereof order that the appeals to that Court be allowed with costs. …

Common Law Theory

Edited by

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3

The Principles of Legal Reasoning in the Common Law

MELVIN A. EISENBERG

The purpose of this chapter is to develop the principles that should, and largely do, govern legal reasoning in the common law.[1] By the common law, I mean judge-made law, and by judge-made law, I mean law made by the courts taken as a whole.

I. Four Foundational Ideas

I begin with four ideas that provide the foundation of the principles developed in this chapter: (1) courts should make law concerning private conduct in areas where the legislature has not acted, (2) the principles of legal reasoning turn on the interplay between doctrinal propositions and social propositions, (3) legal rules can be justified only by social propositions, (4) consistency in the common law depends on social propositions.

A. Courts Should Make Law

The first foundational idea is that courts should make law concerning private conduct in areas where the legislature has not acted. Like other complex institutions, common law courts serve several social functions, but two of these are paramount. The first concerns the resolution of private disputes. The second is the enrichment of the supply of legal rules to empower and govern private conduct. Our society has an enormous demand for legal rules that private actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. The capacity of a legislature to generate legal rules is limited. Moreover, much of that capacity must be allocated to the production of public-law rules and to matters such as budgets, taxation, governmental organization, and public administration. Furthermore, state legislatures are normally not staffed in a manner that enables them to perform comprehensively the function of establishing law

[1] For ease of exposition, in the balance of this chapter I will refer to legal reasoning in the common law simply as legal reasoning.

to empower and govern private conduct. Finally, in many areas the flexible form of a judge-made rule is preferable to the canonical form of a legislative rule.

Accordingly, it is socially desirable that the courts act to enrich the supply of legal rules that concern private conduct – not by taking on law making as a freestanding function, but by attaching much greater emphasis to the establishment of legal rules than would be necessary if the courts' sole function were the resolution of disputes.

An important corollary of the idea that it is socially desirable for judges to make law is that courts should utilize methods of legal reasoning that are easily replicable by the profession as a whole. If the methods of legal reasoning utilized by courts are easily replicable by the profession as a whole, then the profession normally can determine the law and give advice on that basis. If, however, the methods of legal reasoning utilized by courts are not easily replicable, then it will be difficult for the profession to determine the law. Such a state of affairs would vitiate the judicial lawmaking function.

B. Doctrinal and Social Propositions

The second foundational idea is that the principles of legal reasoning turn on the interplay between doctrinal propositions and social propositions.

By *doctrinal propositions*, I mean propositions that purport to state legal rules and are found in or can be derived from sources that are generally regarded by the legal profession as expressions of legal doctrine. One group of doctrinal sources consists of official texts that are regarded as binding on the deciding court, such as statutes and precedents of the deciding court's jurisdiction. A second group of doctrinal sources consists of official texts that are not binding on the deciding court, such as precedents in other jurisdictions and statutes that are applicable only by analogy. A third group consists of texts written by members of the profession, such as Restatements, treatises, and law reviews. Propositions that take the form of rules and are found in a given type of source are doctrinal if in the view of the legal profession it is proper to invoke propositions of that type as rules to decide cases.

By *social propositions*, I mean all propositions other than doctrinal propositions. The types of social propositions most salient to the common law are moral norms, policies, and empirical propositions (i.e., propositions that describe the way in which the world works, such as statements concerning individual behavior and institutional design; statements that describe aspects of the present world, such as trade usages; or statements that describe historical events, such as how a trade usage developed).

Not every social proposition can properly be taken into account by a court in making law. For reasons I have developed elsewhere,[2] normally in making

[2] Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988), 14–42.

common law rules, the courts can properly take into account only (1) moral standards that claim to be rooted in aspirations for the community as a whole and that either can fairly be said to have substantial support in the community, can be derived from moral standards or policies that have such support, or appear as if they would have such support; (2) policies that claim to characterize states of affairs as good for the community as a whole and have comparable support; and (3) experiential propositions that are supported, or appear to be supported, by the weight of informed opinion. In the balance of this chapter, when I refer to social propositions I mean this universe of social propositions.[3]

A crucial difference between doctrinal propositions and social propositions is that doctrinal propositions are invoked by the legal profession *as* legal rules, while social propositions are invoked as *reasons for* legal rules. For example, there is a well-established rule that a simple donative promise (a promise to make a gift that has not been relied upon, is not based on a preexisting moral obligation, and is not in some special form, such as under seal) is unenforceable. If we want to show *that* a simple donative promise is unenforceable, we invoke doctrinal propositions. If we want to show *why* there should be a rule that simple donative promises are unenforceable, we invoke social propositions.

To illustrate, suppose a court in a given state is asked to decide whether reliance makes a donative promise enforceable. There is no case in the state on that precise issue, although old cases held that donative promises are unenforceable, but without having considered the possible effect of reliance. However, Section 90 of the *Restatement of Contracts* has adopted the rule that relied-upon donative promises are enforceable, and courts in many or most other states have adopted the rule embodied in Section 90. If the deciding court proposes to adopt that rule, it may publicly reason in one or both of two ways. First, the court may adduce the social propositions that underlie the rule embodied in Section 90 and the out-of-state cases, and then state that it agrees with those propositions and therefore adopts the rule. Second, the court may simply invoke the rule adopted in Section 90 and the out-of-state cases, and then apply that rule to decide the case at hand.

C. Legal Rules Can Be Justified Only by Social Propositions

The third foundational idea is as follows: There are two very different kinds of justification in legal reasoning. The first is justification for *following* legal rules. The second is justification *of* legal rules. A court may be justified in following a doctrinal rule on the ground that the rule can be identified as a legal rule – say

[3] Some commentators argue that courts should employ some different universe of social propositions – such as the moral and policy propositions that the court believes are best, or that best cohere with the existing body of law – in establishing common law rules. For the most part, the principles developed in this chapter apply even if common law courts should properly employ the propositions in one of these alternative universes.

because the rule has been adopted by the legislature or by the highest court of the deciding court's jurisdiction. However, the fact that a rule can be identified as a legal rule does not justify the rule itself. For example, there is a rule that a bargain is consideration. The existence of the bargain rule justifies a court in following the rule and enforcing bargains. However, the existence of the rule cannot justify the rule. Only social propositions can justify the bargain rule.

D. Consistency in Legal Reasoning

The fourth foundational idea is that consistency in legal reasoning depends on social propositions, not formal logic.

Begin with the consistency of two precedents. Formal logic can tell us that, and only that, the different treatment of identical cases is inconsistent. However, no two cases *are* identical, and formal logic cannot determine what differences between cases justify different results. Therefore, if the only criterion of consistency were formal logic, the concept of consistency would have little or no meaning in making a determination whether two precedents are consistent. But consistency does have meaning in making that determination, and that meaning depends on social propositions. For purposes of legal reasoning, two precedents are consistent if they reach the same results on the same relevant facts, and inconsistent if they reach different results on the same relevant facts. What facts are relevant turns on social propositions. For example, as a matter of social propositions – and only as a matter of social propositions – it is often relevant in determining liability for causing an accident that the defendant was intoxicated, but seldom if ever relevant that the defendant was wearing a red hat. We could think of societies in which it would be relevant that a party to an accident was wearing a red hat. For example, it might conceivably be relevant in the Vatican. But under the social propositions of our society, it would not be relevant.

Next, consider the consistency of a rule and an exception to the rule. Whether a rule and an exception are consistent also depends on social propositions. A rule and an exception are consistent if, and only if, one of the following conditions is satisfied:

(1) the social proposition, *SP1*, that supports the rule does not extend to the type of case covered by the exception,
(2) the exception is justified by a social proposition, *SP2*, and there is good social reason, in the type of case at hand, to allow *SP2* either to trump *SP1* or to figure, along with *SP1*, in the creation of an exception that is a vector of both social propositions.

To illustrate, take the rule that bargains are enforceable. There are a number of exceptions to this rule. The exceptions are consistent with the rule only if the exceptions are based on social propositions. For example, one standard exception to the rule is that a bargain made by a minor is not enforceable against

the minor. This exception is consistent with the bargain rule because, and only because, the social propositions that support the bargain rule do not support the application of the rule to bargains with minors. One social proposition that supports the bargain rule is that actors are normally good judges of their own interests. Under other social propositions, however, this reason does not extend to minors. Therefore, the bargain rule should be and is made subject to an exception for minors. In contrast, suppose a court were to hold that a bargain made by a clergyman is not enforceable against the clergyman, even if the bargain is not religious in nature (that is, even if it does not concern issues of dogma, or the allocation of authority within a church, or the like). This exception would be inconsistent with the rule. That inconsistency, however, would not be because of formal logic but because social propositions would not support a clergyman exception for this purpose. It is easy to imagine social propositions that would support clergyman exceptions for other purposes or in other societies or times. In the Middle Ages, for example, clergymen could be prosecuted for a felony only in ecclesiastical courts, and therefore they were not subject to capital punishment. Even today, religious bargains made by clergymen might well be unenforceable. But social propositions in contemporary society would not support a clergyman exception for secular bargains. That is the reason, and the only reason, why such an exception would be inconsistent with the bargain rule.

A similar analysis normally applies to the consistency of two rules, as opposed to a rule and an exception. Two rules will be consistent in a strong sense if, and only if, one of the following conditions is satisfied:

(1) the two rules are supported by the same social propositions,
(2) each rule is supported by different social propositions and the social propositions are not in conflict, either because the social propositions that support one rule have no bearing on the other, or because they do have a bearing but would not lead to a different rule,
(3) the two rules are supported by different social propositions that are in conflict in certain cases, in the sense that, taken alone, the different social propositions would lead to different rules to govern those cases. However, each social proposition has a range of applicability in which it does not conflict with the other, and there is good reason why, in the cases in which the social propositions conflict, either one social proposition should be subordinated to the other, or one or both rules should reflect the conflicting social propositions in different ways.

It is necessary, however, to draw a distinction here between a strong and a weak meaning of consistency between legal rules. Two legal rules are consistent in a strong sense only if one of the three conditions is satisfied. Even if none of those conditions is satisfied, however, two legal rules may be said to be consistent in a weak sense if one rule falls within a deep doctrinal domain that is traditionally taken to justify differentiations that are not justified by social propositions. Examples include the special treatment that is often afforded to

transactions in the domains of the real estate and maritime worlds. These two deep doctrinal domains may render different treatment of two socially comparable transactions consistent in a weak sense on the ground that one transaction involves personal property and one involves real property, or one transaction involves navigable waters and the other does not. However, the number of such domains is very limited. Domains of this sort tend to dissolve over time, because they provide only an impoverished justification for different treatment of socially comparable transactions. For example, a well-known trend in modern law is the gradual dissolution of the distinction between real estate leases and other contracts.

When the four foundational ideas are combined, they seem to give rise to a basic dilemma in legal reasoning. On the one hand, we want the common law to consist of the rules that are the best possible rules on the basis of social propositions. I will call this goal the *ideal of social congruence*. On the other hand, we want the law to be reliable. To achieve reliability, and to make judicially adopted rules *legal* rules, weight must be given to doctrine. I will call this goal the *ideal of doctrinal stability*. However, when a doctrinal rule is invoked, typically it is invoked not on the ground it is the best possible rule, but because of the manner in which it was adopted – for example, in a binding precedent. Indeed, the fact that a rule is doctrinal can be significant only if the rule is not the best possible rule. If the rule were the best possible rule, the fact that the rule was also doctrinal would bring nothing to the table. But if rules are to be taken into account even when they are not the best possible rules, the ideal of doctrinal stability and the ideal of social congruence are in tension. How can this tension be reconciled?

II. The Basic Principle of Legal Reasoning

To answer this question, I begin by constructing a hierarchy of rules under the ideal of social congruence. First are rules that are fully congruent with social propositions. These are the best possible rules under that ideal. Next are rules that are not fully congruent with social propositions but are substantially congruent with such propositions. These are reasonably good rules, although not the best possible rules. Last are rules that are substantially incongruent with applicable social propositions. These are not even reasonably good rules; they are poor rules.

Given this differentiation, the principle that should be used to resolve the tension between the ideals of social congruence and doctrinal stability, and to guide legal reasoning in the common law, is as follows: A doctrinal rule should be consistently applied and extended if it is the best possible rule because it is fully congruent with social propositions. A doctrinal rule should also be consistently applied and extended, even if it is not the best possible rule, if it is a reasonably good rule because it is substantially congruent with social

propositions. However, a doctrinal rule should not be consistently applied and extended if it is a poor rule because it is not even substantially congruent with social propositions.

I call this principle the *basic principle of legal reasoning*. This principle is descriptive of legal reasoning in the common law, although it is typically implicit rather than explicitly. The principle is also normatively desirable, because it appropriately reconciles the tension between the ideal of doctrinal stability and the ideal of social congruence by giving appropriate weight to each ideal.

First, the ideal of doctrinal stability is and should be given weight, because predictability has social value. This weight is reflected in the branch of the principle that the courts should not decline to follow a rule as long as it is a reasonably good rule, even if it is not the best possible rule. Small differences between the best possible rule and a reasonably good rule are likely to be highly debatable, difficult to perceive, or both. Therefore, if the courts failed to follow a doctrinal rule just because the rule was modestly less desirable than a competing alternative, it would be difficult to put reliance on doctrine. To put this differently, at least over the short term, the value of making *minor* improvements in legal rules is normally outweighed by the value of doctrinal stability.

The ideal of social congruence should be and is given weight, because the courts should not consistently apply and extend a common law rule that is not even a reasonably good rule. The value of *major* substantive improvements in legal rules normally outweighs the value of doctrinal stability.

III. Modes of Legal Reasoning

In this part, I will elaborate the basic principle of legal reasoning, together with the four foundational ideas, to provide normative and positive accounts of several specific modes of legal reasoning. Legal reasoning falls into a number of specific modes, such as reasoning from precedent, distinguishing, reasoning by analogy, overruling, reasoning from principle, and reasoning by the use of hypotheticals. In this chapter, I will examine only reasoning from precedent, distinguishing, and reasoning by analogy. These are the workhorses of legal reasoning. Furthermore, these modes are intimately connected: none can be understood in isolation from the others.

A. Reasoning from Precedent

I first consider reasoning from precedent. The *end point* of reasoning from precedent involves the application, by the deciding court, of the rule for which a precedent stands. Although rule application may involve various kinds of difficulties. I will focus here not on the end point of reasoning from precedent but on the *starting point* of such reasoning. The starting point of reasoning from

precedent is the establishment, by the deciding court, of the rule for which a precedent stands.[4]

Here we arrive at a crucial dichotomy, because there are two entirely different and indeed opposed approaches by which a deciding court may establish the rule for which a precedent stands. I will call these the adopted-rule approach and the result-based approach.

Under the adopted-rule approach, the rule for which a precedent stands is the rule the precedent explicitly adopted (i.e., explicitly stated to be the rule), provided the rule was relevant to the issues raised by the dispute before the court. Under the result-based approach, the rule for which a precedent stands is whatever rule that was strictly necessary, on the facts of the decision, to reach the result of the decision. A common corollary of this approach is that the rule deemed necessary to reach the result in a precedent is the narrowest possible rule that would justify the result. To put this differently, under the adopted-rule approach what counts is what the precedent court said, whereas under the result-based approach what counts is what the precedent court did.

The result-based approach accords with the way courts sometimes talk about precedents. As a full description of judicial practice, however, the result-based approach comes up very short. Deciding courts almost invariably base their determination of the rule that a precedent stands for on the rule that the precedent court explicitly adopted, not on the rule that was strictly necessary to reach the result on the fact. Indeed, courts that reason from precedent more often than not simply quote, paraphrase, or summarize the rules explicitly adopted in the precedent. And in basing their decisions on the rule adopted by a precedent court, deciding courts seldom analyze whether that rule had an ambit that was broader than was necessary for the decision. Anyone who reads cases will observe this phenomenon.

There is a good reason why courts should and normally do use the adopted-rule approach rather than the result-based approach to establish the rule of a precedent. The adopted-rule approach usually (although not always) enables the courts and the profession to establish the rule of a precedent with relative ease. In contrast, widespread use of the result-based approach would render the law highly uncertain, because normally many different rules can be constructed to explain the result of a precedent, and there is no mechanical way in which to privilege one of those rules over the others.

This problem is well illustrated by the famous British case *Donoghue v. Stevenson*.[5] The plaintiff and a friend were together in a café, and the friend purchased a bottle of ginger beer for the plaintiff. The bottle was opaque. After the plaintiff drank part of the ginger beer, she discovered a decomposed snail in the bottle. She suffered shock and severe gastroenteritis and sued the manufacturer.

[4] Many rules are established by a series of precedents rather than a single precedent. However, for ease of exposition, in this chapter I will usually treat a rule established by precedent as if it were established in a single precedent.

[5] *Donoghue v. Stevenson*, [1932] AC 562.

The House of Lords held in her favor, three to two. Lord Atkin stated that "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."[6]

Before *Donoghue*, it was a well-established rule of law that the manufacturer of a product was liable only to its immediate buyers for injuries caused by its negligence in producing the product. It is clear that *Donoghue* abandoned that rule, because the House of Lords held that the manufacturer was liable to the plaintiff, who was not the product's immediate buyer. Under a result-based approach, however, it would be far from clear what rule the *Donoghue* case stands for, because as Julius Stone pointed out,[7] under such an approach the facts in *Donoghue*, and therefore the rule necessary to justify the result, could be characterized at vastly different levels of generality. For example, the agent of harm in that case could be characterized as a thing, a food product, or a food product in an opaque container. The defendant could be characterized as a manufacturer, a manufacturer of nationally distributed goods, or a food manufacturer. The injury could be characterized as a physical injury, an emotional injury, or simply an injury. Under a result-based approach, therefore, *Donoghue* could stand for almost numberless rules constructed from permutations of the various facts at various levels of generality – for example, for the rule that if a manufacturer of nationally distributed goods that are intended for human consumption produces the goods in a negligent manner, it is liable for resulting physical injury; or for the rule that if a food manufacturer is negligent, it is liable for any resulting injury if it packaged the food in such a way that the defect was concealed.

The descriptive power of the adopted-rule approach is much greater than that of the result-based approach. In the great majority of cases, a deciding court simply applies the rule explicitly adopted in a precedent, without worrying about whether the precedent court could have adopted one or more other rules. But despite its predominance, the adopted-rule approach does not describe all judicial practice. Not infrequently, courts *do* use the result-based approach to reformulate the rule that was explicitly adopted by the precedent court. In some cases, a court employs a result-based approach on a relatively modest level, to distinguish a precedent away. In other cases, including some of our most important cases, a court employs a result-based approach on a grander scale, to overturn the rule that a precedent explicitly states, while purporting to follow the precedent – a use of the result-based approach that I will refer to as *transformation*.

[6] *Donoghue*, [1932] AC at 599.

[7] Julius Stone, *The Ratio of the Ratio Decidendi*, 22 Modern Law Review 597 (1959). See also A.W.B. Simpson, *The Ratio Decidendi of a Case*, 20 Modern Law Review 413 (1957); A.W.B. Simpson, *The Ratio Decidendi of a Case*, 21 Modern Law Review 155 (1958); A.W.B. Simpson, *The Ratio Decidendi of a Case*, 22 Modern Law Review 453 (1959).

Judge Cardozo's famous opinion in *MacPherson v. Buick Motor Co.*[8] provides a classic illustration of the way in which a precedent can be made to stand for more than one rule under the result-based approach and therefore can be completely transformed to stand for a rule much different from the rule explicitly adopted in the precedent.

From an early time, the established rule in New York, like the established rule in England prior to *Donoghue*, was that a manufacturer was liable only to its immediate buyers for injury caused by its negligence in producing a product. In *Thomas v. Winchester*,[9] decided in 1852, the established rule was affirmed, but reformulated, because an exception to the rule was created. The defendant in that case had negligently labeled a jar of belladonna, a poison, as dandelion, a medicine. The plaintiff bought the jar, thinking it was dandelion, drank its contents, and became seriously ill. The court first held that a manufacturer is normally liable in negligence only to its immediate buyer: "If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. cannot recover damages against A., the builder. A's obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life."[10] Nevertheless, the court in *Thomas v. Winchester* imposed liability on the manufacturer, on the ground that a manufacturer *is* liable to persons other than its immediate buyer if its negligence put human life in imminent danger.

After the decision in *Thomas v. Winchester*, the New York cases all purported to follow the rule that a manufacturer who negligently produced a defective product was liable only to its immediate buyer unless the product was of a kind that is "imminently" or "inherently" dangerous, like poison. For example, in *Loop v. Litchfield*,[11] decided in 1870, the defendant had negligently constructed the flywheel of a circular saw. After the circular saw had been leased out by the original buyer, it flew apart and fatally injured the lessee. The plaintiffs alleged that the circular saw, like the poison in *Thomas v. Winchester*, was a dangerous instrument. The court rejected this argument and held that the manufacturer was not liable to the lessee. In *Losee v. Clute*,[12] decided in 1873, the defendant had negligently constructed a steam boiler that exploded and injured property of the plaintiff, who was not the defendant's immediate buyer. Again the court held that the manufacturer was not liable. In contrast, in *Devlin v. Smith*,[13] decided in

[8] *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).
[9] *Thomas v. Winchester*, 6 N.Y. 397 (1852).
[10] *Thomas*, 6 N.Y. at 408.
[11] *Loop v. Litchfield*, 42 N.Y. 351 (1870).
[12] *Losee v. Clute*, 51 N.Y. 494 (1873).
[13] *Devlin v. Smith*, 89 N.Y. 470 (1882).

1882, the defendant had negligently constructed a painters' scaffolding, which then collapsed and caused the death of a worker. The court reiterated the rule that "The liability of the builder or manufacturer for [defects caused by negligence] is, in general, only to the person with whom he contracted." It nevertheless held the defendant liable on the ground that the defect rendered the scaffolding imminently dangerous. Similarly, in *Statler v. George A. Ray Manufacturing Co.*,[14] decided in 1909, the defendant had negligently constructed a restaurant-size coffee urn, which exploded and severely scalded the plaintiff, who had purchased the urn from a jobber. The court held the defendant liable on the ground that the urn was "inherently dangerous" and the defendant's negligence made it "imminently dangerous."

MacPherson was decided in 1916. The case grew out of injuries suffered by MacPherson as a result of the sudden collapse of a new Buick that he had purchased from a dealer. One of the car's wheels had been made of defective wood, and the car had collapsed because the spokes of the wheel had crumbled into fragments. MacPherson sued Buick. MacPherson won a jury verdict, and Buick appealed. Cardozo affirmed the judgment for the plaintiff on the basis of the following rule:

> We hold . . . that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. *If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.* . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.[15]

This formulation adopted the cloak of the previous rule, insofar as it made the manufacturer's liability turn on whether the product was "a thing of danger." However, the formulation completely changed the substance of the old rule. Under the formulation in *MacPherson* the issue became not whether a product is of a type that is inherently or imminently dangerous, but whether a product is dangerous if negligently made – and any product can be dangerous if negligently made. In substance, therefore, *MacPherson* adopted a straightforward negligence rule, under which the manufacturer of a defective product is liable to any person who would foreseeably be injured as a result of the manufacturer's negligence, whether or not that person is the manufacturer's immediate buyer.

However, Cardozo did not formally overrule the precedents. Instead, he used a result-based approach to transform the previous rule by a radical reconstruction of the precedents. *Thomas v. Winchester*, *Devlin v. Smith*, and *Statler v. Ray*, he concluded, supported the rule adopted in *MacPherson*, because all

[14] *Statler v. George A. Ray Manufacturing Co.*, 195 N.Y. 478, 88 N.E. 1063 (1909).
[15] *MacPherson*, 217 N.Y. at 389, 111 N.E. at 1053 (emphasis added).

those cases had imposed liability on a negligent manufacturer – never mind that they did so by stating a rule different from the rule that *MacPherson* adopted. *Loop v. Litchfield*, which had held in favor of the manufacturer of a defective circular saw, and *Losee v. Clute*, which had held in favor of the manufacturer of a defective steam boiler, were distinguished on the ground that on the facts of those cases the defendants were insulated by standard negligence defenses – even though those defenses were not the basis of the courts' decisions. Under all the circumstances of those cases, Cardozo suggested, there might not have been a lack of due care by the manufacturer, and even if there was, the manufacturer's immediate buyer had assumed or made himself responsible for the risk. By using the result-based approach, therefore, Cardozo was able to establish a rule that was based on the precedents but that was contrary to the rule the precedents had explicitly adopted.

In short, there are two completely different approaches to establish the rule for which a precedent stands, and these two methods often produce opposed rules. The availability of a choice between these two approaches might appear to allow courts almost unlimited discretion to establish the rule for which a precedent stands. In fact, however, this is not so, because that discretion is drastically cabined by the basic principle of legal reasoning, together with certain institutional considerations.

The principal institutional consideration is that it is desirable for judicial reasoning to begin with explicitly adopted rules. The traditional view of *stare decisis* stresses that a court's power to make law is reined in by the concept that what the court says is less important than what it does. In reality, however, as *Donoghue* illustrates, the result-based approach permits the construction of almost numberless rules from any single precedent. Therefore, if deciding courts were required or even encouraged to use that approach as a matter of course, the law would be extremely uncertain. In contrast, the adopted-rule approach tends to minimize judicial discretion and to maximize the replicability of judicial reasoning by the profession, because determining what rule a precedent explicitly adopted, although not always unproblematic, is a relatively straightforward enterprise in the typical case. Combining that institutional consideration with the basic principle of adjudication, the algorithm for establishing the rule of a precedent is as follows: When the case before a deciding court is covered by a rule explicitly adopted in a precedent that is at least a reasonably good rule, then the court should (and normally will) either apply the explicitly adopted rule or distinguish it in a way that is consistent with the rule. In contrast, when the case before a deciding court is covered by a rule adopted in a precedent that is a poor rule, then the court should (and normally will) either overrule the precedent, use the result-based approach to transform the rule, or distinguish the rule in an inconsistent way. It will be noted that since establishing the rule that a precedent stands for turns in significant part on the basic principle of legal reasoning, and that principle turns in significant part on social propositions, then contrary to some forms of legal positivism, what is the law – or at least, what is the common law – at any given time turns in significant part on social morality, social policy, and experience.

B. Distinguishing

In the mode of legal reasoning known as distinguishing, the court begins with a rule that was explicitly adopted in a precedent and is literally applicable to the case at hand. The court does not reject the rule, but neither does it apply the rule. Instead, the court determines that the adopted rule should be reformulated by carving out an exception that covers the case at hand. *Thomas v. Winchester* is an example. The court began with the adopted rule that a manufacturer of a product was liable only to its immediate buyers for injuries caused by its negligence in producing the product. That rule was literally applicable to the case at hand. The court did not reject that rule. However, the court reformulated that rule by carving out an exception for products that if negligently made are imminently dangerous to human life.

As shown in Part III.A., in establishing the rule of a precedent the courts have a choice – a constrained choice – between applying the adopted-rule approach and the result-based approach. Which approach should and normally will be used depends on the basic principle of legal reasoning – that is, on whether the adopted rule is at least a reasonably good rule, on the one hand, or a poor rule, on the other. Similarly, in distinguishing, the courts have a choice between consistent and inconsistent distinguishing. Which approach should and normally will be used also depends on the basic principle of legal reasoning.

1. **CONSISTENT DISTINGUISHING.** Consistent distinguishing of a rule explicitly adopted in a precedent occurs when as a result of some feature of the case at hand, one or both of two conditions are fulfilled:

(1) the social propositions that support the adopted rule do not apply to the case at hand,
(2) the case at hand implicates a social proposition that does not apply to the typical case covered by the adopted rule.

Consistent distinguishing therefore combines elements of both the adopted-rule and result-based approaches. On the one hand, the court begins with, and does not abandon, the explicitly adopted rule. On the other hand, the court concludes that the adopted rule was formulated without considering some feature that is salient in the case at hand, and that a reformulation of the adopted rule to take account of this feature is consistent with the result of the precedent.

An example is the case, discussed earlier, of bargains with minors. Suppose the explicitly adopted rule is that bargains are enforceable. Now a minor enters into a bargain. The court has never considered whether bargains involving minors should be enforceable against the minor. The adopted rule, that bargains are enforceable, is the best possible rule, and it is literally applicable to the case

at hand. However, the court should and would distinguish the case at hand, and reformulate the adopted rule, by making an exception for minors. That is so because the conditions for consistent distinguishing are fulfilled. The adopted rule rests in part on the social proposition that private actors are the best judges of their own interests. That proposition, however, does not apply to the case at hand, because another social proposition tells us that minors are often not good judges of their own interests.

2. **INCONSISTENT DISTINGUISHING.** Suppose now that a rule explicitly adopted in a precedent, which is literally applicable to the case at hand, is a poor rule – that is, the rule is substantially incongruent with social propositions. Under the basic principle of legal reasoning, the rule should not be followed. One mechanism that a court can employ to avoid following a poor rule is to use a result-based approach to transform the rule, as Cardozo did in *MacPherson*. A second mechanism is to overrule the precedents that have adopted the rule. That is often desirable, but for a variety of reasons it is a relatively drastic step. There is a third mechanism that the courts can and do employ to avoid following a poor rule. This mechanism is to *inconsistently* distinguish the rule adopted in the precedent – that is, to formulate an exception to the adopted rule that is not justified either by the social propositions that support the rule or by a social proposition that is implicated in the case at hand but does not apply to the typical case covered by the rule.

For example, under the legal-duty rule in contract law, a modification of a contract is unenforceable if one party's performance under the modification would consist only of an act that he was already obliged to perform.[16] This rule is based on the proposition that a party who promises to do only what he is already obliged to do gives up nothing and therefore has not made a real bargain.

The legal-duty rule is a poor rule.[17] Call a party who proposes to modify a contract in such a way that he will receive a higher price but will not render a greater performance, A, and call a party who agrees to such a modification, B. Many modifications are agreed to by persons in the position of B on the basis of a mutual belief that as a result of some initial misapprehension or later changed circumstance, fair dealing requires a readjustment of the contract to reflect either the original purpose of the contractual enterprise, or the equities as they now stand. Other modifications are agreed to by persons in the position of B to reciprocate for past modifications that A has made in B's favor, or because B expects that if he agrees to an appropriate modification in A's favor, A will reciprocate in the future by agreeing to a modification in B's favor where such a modification is equally appropriate. Accordingly, the legal-duty rule conflicts with the values of fair dealing, accommodation, and ongoing cooperation

[16] *Restatement (Second) of Contracts*, § 73 (1979).
[17] See, e.g., Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 University of California Los Angeles Law Review 1005, 1034–48 (1998).

between contracting parties, while an enforceability regime promotes those values. Similarly, the legal-duty rule inhibits the dynamic evolution of contracts and dynamic reciprocity between contracting parties, while an enforceability regime serves those ends. An enforceability regime also makes the contracting process more efficient, because it allows parties to enter into contracts without negotiating every possible contingency on an *ex ante* basis, knowing that if misapprehensions or changed circumstances do occur, they can be dealt with by dynamic modifications, *ex post*.

Because the legal-duty rule is a poor rule, a number of inconsistent exceptions have been made to it. Under one exception, the rule is inapplicable where A's contractual duty is owed to a party other than B.[18] This exception is inconsistent with the rule, because it makes bargains enforceable even when A promises only to do what he is already contractually obliged to do – just what the legal-duty rule prohibits. (If the legal-duty rule were justified on the ground that a threat to withhold performance of a contract puts a person in B's position under duress, then it might matter that the duty was owed to a third person, rather than to B. Classically, however, the application of the rule does not turn on whether B was under duress.)

Under another exception, the legal-duty rule is inapplicable where a modification consists of paying that part of a disputed debt that A admittedly owes.[19] This exception is inconsistent with the rule for the same reason that the third-party exception is inconsistent with the rule.

Still other courts have held the legal-duty rule inapplicable by concluding that in the cases before them, the parties had "rescinded" their prior contract and then made a "new" one[20] – a conclusion that can be drawn, if a court so desires, in any case that falls within the rule.

Most important, under modern law a modification is enforceable if it is fair and equitable in view of circumstances not anticipated when the original contract was made[21] – an exception that is both inconsistent with the legal-duty rule and that probably covers the great majority of the cases to which the rule purportedly applies. (The legislatures have also intervened. Many statutes provide that promises within the rule are enforceable if in writing,[22] and under the Uniform Commercial Code a promise modifying a contract for the sale of goods is binding despite the rule.[23])

The inconsistent exceptions to the legal-duty rule are justified under the basic principle of legal reasoning. Because the legal-duty rule is a poor rule, under that principle, the rule should not be consistently followed and applied. One

[18] *Restatement (Second) of Contracts*, § 73 comment d.
[19] *Restatement (Second) of Contracts*, § 73 comment f, § 74.
[20] See *Schwartzreich v. Bauman-Basch, Inc.*, 231 N.Y. 196, 131 N.E. 887 (1921).
[21] *Restatement (Second) of Contracts*, § 89.
[22] See Cal. Civ. Code, §§ 1524, 1697; Mich. Comp. Laws Ann., § 566.1; N.Y. Gen. Oblig. Law, § 5–1103.
[23] U.C.C., § 2–209.

way not to consistently follow and apply the rule is to formulate inconsistent exceptions to the rule. Consistency in the law is a good, and by hypothesis inconsistent distinguishing conflicts with that good. Nevertheless, the practice of inconsistent distinguishing, if properly employed, is desirable. Inconsistent distinguishing is not a final destination; it is an intermediate step in a dynamic process that should lead to a full-bodied change in the law. It may sometimes be best for courts to move to the best possible rule in steps, even at the price of inconsistency during the transition. A court may properly decide that if it is uncertain how given conduct should be treated, it may give effect to its uncertainty by carving out only a portion of the conduct for special treatment, on a provisional basis, provided the line it carves is rationally related to the court's purpose. For example, a court may believe that a rule adopted in precedent is not even reasonably good and yet may not be confident that its belief is correct. The court may then properly draw an inconsistent distinction as a provisional step toward full overruling. Alternatively, a court may properly formulate an exception at a level of generality that is less than what is necessary for the exception to be fully principled, as a provisional step toward full generality. That is one way to look at the ever-expanding set of exceptions to the legal duty rule.

Inconsistent distinguishing can also be used as a technique for dealing with the problem of reliance. Inconsistent distinguishing allows the courts to protect at least those who relied on the core of a doctrine – that part of a doctrine that cannot be even plausibly distinguished – while signaling to the profession that the underlying doctrine has been advanced to candidacy for overruling. Thus by using the technique of inconsistent distinguishing, a court may simultaneously move toward the best rule, protect past justified reliance on the core of a doctrine, diminish the likelihood of future justified reliance, and prepare the way for an overruling that might not otherwise have been institutionally appropriate.

C. Reasoning by Analogy

Legal commentators have had great difficulty in explaining reasoning by analogy in law. In part, this difficulty has resulted because reasoning by analogy in law may differ from reasoning by analogy in other fields, such as science. In part, this difficulty has resulted because reasoning by analogy in law is sometimes viewed as reasoning by example. It is not. Indeed, it is impossible to reason by example in law. For example, imagine an enormous room in which are the following defective products, and nothing else: On the left-hand side are a defective circular saw and a defective steam boiler. On the right-hand side are a defective coffee urn, a mislabeled bottle of poison, and some defective scaffolding. In the center of the room is a defective electric broiler. A judge is sent into the room. The judge is told that the manufacturers who made the products on the right were obliged to compensate injured persons, but the manufacturers who made those on the left were not. The judge is further told that he cannot

come out of the room until he reasons by example to determine whether the broiler should be placed with the objects on the left or the right. The judge would probably go mad, and would surely starve, unless he mercifully ended his life by taking the poison.

As this illustration suggests, reasoning by analogy in the law does not proceed from example to example. Quite the contrary: It proceeds from rule to rule, just as do the processes of establishing the rule of a precedent and distinguishing. Indeed, at its core, the process of reasoning by analogy in law is the mirror image of the process of distinguishing. In distinguishing, a deciding court normally begins with a rule, explicitly adopted in a precedent, that is literally applicable to the case at hand, and then determines that as a matter of social propositions the rule should not be applied to the case at hand. Accordingly, the court modifies the rule adopted in the precedent, usually by formulating an exception and therefore a new rule. In reasoning by analogy, a court normally begins with a rule, adopted in a precedent, that is *not* literally applicable to the case at hand, and then determines that as a matter of social propositions a generalized version of the rule should be adopted and applied to the case at hand, because there is not a good social reason to treat the case at hand differently. The court therefore extends or modifies the adopted rule – or, what is the same thing, formulates a new rule – in such a way that the precedent and the case at hand are treated alike.

Essentially, therefore, whether a court applies or distinguishes an adopted rule, on the one hand, or reasons by analogy from an adopted rule, on the other, normally depends on the level of generality at which the adopted rule was formulated. If the adopted rule was formulated at a relatively high level of generality, so that it covers the case at hand, the question for the court will be whether to apply the rule to the case at hand, or to reformulate and narrow the rule by drawing a distinction so that as reformulated the rule does not cover the case at hand. If the adopted rule was formulated at a relatively low level of generality, so that it does not cover the case at hand, the question for the court will be whether to reformulate and generalize the rule by drawing an analogy, so that as reformulated the rule covers the case at hand.

Within that general structure, reasoning by analogy in the law falls into two modes. One mode is as follows: There is an established rule, *r*, which in terms covers cases that involve Matter X. The deciding court is now faced with a case that concerns Matter Y. Matter Y does not fall within the ambit of rule *r*, although it would fall within a more generalized rule, *R*. Because Matter X and Matter Y are not identical, treating them differently would be consistent as a matter of formal logic. However, treating Matters X and Y differently would be inconsistent as a matter of legal reasoning, because social propositions do not justify different treatment of the two cases. In effect, the deciding court determines that the statement of the rule by the precedent court in the relatively narrow form *r*, rather than in the relatively general form *R*, was adventitious, or has become so. Perhaps there never was any special reason for stating the

rule in the narrow form. It may be, for example, that the facts involved in the precedent were narrow, and the precedent court adopted a rule in a manner that addressed those facts without deliberately intending to limit the rule to those facts. Or perhaps there was a good reason to state the rule narrowly when it was adopted, but social propositions have changed, so that the narrow statement is no longer sensible. In either event, the deciding court concludes that Rule *r*, which covers only Matter X, should now be deemed only a special case of Rule *R*, which covers both Matters X and Y. The court therefore reformulates the rule by generalizing it, and decides the case at hand accordingly.

For example, prior to the end of the nineteenth century, there was a rule that a husband could bring suit for the alienation of his wife's affections by a third person. It was not entirely clear why the rule was narrowly formulated to allow suits only by husbands, not by spouses. The narrow formulation of the rule might have had a substantive basis. Maybe the courts believed, based on then-current social propositions, that a wife did not suffer a cognizable injury when her husband's affections had been alienated. Alternatively, the narrow formulation might have been based on a procedural rule. Early on, a married woman was not permitted to bring a suit of any kind in her own name.

Eventually, the procedural rule was changed to allow married women to sue in their own names. The substantive question then had to be faced – whether a wife suffered a cognizable injury if her husband's affections had been alienated. In *Bennett v. Bennett*,[24] the New York court held that the wife did suffer such an injury, because social propositions either no longer supported, or never supported, treating a wife differently from a husband for this purpose:

> The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character and attach to the husband as husband and to the wife as wife.... A remedy ... has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? ... Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?[25]

Thus in *Bennett* the court concluded that the established rule that a *husband* could bring an action for alienation of affections (Rule *r*) should be reformulated

[24] *Bennett v. Bennett*, 116 N.Y. 584, 23 N.E. 17 (1889).
[25] *Bennett*, 116 N.Y. at 590–591, 23 N.E. at 18–19.

into the more general rule that a *spouse* could bring such an action (Rule *R*), because at the time of the decision, at least for this issue social propositions did not support a distinction between the narrow class of husbands and the general class of spouses.

Oppenheim v. Kridel,[26] which arose about thirty years after *Bennett*, shows even more clearly how reasoning by analogy operates by broadly reformulating an existing adopted rule. The issue in *Oppenheim* was whether a wife could bring an action for criminal conversation. Early on, criminal conversation was an action by a husband against his wife's paramour, based simply on the paramour's adultery with the wife. The action did not require a showing that the paramour had also alienated the wife's affections for her husband. In the case of the action for alienation of affections, it was at least arguable that a wife's original inability to bring the action was because of a procedural obstacle. In the case of the action for criminal conversation, however, it was clear that the reason for the narrow formulation of the established rule was substantive: "The husband, so it was said, had a property in the body, and a right to the personal enjoyment of his wife, for the invasion of which right the law permitted him to sue as husband."[27] Under the social propositions that underlaid the established rule, the wife was deemed not to have a corresponding interest.

The court in *Oppenheim* nevertheless reasoned by analogy to hold that a wife could bring an action for criminal conversation. If a husband could bring such an action, so could a wife, because even if social propositions once justified treating husbands and wives differently for this purpose, they no longer did:

> [W]hatever reasons there were for giving the husband at common law the right to maintain an action for adultery committed with his wife, exist to-day in behalf of the woman for a like illegal act committed with her husband. If he had feelings and honor which were hurt by such improper conduct, who will say to-day that she has not the same, perhaps even a keener sense, of the wrong done to her and to the home? If he considered it a defilement of the marriage-bed, why should not she view it in the same light? The statements that he had a property interest in her body and a right to the personal enjoyment of his wife are archaic unless used in a refined sense worthy of the times and which give to the wife the same interest in her husband.... The danger of doubt being thrown upon the legitimacy of the children, which seems to be the principal reason assigned in all the authorities for the protection of the husband and the maintenance of the action by him, may be offset by the interest which the wife has in the bodily and mental health of her children when they are legitimate.... So far as I can see there is no sound and legitimate reason for denying a cause of action for criminal conversation to the wife while giving it to the husband. Surely she is as much interested as the husband in maintaining the home and wholesome, clean and affectionate relationships. Her feelings must be as sensitive as his toward the intruder, and it would be mere willful blindness on the part of the courts to ignore these facts.[28]

[26] *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227 (1923).
[27] *Oppenheim*, 236 N.Y. at 160, 140 N.E. at 228.
[28] *Oppenheim*, 236 N.Y. at 161–162, 140 N.E. at 229.

A second mode of reasoning by analogy in the common law, which is closely related to the first, proceeds by determining that one new rule, Rule *A*, should be adopted in preference to a competing new rule, Rule *B*, because social propositions would not justify adopting Rule *B* while adhering to some *other* previously adopted rule. For example, in *Oppenheim* the court concluded that it would be inconsistent to retain the rule that a wife could not bring suit for criminal conversation while adhering to the rule, established in *Bennett*, that a wife could bring suit for alienation of affections:

> When we concede that a wife may maintain an action for alienating the affections of her husband, we virtually admit that she may also maintain an action for criminal conversation. While adultery is the sole basis of the latter, it is almost universally the chief element of evidence in the former.[29]

Ploof v. Putnam[30] is another, more famous, example. Ploof, the plaintiff, alleged that he and his family were sailing in his sloop on a lake when a violent tempest suddenly arose. The tempest placed the sloop and its passengers in great danger. To avoid injury to Ploof and his family, and destruction of the sloop, Ploof was compelled to moor the sloop to a dock on an island in the lake. The dock was owned by Putnam, whose agent unmoored the sloop. Thereafter, the sloop was driven onto the shore by the tempest, its contents were destroyed, and Ploof and his family were injured. Ploof sued Putnam for damages.

The court held that Ploof had stated a claim for relief. It reached this conclusion in large part by reasoning from cases holding that a landowner could not recover damages for trespass against a person who intruded on the land under necessity. As a matter of formal logic, it would not have been inconsistent to hold that although a landowner cannot recover damages for trespass against an intruder who entered under necessity, the intruder cannot sue the landowner if the latter used self-help to eject the intruder. Therefore, the question in *Ploof* was whether a rule that allowed a landowner to use self-help against an intruder who entered under necessity would be consistent as a matter of social propositions with a rule that the intruder was not liable in damages for the unauthorized entry. The answer was no. The law denies a landowner a right to damages against one who intrudes under necessity because the purpose of saving life is more important than the purpose of giving inviolate status to property. This social reason applies equally well when the issue is whether the landowner has the right to eject the intruder by self-help. Accordingly, it would be inconsistent as a matter of social propositions to adopt a rule that a landowner has a right to use self-help to eject one who intrudes under necessity, while adhering to the rule that the landowner cannot recover damages based on such an invasion.

[29] *Oppenheim*, 236 N.Y. at 166, 140 N.E. at 231.
[30] *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908).

How does the basic principle of legal reasoning figure into reasoning by analogy? The answer is that if a deciding court concludes that the rule established in a precedent is at least a reasonably good legal rule, the court should and normally will extend the rule by analogy where a generalization of the rule is appropriate. If, however, a deciding court concludes that the rule established in a precedent is a poor legal rule, the court should not, and normally will not, extend the rule by analogy. Instead, the court will say that the precedent should be confined to its facts.

IV. Conclusion

The basic principle of legal reasoning is as follows: A doctrinal rule should be consistently applied and extended if it is the best possible rule because it is fully congruent with social propositions or, even if it is not the best possible rule, if it is a reasonably good rule because it is substantially congruent with social propositions. However, a doctrinal rule should not be consistently applied and extended if it is a poor rule because it is not even substantially congruent with social propositions.

The question might be asked, if social propositions are critical in legal reasoning, and if the force of a rule adopted in a precedent depends on social propositions, why do social propositions seem not to be as prominent as doctrinal propositions in the typical judicial opinion? The answer is that social propositions always figure in legal reasoning, but they often play an implicit rather than an explicit role. At any given time, most common law rules are likely to be at least substantially congruent with social propositions. The reason is that when a new rule is adopted, it will usually be congruent with social propositions – that is why it is adopted – and if a new rule is not congruent with social propositions, or an existing rule becomes incongruent, the rule will likely be changed as a result of criticism by the profession in the secondary literature, in briefs, and in opinions in other jurisdictions. Where the profession, including the judiciary, implicitly views a rule as substantially congruent with social propositions, there is little or no occasion for explicitly invoking social propositions in legal reasoning that involves the application of the rule. Accordingly, social propositions figure in all legal reasoning, but play an explicit role only when a new rule needs to be adopted, when an existing rule becomes a candidate for transformation or overruling, or when the issue arises whether an existing rule should be distinguished, on the one hand, or extended by analogy, on the other.

Elmiger and Another v Commissioner of Inland Revenue

[1966] NZLR 683

Supreme Court, Hamilton
16, 17 February; 24 March 1966
Woodhouse J.

[Affirmed on appeal – see [1967] NZLR 161 (CA)]

Cur adv vult

WOODHOUSE J.

The appellants, who are brothers, at all material times carried on business in partnership as agricultural contractors. Their business, which was profitable, involved the use of heavy machinery. They owned substantial assets of this type, and each machine had a high income-producing capacity.

Towards the end of October 1962 there were discussions with their solicitor and accountant concerning the reorganisation of their affairs by the introduction of some form of family trust. Then on 12 November 1962 they became trustees of a trust set up by their father with an initial fund of £10, the immediate beneficiaries of which were their respective wives and children. The trust deed gave them extraordinarily wide, and even arbitrary powers of controlling and dealing with the trust assets and income; and it contained a rather remarkable provision that at the termination of the trust on 31 March 1968 the trust capital should revert to themselves.

On 28 November 1962 they sold to this trust two of their earth-moving machines at a price of £5,250. This amount was treated as an

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interest-free loan payable on demand. Contemporaneously they arranged to hire back the two machines on terms (later reduced to writing) which provided for hire charges calculated at hourly rates of £3 and £2 respectively, but with minimum monthly charges amounting to £250 and £175. There was provision, too, for all outgoings to be borne by the appellants, so that, for all practical purposes, the amounts received for hire can be regarded (subject to depreciation) as net profit to the trust. This being the case, it is clear that the minimum monthly charges were able to produce an annual income for the trust of £5,100 upon a capital outlay of £5,250. This minimum trust income can be compared with the net business income of the partnership for the year preceding these transactions of approximately £9,300, during which time capital assets were employed valued in the books at £30,755.

These arrangements took effect on 1 December 1962, and for the following four months the calculated hire charges for the machines amounted to £3,355. This sum was not paid over in cash but was set off against the amount due to the appellants arising from the purchase of the machines. The hiring arrangement continued during the next twelve months to 31 March 1964, but when the hire charges were then calculated on the rates laid down in the bailment it was found that the appellants would be involved in a business loss of about £100. The calculations produced a figure of approximately £7,900. Accordingly, acting on the one side in a personal capacity, and on the other in exercise of the unusually wide powers given them by the deed of trust, the appellants took steps to reduce the rates of hire. In the result an overall reduction was made in the charges for the year of about £3,500. This reduced the figure for hire charges to £4,300 which was dealt with in the books first, by crediting the appellants with the balance of £1,895 still due to them for purchase money, and next by treating £1,460 as an interest-free loan by the trust to themselves. There remains a balance of about £950, and although there is no direct evidence upon the point this amount seems to have been accounted for by payments which they handled as trustees for the purposes of the trust. In the result they retained in their own hands a total sum of £6,710 out of the hire charges for the sixteen months in question amounting to £7,655. In their business accounts this last amount was divided appropriately between the two years in question as a deductible expense, and the net incomes were reduced accordingly.

The contest between the parties arises out of the fact that the Commissioner of Inland Revenue formed the opinion that the general arrangement

which I have described was void in terms of s. 108 of the Land and Income Tax Act 1954. He therefore treated the agreement for sale and purchase and the hiring arrangement as annihilated, and added back the purported deductions for hire charge to the partnership income. He allowed as an expense appropriate amounts for depreciation of the machines. The appellants have contended that in the circumstances of the case s. 108 can have no application.

This section is a difficult and perplexing one by reason of its superficially far-flung, and even unlikely implications. Read literally and without keeping in mind that it is only one part of a whole code, it might seem to embrace almost every type of business or family dealing. On the other hand over-qualification prompted by considerations of this sort could soon leave it emasculated. The section reads:

> Every contract, agreement or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void in so far as,
> *[1966] NZLR 683 page 685*
> directly or indirectly, it has or purports to have the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax.

In so far as the demands of the revenue are concerned, this is a provision which seems to have received the attention of this Court on only two occasions, and on both of these within the last year. In each case the decision went in favour of the taxpayer. Not unnaturally, the appellants in the present case invite me to follow those decisions which, it is claimed, directly assist in resolving the differences between the Commissioner and themselves. The first case is Lewis v Commissioner of Inland Revenue (1965) NZLR 634, where in the course of his judgment Hardie Boys J. said: "I am satisfied that unless as a matter of law the transaction . . . can be set aside as a sham it cannot be attacked under s. 108" (ibid., 637).

He allowed the appeal by the taxpayers on the basis that their transaction was a genuine one, and that, as it could not be branded as a sham, the section was not applicable. The second decision is that of Wilson J. in Purdie v Commissioner of Inland Revenue (unreported) delivered on 10 May 1965. In this case Wilson J. found as a fact that any diminution in the appellant's income brought about by the scheme under review was merely incidental to charitable purposes which the taxpayer had in mind. He held on this ground that s. 108 had no application. He then went on, however, to deal with a submission that the section was inapplicable in respect of future liabilities for income tax. In supporting this submission he expressed the view that, as a matter of construction, the section could affect only a present or accrued liability, and that for this reason also the taxpayer must succeed.

Mr Richardson has made two initial submissions in respect of these decisions. He argued that the "sham" test propounded in the Lewis case must be inapplicable because the Revenue has always been able to go behind transactions which are mere shams. He claimed, too, that in Australia, where there is somewhat similar legislation upon the point, this test had not been applied, and that it was unsupported by authority. Concerning the judgment of Wilson J. in the Purdie case, he submitted that taxpayers are never able to make arrangements which would relieve them of their liability to the Revenue for income tax already accrued due; and accordingly the section would be meaningless and without effect if it were held to be limited in its operation to arrangements affecting accrued liabilities alone. Upon this reasoning and on the construction of the section itself he claimed that it must have application in respect of future liabilities for income tax. It will be necessary to consider these various submissions in due course.

Although the two cases to which I have referred appear to be the only two decisions of this Court which directly bear upon the interpretation of the section in so far as it has fiscal implications, there is a growing volume of authority in Australia relating to the construction of a somewhat similar section of the Commonwealth of Australia Income Tax and Social Services Contribution Assessment Act 1936-1951. This is s. 260 of that Act and seems to have found its way into this and other Australian legislation from pre-

ceding New Zealand enactments. Section 260 is as follows:

> Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly --
>
> (a) altering the incidence of any income tax;
>
> *[1966] NZLR 683 page 686*
>
> (b) relieving any person from liability to pay any income tax or make any return;
>
> (c) defeating, evading or avoiding any duty or liability imposed on any person by this Act; or
>
> (d) preventing the operation of this Act in any respect,
>
> be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.

It will be observed that it is the addition of paras. (c) and (d) which provides the substantial point of difference between this and the New Zealand provision. And in this regard it was strenuously urged upon me on behalf of the appellants that the Australian cases provide little assistance in interpreting the New Zealand section, because all the reported cases which have gone in favour of the Revenue were founded upon an application of para. (c), to the exclusion of the other three paragraphs. It was argued that this paragraph has much wider implications than either (a) or (b) which precede it, and which are in the same terms as the two limbs of s. 108. On this ground it was submitted for the appellants that the New Zealand section should be given a much more limited and restricted construction than the Courts may have given to the Australian s. 260.

It is convenient at this point to refer to a more general submission made on behalf of the appellants. First I was asked to recognise that the transactions under review were real and genuine in a legal sense and could not be regarded as sham transactions put forward as a cloak to conceal something different. I think that this is so. Despite the powerful opportunities given to the trustees to control and dispose of the income and capital of the trust and the singular benefits which might seem to flow in one direction or the other from the transactions, I consider that the obligations which they purported to carry were intended to have and were given their legal operation. Apart from any effect which s. 108 may have upon them, I do not think they can be put to one side or treated as a sort of masquerade. Upon the basis of such a finding I am then invited to take the view that even if there might appear to be some associated tax advantage for the appellants in the arrangements made, the whole scheme should still be regarded as a legitimate and normal one adopted by them for family reasons. It was claimed that they could not be expected to submit to the continuing demands of the taxation authorities in respect of income tax merely because by taking these legal steps their liability for tax would be consequentially diminished. In this regard I was referred to the well-known dictum of Lord Tomlin in Duke of Westminster v Commissioners of Inland Revenue [1936] A.C. 1; [1935] All ER Rep. 259 to the effect that: "Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax" (ibid., 19; 267).

I naturally appreciate that this forceful argument has the support of the highest authority. And I well recognise that the Courts will always be careful to protect citizens against any demands of the Revenue which cannot be supported by some statutory provision. Nevertheless, since the House of Lords was obliged to consider the highly beneficial arrangements which were able to be made in 1930 on behalf of the Duke of Westminster, there has been a growing awareness by the Legislature and the Courts alike that ingenious legal devices contrived to

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enable individual taxpayers to minimise or avoid their tax liabilities are often not merely sterile or unproductive in themselves (except perhaps in respect of their tax advantages for the taxpayer concerned), but that they have social consequences which are contrary to the general public interest. There is the problem, too, that the Legislature usually is lagging several steps behind the ever-developing arrangements worked out by experts in this field on behalf of their taxpayer clients. It is probably this consideration which prompted the enactment in the United Kingdom of two general provisions designed to nullify any scheme within the types contemplated which might avoid surtax or profits tax (see s. 18 of the Finance Act 1936, 12 Halsbury's Statutes of England, 2nd ed. 353, and s. 2 of the Finance Act 1951, 30 Halsbury's Statutes of England, 2nd ed. 157). There have, too, been expressions of judicial opinion regarding these problems, and this legislation in particular, which deserve to be kept in mind when considering the broad principle laid down by Lord Tomlin. For example, in Lord Howard de Walden v Inland Revenue Commissioners [1942] 1 K.B. 389; [1942] 1 All ER 287 Lord Greene M.R. said: "For years a battle of manoeuvre has been waged between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. . . . It would not shock us in the least to find that the Legislature has determined to put an end to the struggle. . . ." (ibid., 389; 289).

Somewhat similar views were expressed by Viscount Simon L.C. in Latilla v Inland Revenue Commissioners [1943] A.C. 377; [1943] 1 All ER 265. He referred to the ingenuity which had been expended in devising methods of avoiding or minimising tax, and went on to say: "Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts or those of the professional gentlemen who assist them in the matter should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres" (ibid., 381; 266).

Considerations of the same nature prompted the Supreme Court of the United States in Higgins v Smith (1940) 308 U.S. 473, 476, 477, to state: "Each tax according to a legislative plan raises funds to carry on government. The purpose here is to tax earnings and profits less expenses and losses. If one or the other factor in any calculation is unreal it distorts the liability of the particular taxpayer to the detriment of the entire tax-paying group."

In my opinion the broad purposes of s. 108 and of the equivalent Australian section are to be discerned in problems of this sort. I think these provisions are intended to forestall deliberate attempts by individuals to obtain tax advantages denied generally to the same class of taxpayer. That the Legislature should attempt to anticipate these manoeuvres is not surprising; nor can it be thought unfair to those affected if the method adopted by the Legislature should be, as in the case of these sections, the method of general proscription. If there seem to be difficulties in this last area they should be related, not to anticipated injustices to the body of taxpayers, but to the problem of discovering the intended limits of any general embargo. This is, of course, a problem

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of definition and one which is peculiarly complicated by the fact that nearly all dispositions of property or income must carry with them some consequential effect upon income tax liabilities. In relation to s. 108 it is necessary, therefore, to find some suitable way of testing the purposes and effect of contracts, agreements, or arrangements, against the words of the section; and this is not a need which can be resolved by a possibly over-confident belief in some intuitive capacity to place a particular arrangement on one side of the line or the other.

The problems inherent in this type of legislation have been given a good deal of attention by the Australian Courts. Before I attempt to understand any implications which might follow from

differences in wording between s. 260 in Australia and s. 108 of the New Zealand Act, I think it useful to examine some of these decisions. In the first place it does seem that about forty-five years ago some doubt was felt in Australia as to whether the equivalent section at that time could be applied to bona fide gifts or sales by a taxpayer of income-producing assets. See, for example, Federal Commissioner of Taxation v Purcell (1921) 29 C.L.R. 464, 476, and the judgment of Knox C.J. in Jaques v Federal Commissioner of Taxation (1924) 34 C.L.R. 328, 355, where he appears to have decided that the transactions under review in that case "were in no sense genuine transactions". He then went on, however, to hold that they constituted "an arrangement having the purpose of relieving the appellant . . . from liability to pay income tax." It would seem from these passages that Knox C.J. was inclined to apply the section to transactions that were not genuine. Nevertheless, I think it is clear from the other judgments that the case was not decided on this basis. Rich J. dealt with the matter in the High Court in the first instance; and he expressly decided that the section: ". . . regards the contract, agreement, or arrangement, as possibly a very real one, but attaches consequences to the purpose or effect" (ibid., 338).

This judgment was upheld on appeal in the High Court, and Isaacs J. (ibid., 356) considered that the appeal should be dismissed "substantially for the reasons given by Rich J.". He also said: "That the transaction is a reality is no reason for the non-application of the section" (ibid., 358). Then Starke J. remarked that: "My brother Rich saw no reason for treating these transactions as unreal; nor do I. It is impossible, in my opinion, to say that they were not genuine transactions. . . ." (ibid., 361). With very great respect, therefore, to the contrary view expressed in the Lewis case, I think the judgments in Jaques v Federal Commissioner of Taxation put to one side any idea that the relevant Australian section was aimed at sham transactions. This point was dealt with again in the High Court of Australia in Federal Commissioner of Taxation v Newton (1957) 96 C.L.R. 578. (This decision was upheld by the Privy Council at [1958] A.C. 450). Fullagar J. (ibid.) considered the issue by relating it to an article appearing in 18 Mod. L.R. 209 which had described tax avoidance as meaning "the art of dodging tax without actually breaking the law". He then went on to say: "The section is not aimed at fraudulent conduct or at pretended as distinct from real transactions. Such cases need no statutory provision. It is aimed at transactions which are in themselves real and lawful but which the Legislature desires to nullify so far, and only so far as they may operate to avoid tax" (ibid., 646, 647).

And later he said: "Again, it is nothing to the point in considering the purpose of the agreement or arrangement, to assert that the agreement or arrangement was 'genuine' or 'intended to have real

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effect.' Of course it was 'genuine' and 'intended to have real effect'. Otherwise it could not on any view have achieved anything. As Isaacs J. said in Jaques' case (1924) 34 C.L.R. 328, 'a sham transaction . . . needs no enactment to nullify it'. It is, as I have said, at genuine transactions, intended to have full legal effect as between the parties, that s. 260 strikes. It is said that, if a transaction is 'genuine', there can be no distinction between form and substance -- the form determines the substance. But it is not a mere question of form and substance. This whole approach is, in my opinion, quite wrong" (ibid., 655).

I think it clear that in Australia it has been held conclusively that s. 260 is intended to apply to contracts, agreements, or arrangements, which are entirely genuine in the sense that real liabilities are intended to be undertaken and discharged. And with all respect the opinions expressed in the various judgments which have led to this result seem to me to be entirely applicable to s. 108. In my view, none of the differences between this section and its Australian equivalent suggest that it was intended to operate only when the arrangement in question could be regarded as a sham, and I think that the test as to what arrangements are in fact caught by the section must be found elsewhere.

The judgment of Fullagar J. in the Newton case (supra) provides (ibid., 646 et seq.) a lucid and convenient guide to the gradual evolution by the High Court of Australia of the way in which s. 260 should be interpreted. In the first place he referred to Federal Commissioner of Taxation v Purcell (1921) 29 C.L.R. 464. In this case Knox C.J. said: "The section, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any taxpayer" (ibid., 466).

Nevertheless, he recognised that the section must be given some effect, and in the final half of the same sentence he has indicated his view

of its general purpose as follows: "But, in my opinion, its provisions are intended to and do extend to cover cases in which the transaction in question, if recognised as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth his income" (ibid., 466).

The emphasis in this sentence is clearly on the penultimate word. Some further light upon the effect of the section is thrown by Rich J., who said that it would be unreasonable to apply it "so as to include a genuine gift which had the incidental effect of diminishing the donor's assets and income" (ibid., 476). The case itself involved a simple disposition of a farm property to a trust for the donor's family, and the appeal went in his favour despite a finding that he was "influenced to some extent by a desire to lessen the burden of taxation". It is worth noting, nevertheless, as Fullagar J. has pointed out in his judgment in the Newton case that there there was "no 'contract, agreement or arrangement' lying behind the actual disposition of property and having one of the purposes mentioned in s. 260".

Then there is Jaques' case to which I have already referred. It was held here that the taxpayer concerned was not entitled to make certain deductions which would have had the effect of diminishing his assessable income. Fullagar J. (ibid., 469) has drawn attention to two important features of this decision. The first is that the case makes clear that the purpose lying behind the transaction may readily be inferred from the form which it assumes; the second that the section operates to void not merely the "contract, agreement, or arrangement" which
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lies behind the actual things done, but the actual things done themselves.

Next he turned to consider Clarke v Federal Commissioner of Taxation (1932) 48 C.L.R. 56. In effect it can be said that here the Court on the one hand held that assessments could not be made by the Commissioner by substituting for a transaction annihilated by the section another which in fact the taxpayer had not embarked upon; but on the other hand that the section would enable a reassessment of tax if when the voided arrangement was put to one side there was "exposed a set of actual facts from which [a tax] liability does arise".

The analysis of the Australian decisions made by Fullagar J. in the Newton case concludes where he remarked upon the fact that s. 260 involves two separate and distinct questions. He said: "The first is whether the operations which the Commissioner challenges were actuated by one or more of the purposes mentioned in s. 260. Was there a contract, agreement, or arrangement which had in view the attainment of one or more of those purposes? If that question, which is ultimately a question of fact, is answered in the affirmative, the second question arises, which is -- what is the effect of the application of s. 260 to the case?" (ibid., 654).

He then went on to emphasise that these two questions must not be allowed to run into one another, but should be dealt with in their logical order. Fullagar J. did not say so in his judgment, but I think it likely that his purpose in drawing this distinction was to prevent the bare decision as to whether an arrangement came within the scope of s. 260 being influenced by the tax consequences which might then seem to follow from it. This is not unimportant, because, as Clarke's case makes plain, the mere decision that a transaction is within the scope of the section will not automatically result in new demands upon the taxpayer. The section does no more than annihilate the transaction that is aimed at and nothing is put in its place. Accordingly, before a taxpayer can be adversely affected by the section or before the Commissioner can make productive use of it in the interests of the Revenue, there must be disclosed a taxable situation upon which he is able to operate after the arrangement concerned has been stripped away.

The Newton case went on appeal to the Privy Council, as I have mentioned. The judgment of the Board was delivered by Lord Denning who discussed the opening words of s. 260 in the following terms: "Their Lordships are of opinion that the word 'arrangement' is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons -- a plan arranged between them which may not be enforceable at law. But it must in this section comprehend, not only the initial plan but also all the transactions by which it is carried into effect -- all the transactions, that is, which have the effect of avoiding taxation, be they conveyances, transfers or anything else. It would be useless for the Commissioner to avoid the arrangement and leave the transactions still standing. The word 'purpose' means, not motive but the effect which it is sought to achieve -- the end in view. The word 'effect' means the end accomplished or

achieved. The whole set of words denotes concerted action to an end -- the end of avoiding tax" (ibid., 465).

He then referred to the argument that this apparently wide interpretation could produce sweeping results which went far beyond anything intended by Parliament, and said: "The answer to the problem seems

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to their Lordships to lie in the opening words of the section. They show that the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. . . . In order to bring the arrangement within the section you must be able to predicate -- by looking at the overt acts by which it was implemented -- that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section" (ibid., 465, 466).

He then gave a number of examples of comparatively simple transactions of a business or of a family nature in regard to which it could not be predicated that the transaction concerned was done to avoid income tax. The tests contained in the foregoing extracts from the judgment are those which must be applied in respect of s. 260, and as Kitto J. said in Peate v Federal Commissioner of Taxation (1964) 111 C.L.R. 443, the issue is "whether, upon consideration of the overt acts which have been done in carrying out the plan, the arrangement is to be recognised as a means for the avoidance of a tax liability, whether or not it be a means to other ends also" (ibid., 409). See also Kitto J.'s comprehensive statement of the effect of the Newton case which appears in Hancock v Federal Commissioner of Taxation (1961) 108 C.L.R. 258, 283. This being the position in relation to the Australian section, the question arises whether the New Zealand section with which I am concerned is to be interpreted on much the same basis. The appellants say, No.

In the first place they have claimed that s. 108 is able to operate only in respect of arrangements which might attempt to alter the incidence of or diminish the liability for tax on income already derived. It was argued that the liability for tax could not exist until the income concerned had been so derived; and also that the word "relieving" carried with it implications which related only to an existing state of affairs.

Arguments of this sort were put forward and rejected in relation to the Australian section in Newton's case: see [1958] A.C. 450, 464. I am asked, however, to distinguish the decisions on this point on the ground that it turned upon the words in para. (c) of s. 260 which refer to avoiding a liability under the Act. It is claimed, too, that wherever the section had been used in Australia to embrace prospective liabilities the Courts had relied upon this paragraph to the exclusion of the other three.

It is true that in many of the Australian decisions the attention of the Court has concentrated upon para. (c); but I think it incorrect to assume because of this that the other paragraphs have been rejected as inapplicable. In the Newton case, for example, it is said by Williams J. in the High Court (96 C.L.R. at 631) that of the three paragraphs relied upon by the Commissioner, para. (c) appeared to be "most appropriate". But he did not exclude the view that the other sections might also operate against the taxpayer. Then in de Romero v Read (1932) 48 C.L.R. 649, the decision turned exclusively upon the equivalent of para. (a) of s. 260. Moreover, the Court was dealing here with a transaction which clearly would have an effect upon the incidence of tax in respect of income to become due in the future. Again in more recent times Menzies J. disposed of a submission that s. 260 was limited in its

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application to sources of income which were already in existence, by stating expressly that "the language in which (a), (b), (c) and (d) of s. 260 are expressed affords no support for the appellant's argument:" See Peate v Commissioner of Taxation (1964) 111 C.L.R. 443, 460.

In Newton's case (supra) the argument presented before the Privy Council was to the effect that "the words 'liability imposed on any person' meant a liability which had already accrued: and that 'avoid' meant 'displace'". I do not overlook that in rejecting this submission the verb "avoid" was used as an aid in interpretation. Nevertheless, taking into account the whole context of s. 260, I do not find it easy to appreciate on any practical basis the subtle differences in meaning which may exist between this verb and the verb "to relieve" which appears, of course, in the same text. The Shorter Oxford Dictionary defines the word "avoid" as meaning to free or get rid of something, while "to relieve" is given the meaning of to free or clear from an obligation.

And indeed in the High Court of Australia (see 96 C.L.R. at 622) McTiernan J. seems to have assumed that these two words were almost interchangeable -- he described the transaction in that case as one which "clearly had the effect of relieving each respondent from liability to which he would have been exposed had he continued to be the shareholder when the companies paid the dividends in question". On the other hand, as I have already mentioned, in Purdie's case (supra) Wilson J. felt it necessary to distinguish between the use of the two words. He said: "Whereas one avoids something which is approaching but not yet arrived, one obtains relief from an already existing condition (whether it be pain, poverty or liability to pay income tax). The words have relevance to different points of time." With the greatest respect, I find myself driven to a contrary conclusion, and I think that what shades of difference there may be cannot achieve the effect contended for on behalf of the appellants. With respect, I think the correlation of the examples of pain or poverty with liability to pay income tax tends to obscure the fact that the verb "to relieve" can be used in different ways, and according to the text just as aptly in relation to an anticipated as to an existing burden. For myself I think that the analogous use of the noun "relief" as something to be obtained only in respect of a condition already existing is not apposite to the way in which the word "relieving" is used in s. 108. In my opinion the two limbs of the section are looking to the future, and I think it is in this sense that they should be construed. Its whole purpose appears to be to effect a general proscription of schemes which would have the effect of diverting potentially taxable income outside the ordinary operation of the Act and thus preventing a liability for tax on that income from coming into existence. I find it impossible to interpret the section in terms of some illogical intention to confine it to existing liabilities. As was said by Lord Denning in the Newton case (ibid., 464) on this basis the words would be deprived of any effect, because "no one can displace a liability to tax which has already accrued due or in respect of income which has already been derived". Accordingly, for these various reasons I do not accept the submission put forward by Mr Lewis.

The next issue raised on behalf of the appellant is that, even if s. 108 is held to have effect upon arrangements dealing with income still in prospect, nevertheless it cannot operate in order to prevent a deduction being made which otherwise would be available to a taxpayer in terms of s. 111 of the Act. In this regard I am asked to act upon a brief observation of Dixon C.J. in Cecil Bros. Pty. Ltd. v Commissioner

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of Taxation (1964) 111 C.L.R. 430, 438, where he indicated that he had difficulty "in seeing how s. 260 could apply to defeat or reduce any deduction otherwise truly allowable" under the section in the Australian Act equivalent to s. 111. This dictum is not a part of the reasons for the decision of the Court, and in addition a contrary view can be found in the same case, expressed by Owen J. (ibid., 436) and by Menzies J. (ibid., 439). With all respect, it appears to me that this is a dictum which overlooks such a decision of the High Court as that of Jaques which turned entirely upon a transaction which attempted to diminish taxpayers' income by deductions. In this connection Rich J. said (see 34 C.L.R. at p. 338): "The Legislature has permitted the deduction where it is the legitimate result of a call arising from the ordinary situation of a shareholder in a mining company. But [the section] in my opinion also excludes a deduction which is not the result but the animating purpose of a call deliberately incurred, as this was, for the purpose of the deduction."

On the basis of this finding Rich J. disallowed the deduction, and as I have mentioned his decision was upheld by the High Court on appeal.

With respect, I think that the issue of deductions is one which naturally comes within the second of the questions posed by Fullagar J., and to which I have referred. The question is not whether arrangements which promote deductions can fall within the ambit of the section; but whether, having so fallen, the section can then be applied in order to justify a reassessment of income tax. Indeed, it is upon this second point that the decision in the Cecil Brothers case actually turns (ibid., 440). In every case coming within s. 108 the second step is to ascertain what facts remain after the proscribed arrangement is stripped away. Does the removal of that arrangement leave a situation which (without the introduction of other assumed or notional facts) will enable the reassessment to be made? If it does, then I think that it cannot matter whether the quantum of assessable income thereupon disclosed results from the removal of contrived outgoings for expenses or from the removal of some other manufactured transaction. In the Cecil Brothers case it was finally decided by the High Court that the removal of the single interposed company from which the appellant had

purchased goods for resale left nothing upon which the Commissioner could then operate in order to reassess for income tax. In other cases, however, the position clearly could be very different. In any event it is my opinion that s. 108 is part of the law to be applied and must be given its appropriate place in the statute (cf. Peate v Commissioner of Taxation (1964) 111 C.L.R. 443, 458). I can see no reason why s. 111 should act in such a way as to override the effect of s. 108, and with all respect, I think this last section will operate to exclude a deduction if this arises as the result of an arrangement of the type struck at by s. 108.

To this point I have attempted to deal with what perhaps can be described as a number of negative propositions advanced in criticism of the way in which the Commissioner has proposed to apply s. 108. I should now add that in so far as fiscal implications are concerned, I think its meaning and operation is determined by the general principles laid down by the Privy Council in Newton's case (supra). There are differences in wording between s. 108 and the Australian section, but I do not think they have any great practical significance when one is comparing the scope of the two sections in so far as arrangements directed to obtaining an income tax advantage are concerned. I have already expressed my opinion as to the meaning of the two words "relieving"

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and "avoiding" where they appear in s. 108 and s. 260 (c) respectively. But there is a further consideration which appears to bring the effect of each of the two sections to a point which is virtually indistinguishable. Section 260 (c) speaks of avoiding any liability imposed by the Act; while the second limb of the New Zealand section is limited to a particular liability -- the liability to pay income tax. However, all the Australian cases have been concerned with the avoidance of this last liability rather than any other which might be imposed by the Act; and I find great difficulty in imagining an arrangement having the effect of avoiding a liability for income tax which would not also have the effect of relieving a person (wholly or in part) from that same liability. The converse seems equally to be true. In any case, I think that valuable assistance can be derived from the Australian cases when an attempt is made to give effect and meaning s. 108.

On the principles laid down by the Privy Council, therefore, and taking into account the Australian decisions, it seems that the application of s. 108 will depend first upon a decision as to whether an income tax advantage was one of the actuating purposes of the transaction under review; or whether it is "capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means" for obtaining such a tax advantage. (See Newton's case [1958] A.C. 450, 466). And this decision is to be made objectively by looking at the overt acts done in pursuance of the whole arrangement (ibid., 465). The section is not designed to prevent ordinary commercial, or family, or charitable dispositions. Nevertheless this is a general provision aimed at otherwise legal methods of tax avoidance. It is designed, as I stated earlier, to forestall the use by individual taxpayers of ordinary legal processes for the deliberate purpose of obtaining a relief from the natural burden of taxation denied generally to the same class of taxpayer. Accordingly it is my opinion that family or business dealings will be caught by s. 108 despite their characterisation as such, if there is associated with them the additional purpose or effect of tax relief (in the sense contemplated by the section) pursued as a goal in itself and not arising as a natural incident of some other purpose. If this were not so I suppose an appropriate legal window dressing could still be devised to defeat the general objects of the section.

In applying these general principles the Australian Courts have concentrated some attention upon the extent to which the taxpayer concerned has retained in his own hands the effective use and disposition of the moneys in question. There usually is, too, a series of transactions which have been applied in a concerted way as part of a predetermined routine. It is my opinion that both these elements apply and are to be found in the present case. There clearly was an overall plan preceding the individual steps taken, and equally clearly the intention was that those steps should take effect as a whole. The steps themselves involved first the creation of a trust which had vitality only to the extent desired or permitted by the trustees, who are the appellants; then there was a sale by them to the trust of valuable assets capable of producing a high gross income on terms which involved no money payments for purchase price by the trust; and this was followed by an agreement for hire on a basis which had the effect of cutting the appellants' assessable income in half. Nevertheless the amount representing the hire charges was not paid over, but for all practical purposes remained in their hands

either as a capital receipt or as a loan. And the assets in respect of which the capital payments were made by the trust would in due

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course revert to them as absolute owners unless they chose on an arbitrary basis to dispose of the capital of the trust in favour of the beneficiaries. It is said that this whole arrangement was intended to give each family a share in the capital assets of the business or in the business itself. On this basis the claim is made that this should be regarded as one of those normal family transactions described by Lord Denning. I am quite unable to accept this submission. The absence of any change in the practical operation of the partnership business; the emphasis on the income aspects of the transaction; the extraordinarily wide powers given to the appellants as trustees; and provision that any remaining capital should revert to them in 1968; and the other features of the transaction which I have described -- all this puts it outside the range of any normal disposition for family purposes. To the extent that the transaction included as a purpose intended benefits for the one family or the other, I consider this purpose to be entirely subsidiary to the dominant and general purpose disclosed by the whole arrangement of obtaining a disposition of income in the guise of business expenses. It is not without interest that the Commonwealth Taxation Board of Review in Australia has dealt with an almost parallel case and in much the same way: see Case No. 6 (1962) 11 C.T.B.R. (N.S.) 24.

I think, therefore, that looking at the transactions themselves, there is a clear inference to be drawn that one at least of the designed purposes was to diminish income receipts by factitious deductions, and by this process achieve a favourable alteration in the incidence of income tax, and have the effect for the appellants of relieving them from some part of their liability to pay income tax. In the circumstances the agreement for sale and purchase of the two machines and the instrument by way of bailment cannot be relied upon by the appellants for the purpose of disputing the assessments, and by reason of the operation of s. 108 must be disregarded. When this is done the deduction for hire charge immediately disappears and the assessable income of the appellants is consequently the income determined by the Commissioner as outlined in his assessments. The questions before the Court are therefore answered in terms of these findings, and I allow the Commissioner costs on the appeal in the sum of 40 guineas together with disbursements. Judgment accordingly.

Solicitors for the appellants: R. H. le Pine and Co. (Taupo).

Solicitors for the respondent: Crown Law Office (Wellington).

Entick v Carrington [1765] EWHC KB J98, 95 ER 807

King's Bench
Michaelmas Term, 6 Geo. III 1765

In trespass; the plaintiff declares that the defensants on the 11th day of November in the year of our Lord 1762, at Westminster in Middlesex, with force and arms broke and entered the dwelling-house of the plaintiff in the parish of St. Dunstan Stepney, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, etc. thereto affixed, and broke open the boxes, chests, drawers, etc. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, etc. in his dwelling-house, and all the boxes, etc. so broke open, and read over, pryed into, and examined all the private papers, books, etc. of the plaintiff there found, whereby the secret affairs, etc. of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, etc. of the plaintiff there found, and other 100 charts, etc. etc. took and carried away, to the damage of the plaintiff 2000l. The defendants plead, 1st, not guilty to the whole declaration, whereupon issue is joined. 2ndly, as to the breaking and entering the dwelling-house, and continuing four hours, and all that time disturbing him in the possession thereof, and breaking open the doors to the rooms, and breaking open the boxes, chests, drawers, etc. of the plaintiff in his house, and searching and examining all the rooms, etc. in his dwelling-house, and all the boxes, etc. so broke open, and reading over, prying into, and examining the private papers, books, etc. of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration first mentioned there found, and also as to taking and carrying away the goods and chattels in the declaration last mentioned, the defendants say, the plaintiff ought not to have his action against them, because they say, that before the supposed trespass, on the 6th of November 1762, made his warrant under his hand and seal directed to the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled *The Monitor, or British Freeholder*, No. 357, 358, 360, 373, 376, 378, and 380; London prinpted for J. Wilson and J. Fell in Paternoster-Row, containing gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody, before Earl of Halifax to be examined concerning the premises, and further dealt with according to law; in the due execution whereof all mayors sheriffs, justices of the peace, constables, and all other His Majesty's officers civil and military and loving subjects, whom it might concern, were to be aiding and assisting to them the defendants, as there should be occasion: and the defendants further say, that afterwards and before the trespass, on the same day and year, the warrant was delivered to them to be executed, and thereupon, they on the same day and year in the declaration, in the day time about 11 o'clock, being the said time when, etc. by virtue and for the execution of the said warrant, entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize the plaintiff and his books and papers in order to bring him and them before the Earl of Halifax, according to the warrant,

and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, etc. there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at Westminster, where the said earl then and long before transacted the business of his office, and delivered the same to Lovel Stanhope Esq. Who then was, and yet is an assistant to the earl in his office as Secretary of State, to be examined, and who was then authorized to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards, (to wit) on the 17th of November in the said year, was discharged out of their custody, and in searching for the books and papers of the plaintiff the defendants did necessarily read over, pry into, and examine the said private papers, books, etc. of the plaintiff, in the declaration mentioned then found in his house; and because at the said time when, etc. the said doors in the said house leading to the rooms therein, and the said boxes, chests, etc, were shut and fastened so that the defendants could not search and examine the said rooms, boxes, chests, etc. they, for the necessary searching and examining the same, did then necessarily break and force open the said doors, boxes, chests, etc. as it was lawful for them to do; and on the said occasion the defendants necessarily stayed in the house of the plaintiff, etc. (and so repeat the trespass covered by this plea) whereof the plaintiff above complains; and this, etc. wherefore they pray judgment, etc. The plaintiff replies to the plea of justification above, that (as to the trespass thereby covered) he, by any thing alledged by the defendants therein, ought not to be barred from having his action against them, because he says, that the defendants at the parish of Stepney, of their own wrong, and without the cause by them in that plea alledged, broke and entered the house of the plaintiff, etc. etc. in manner and form as the plaintiff hath complained above; and this he prays may be inquired of by the country; and the defendants do so likewise. There is another plea of justification like the first, with this difference only, that in the last plea it is alledged, the plaintiff and his papers, etc. were carried before Lord Halifax, but in the first, it is before Lovel Stanhope, his assistant or law clerk; and the like replication of de injuria sua propria absq. Tali causa, whereupon a third issue is joined. This cause was tried in Westminster-Hall before the Lord Chief Justice, when the jury found a special verdict to the following purport:

"The jurors upon their oath say, as to the issue first joined, (upon the plea of not guilty to the whole trespass in the declaration,) that as to the coming with force and arms, and also the trespass in declaration, except the breaking and entering the dwelling-house of the plaintiff, and continuing therein for the space of four hours, and all that time disturbing him in the possession thereof, and searching several rooms therein, and in one bureau, one writing-desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found, in the declaration complained of, the said defendants are not guilty. As to breaking and entering the dwelling-house, etc. (above excepted,) the jurors on their oath say, that at the time of making the following information, and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the Earl of Halifax was, and still is one of the lords of the King's

Privy Council, and one of his principal Secretaries of State, and that before the time in the declaration, viz. on the 11th of October 1762, at Saint James's, Westminster, one Jonathan Scott of London, bookseller and publisher, came before Edward Weston Esq. an assistant to the said earl, and a justice of peace for the City and liberty of Westminster, and there made and gave information in writing to and before the said Edward Weston against the said John Entick and others, the tenor of which information now produced and given in information of J. Scott, in the year 1755. I proposed setting up a paper, and mentioned it to Dr. Shebbeare, and in a few days one Arthur Beardmore, an attorney at law, sent for me, hearing of my intention, and desired I would mention it to Dr. Shebbeare, that he, Beardmore, and some others of his friends had an intention of setting up a paper in the city. Shebbeare met Beardmore, and myself and Entick (the plaintiff), at the Horn Tavern, and agreed upon the setting up the paper by the name of *The Monitor*, and that Dr Shebbeare and Mr Etnick should have 200l. a-year each. Dr Shebbeare put into Beardmore's and Entick's hands some papers, but before the papers appeared Beardmore sent them back to me (Scott). Shebbeare insisted on having the proportion of his salary paid him; he had 50l. which I (Scott) fetched from Vere and Asgills by their note, which Beardmore gave him. Dr Shebbeare upon this was quite left out, and the monies have been continued to Beardmore and Entick ever since, by subscription, as I supposed, raised, I know not by whom; it has been continued in these hands ever since. Shebbeare, Beardmore, and Entick all told me that the late Alderman Beckford countenanced the paper; they agreed with me, that the profits of the paper, paying all charges belonging to it, should be allowed me. In the paper of the 22d May, called *Sejanus*, I apprehend the character of Sejanus meant Lord Bute; the original manuscript was in the handwriting of David Meredith, Mr. Beardmore's clerk: I before received the manuscript for several years till very lately from the said hands, and do believe that they continue still to write it.

Jona. Scot, St James's, 11th October 1762"

The above information was given voluntarily before me, and signed in my presence, by Jona. Scott.

J. Weston.

And the jurors further say, that on the 6th November 1762, the said information was shewn to the Earl of H. and thereupon the earl did then make and issue his warrant directed to the defendants, then and still being the King's messengers, and duly sworn to that office, for apprehending the plaintiff, etc. the tenor of which warrant produced in evidence to the jurors, follows in these words and figures: "George Montagu Dunk, Earl of Halifax, Viscount Sunbury, and Baron Halifax, one of the Lords of His Majesty's Honourable Privy Council, Lieutenant-General of His Majesty's Forces, Lord Lieutenant-General and General Governor of the kingdom of Ireland, and principal Secretary of State, etc. These are in His Majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author, or one concerned in the writing of several weekly very seditious papers, intitled The Monitor, or British Freeholder, No. 357, 358, 360, 373, 378, 379, 380; London, printed for J. Wilson and J. Fell in Paternoster-Row; which contain gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament, and him having found, you are to seize and apprehend, and to bring, together with his books and papers, in safe custody before me to e examined concerning the premises, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and other

His Majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you as there shall be occasion; and for so doing this shall be your warrant. Given at St. James's the 6th day of November 1762, in the third year of His Majesty's reign. Dunk Halifax. To Nathan Carrington, James Watson, Thomas Ardran, and Robert Blackmore, four of His Majesty's messengers in ordinary." And the jurors further say, the earl causes this warrant to be delivered to the defendants to be executed, and that the defendants afterwards on the 11th of November 1762, at 11 o'clock in the day-time, by virtue and for the execution of the warrant, but without any constable taken by them to their assistance, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing-desk, and several drawers of the plaintiff there, in order to find and seize the same, and bring them along with the plaintiff before the earl according to the warrant, and did then find and seize some of the books and papers of the plaintiffs, and perused and read over several other of his papers which they found in the house, and chose to read, and that they necessarily continued there in the execution of the warrant four hours, and disturbed the plaintiff in his house, and then took him and his said books and papers form thence, and forthwith gave notice at the office of the said Secretary of State in Westminster unto Lovel Stanhope Esq. then before, and still being an assistant to the earl in the examinations of persons, books, and papers seized by virtue of warrants issued by Secretaries of State, and also then and still being a justice of peace for the City and liberty of Westminster and county of Middlesex, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined; and they then and there, at the instance of the said Lovel Stanhope, delivered the said books and papers to him: and the jurors further say, that, on the 13th of April in the first year of the King, His Majesty, by his letters patent under the Great Seal, gave and granted to the said Lovel Stanhope the office of law-clerk to the Secretaries of State; and the King did thereby ordain, constitute, and appoint the law-clerk to attend the offices of his Secretaries of State, in order to take the depositions of all such persons whom it may be necessary to examine upon affairs which might concern the public, etc. (and then the verdict sets out the letters patent to the law-clerk in *haec verba,*) as by the letters patent produced in evidence to the jurors appears. And the jurors further say, that Lovel Stanhope, by virtue of the said letters patent long before the time when, etc. on the 13th of April in the first year of the King was, and ever since hath been, and still is law-clerk to the King's Secretaries of State, and hat executed that office all that time. And the jurors further say, that the different times from the time of the Revolution to this present time, the like warrants with that issued against the plaintiff, have been frequently granted by the Secretaries of State, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the King, etc. in the place of a messenger in ordinary, etc. And the jurors further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent, in writing, of the perusal and copy of the said warrant so issued against the plaintiff as aforesaid, neither did the plaintiff

commence or bring his said action against the defendants, or any of them, within six calendar months next, after the several acts aforesaid, and each of them were and was done and committed by them as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, the said defendants are guilty of the trespass hereinbefore particularly specified in breaking and entering the house of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing-desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found; or the said plaintiff ought to maintain his said action against them, the jurors are altogether ignorant, and pray the advice of the Court thereupon; and if upon the whole matter aforesaid by the jurors found, it shall seem to the Court that the defendants are guilty of the said trespass, and that the plaintiff hath thereof complained against them; and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out, to 300l., and for those costs and charges to 40s.; but if upon the whole mater by the jurors found, it shall seem to the Court that the said defendants are not guilty of the said trespass, or that the plaintiff ought not to maintain his action against them, then the jurors do say upon their oath that the defendants are not guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them: and as to the last issue on the second special justification, the jury found for the plaintiff, that the defendants in their own wrong broke and entered, and did the trespass as the plaintiff in his replication has alleged.

This special verdict was twice solemnly argued at the Bar; in Easter term last by Serjeant Leigh for the plaintiff, and Burland, one of the King's Serjeants, for the defendants, and in this present term by Serjeant Glynn for the plaintiff, and Nares, one of the King's Serjeants, for the defendants.

Counsel for the plaintiff. At the trial of this cause the defendants relied upon two defences; 1st, that a Secretary of State as a justice or conservator of the peace, and these messengers acting under his warrant, are within the statute of the 24th of Geo. 2, c. 44, which enacts, (among other things,) that "no action shall be brought against any constable or other officer, or any person acting by his order and in his aid, for nay thing done in obedience to the warrant of a justice, until demand hath been made or left at the usual place of his adobe by the party, or by his attorney in writing signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand," and that no demand was ever made by the plaintiff of a perusal or copy of such warrant in this case, according to that statute, and therefore he shall not have this action against these defendants, who are merely ministerial officers acting under the Secretary of State, who is a justice and conservator of the peace. 2ndly, that the warrant under which the defendants acted in a legal warrant, and that they can well justify what they have done by virtue thereof, for that at many different times, from the time of the Revolution till this time, the like warrants with that issued against the plaintiff in this case have been granted by Secretaries of State, and executed by the messengers in ordinary for the time being.

1. It is most clear and manifest upon this verdict, that the Earl of Halifax acted as Secretary of State when he granted the warrant, and not merely as a justice of the peace, and therefore cannot be within the

statute 24 Geo. 2, c.44, neither would he be within the statute if he was a conservator of the peace, such person not being once named therein; and there is no book in the law whatever that ranks a Secretary of State quasi secretary among the conservators of the peace; Lambert, Coke, Hawkins, Lord Hale, etc. etc. none of them take any notice of a Secretary of State being a conservator of the peace, and until of late days he was no more indeed than a mere clerk; a conservator of the peace had no more power than a constable has now, who is a conservator of the peace had no more power than a constable has now, who is a conservator of the peace at common law. At the time of making this statute, a justice of peace, constable, headborough, and other officers of the peace, borsholders and tithingmen, as well as Secretary of State, conservator of the peace and messenger in ordinary, were all very well known; and if it had been the intent of the statute, that a Secretary of State, conservator of the peace, and messenger in ordinary, should have been within the statute, it would have mentioned all or some of them, and it not having done so, they cannot be within it. A messenger certainly cannot be within it, who is nothing more than a mere porter, and Lord Halifax's footmen might as well be said to be officers within the statute as these defendants. Besides, the verdict finds that these defendants executed the warrant without taking a constable to their assistance; this disobedience will not only take them out of the protection of the statute, (if they had been within it,) but will also disable them to justify what they have done, by any plea whatever; the office of these defendants is a place of considerable profit, and as unlike that of a constable or tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in person, and cannot substitute another in his room, though he may call persons to assist him. 1 Hale's P. C. 581. This warrant is more lake a warrant to search for stolen goods and to seize them, than nay other kind of warrant which ought to be directed to constables and other public officers which the law takes notice of. 2 Hale's P. C. 149, 150. How much more necessary in the present case was it to take a constable to the defendants' assistance? The defendants have also disobeyed the warrant in another matter, being commanded to bring the plaintiff and his books and papers before Lord Halifax; they carried him and them before Lovel Stanhope, the law-clerk, and though he is a justice of peace, that avails nothing, for no single justice of peace ever claimed a right to issue such a warrant as this, nor did he act therein as a justice of peace, but as the law-clerk to Lord Halifax. The information was made before Justice Weston; the Secretary of State in this case never saw the accuser nor the accused; it seems to have been below his dignity; the names of the officers introduced here are not to be found in the law-books, from the first Year-Book to the present time.

2. A power to issue such a warrant as this, is contrary to the genius of the law of England, and even if they had found what they searched for, they could not have justified under it; but they did not find what they searched for, nor does it appear that the plaintiff was author of any of the supposed seditious papers mentioned in the warrant, so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise; but the verdict says such warrants have been granted by Secretaries of State ever since the Revolution; if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end; it is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the

Spanish Inquisition; for ranksacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before Lord Halifax; what? Has a Secretary of State a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed; and if it were lawful, no man could endure to live in this country. In the case of a search warrant for stolen goods, it is never granted, but upon the strongest evidence, that a felony has been committed, and that the goods are secreted in such a house, and it is to seize such goods as were stolen, not all the goods in the house; but if stolen goods are not found there, all who entered with the warrant are trespassers. However frequently these warrants have been granted since the Revolution, that will not make them lawful, for if they were unreasonable or unlawful when first granted, no usage or continuance can make them good; even being unreasonable, contrary to common right, or purely against law, if upon considering their nature and quality they shall be found injourious to a multitude, and prejudicial to the common wealth, and to have their commencement (for the most part) through the oppression and extortion of lords and great men. Davis 32 b. These warrants are not by custom; they go no farther back than 80 years and most amazing it is they have never before this time been opposed or controverted, considering the great men that have presided in the King's Bench since that time; but it was reserved for the honour of this Court, which has ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star-Chamber tyranny.

Counsel for the defendants. I am not at all alarmed, if this power is established to be in the Secretary of State; it has been used in the best of times, often since the Revolution. I shall argue, 1st that the Secretary of State has power to grant these warrants, and if I cannot maintain this, I must 2dly shew that by the statute 24 Geo. 2, c. 24, this action does not lie against the defendants the messengers. 1. A Secretary of State has the same power to commit for treason as a justice of peace. Kendale and Roe, Skin. 596. 1 Salk. 346, S. C. 1 Ld. Raym. 65. 5 Mod. 78, S. C. Sir Wm. Wyndham was committed by James Stanhope, Secretary of State, to the Tower for high treason to the 7th of October 1715; see the case 1 Stra. 2; and Serjeant Hawkins says, it is certain that the Privy Council, or nay one or two of them, or a Secretary of State, as in all ages they have done. 2 Hawk. P. C. 117, sect. 4. 1 Leon. 70, 71. Carth. 291. 2 Leon. 175. If it is clear that a Secretary of State may commit for treason and other offences against the State, he certainly may commit for a seditious libel against the Government, for there can hardly be a greater offence against the State, except actual treason. A Secretary of State is within the Habeas Corpus Act, but a power to commit without a power to issue his warrant to seize the offender and the libel would be nothing; so it must be concluded that he has the same power upon information to issue a warrant to search for and seize a seditious libel, and its author and publisher, as a justice of peace has for granting a warrant to search for stolen goods, upon an information that a theft has been committed, and that the goods are concealed in such a place; in which case the constable and officers assisting him in the search, may break open doors, boxes, etc. to come at such stolen goods. Supposing the practice of granting warrants to search for libels against the State be admitted to be an evil in particular cases, yet to let such libellers escape who endeavour to raise rebellion is a greater evil, and may be compared to the reasoning of Mr. Justice Foster in the case of pressing, 159, where he says, "that war

is a great evil, but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war brings with it; but it is a maxim in law and good policy too, that all private mischiefs must be borne with patience, for preventing a national calamity," etc.

2. Supposing there is a defect of jurisdiction in the Secretary of State, yet the defendants are within the stat. 24 Geo. 2, c. 44, and though not within the words, yet they are within the reason of it; that it is not unusual in Acts of Parliament to comprehend by construction a generality where express mention is made only of a particular; the Statute of Circumspecte Agitatis concerning the Bishop of Norwich extends to all bishops. Fitz. Prohibition 3, and 2 Inst. on this statute. 25 Ed. 3 enables the incumbent to plead in quare impedit to the King's suit; this also extends to the suits of all persons. 38 Ed. 3, 31, the Act 1 Rich. 2 ordains, that the warden of the Fleet shall not permit prisoners in execution to go out of prison by bail or baston, yet it is adjudged that this Act extends to all gaolers. Plowd. Com. Case of Platt, 35 b. the Stat. de Donis Conditionalibus extends to all other limitations in tail not there particularly mentioned, and the like construction has been put upon several other statutes. Tho. Jones 62. The stat. 7 Jac. 1, c. 5, the word constable therein extends to a deputy constable. Moor 845. These messengers in ordinary have always been considered as officers of the Secretaries of State, and a commitment may be to their custody, as in Sir W. Wyndham's case. A justice of peace may make a constable pro hac vice to execute a warrant, who would be within the Stat. 24 Geo. 2. So if these defendants are not constables, yet as officers they have power to execute a warrant out of his jurisdiction; officers acting under colour of office, though doing an illegal act, are within this statute. Vaugh. 113. So that no demand having ever been made of a warrant, nor any action commenced within six months, the plaintiff has no right of action. It was said that a conservator of the peace had no more power than a constable has now. I answer, they had power to bind over at common law, but a constable has not. Dalton, cap. 1.

Counsel for the plaintiff in reply. It is said this has been done in the best of times ever since the Revolution; the conclusion from thence is, that it is the more inexcusable, because done in the best of times, in an aera when the common law (which had been trampled under the food of arbitrary power) was revived. We do not deny but the Secretary of State hath power to commit to treason and other offences against the State, but that is not the present case, which is breaking into the house of a subject, breaking into his drawers and boxes, ransacking all the rooms in his house, and prying into all his private affairs; but it is said if the Secretary of State has power to commit, he has power to search, etc as in the case of stolen goods. This is a false consequence, and it might as well be said he has a power to torture. As to stolen goods, if the officers find none, have they a right to take away a man's goods which were not stolen? Pressing is said to be a dangerous power, and yet it has been allowed for the benefit of the State; but that is only the argument and opinion of a single Judge, from ancient history and records, in times when the lower part of the subjects were little better than slaves to their lords and great men, and has not been allowed to be lawful (without an Act of Parliament) since the time of the Revolution. The Stat. 24 Geo. 2 has been compared to ancient statutes, naming particular persons and districts, which have been construed to extend to many others not named therein; and so the defendants, though no such officers are mentioned, by like reason, are within the Statute 24 Geo. 2; but the law knows no such officers as messengers in ordinary to the King. It is said the Habeas Corpus Act extends to commitments by Secretaries of

State, though they are not mentioned therein: true; but that statute was made to protect the innocent against illegal and arbitrary power. It is said the Secretary of State is a justice of peace, and the messengers are his officers; why then did the warrant direct them to take a constable to their assistance, if they were themselves the proper officers? It seems to admit they were not the proper officers; if a man be made an officer for a special purpose to arrest another, he must shew his authority; and if he refuses, it is not murder to kill him; but a constable or other known officer in the law need not shew his warrant.

Lord Chief Justice. I shall not give any opinion at present, because this case, which is of the utmost consequence to the public, is to be argued again; I shall only just mention a mater which has slipped the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument. Suppose a warrant which is against law be granted, such as no justice of peace, or other magistrate high or low whomsoever, has power to issue, whether that magistrate or justice who grants such warrant, or the officer who executes it, are within the stat. 24 Geo. 2, c. 44? To put one case (among an hundred that might happen); suppose a justice of peace issues a warrant to search a house for stolen goods, and directs it to four of his servants, be within the Stat. 24 Geo. 2? I desire that every point of this case may be argued to the bottom; for I shall think myself bound, when I come to give judgment, to give my opinion upon every point in the case.

Counsel for the plaintiff on the second argument. If the Secretary of State, or a Privy Counsellor, Justice of Peace, or other magistrate whatever, have no legal power to grant the warrant in the present case, it will follow, that the magistrate usurping such an illegal power can never be construed to be within the meaning or reason of the statute of 24 Geo. 2, c. 44, which was made to protect justices of peace, etc. where they made blunders, or erred in judgment in cases within their jurisdiction, and not to give them arbitrary power to issue warrants totally illegal from beginning to end, and in cases wherein they had no jurisdiction at all. If any such power in a Secretary of State, or Privy Counsellor, had ever existed, it would appear from our law-books; all the ancient books are silent on this head; Lambert never once mentions a Secretary of State; neither he, nor a Privy Counsellor, were ever considered as magistrates; in all the arguments touching the Star-Chamber, and petition of right, nothing of this power was ever dreamt of; State commitments anciently were either per mandatum Regis in person, or by warrant of several of the Privy Counsellors in the plural number; the King has this power in a particular mode, viz. by the advice of his Privy Council, who are to be answerable to the people of wrong is done; he has no other way but in Council to signify his mandate. In the case of *The Seven Bishops* this matter was insisted upon at the Bar, when the Court presumed the commitment of them was by advice of the Privy Council, but that a single Privy Counsellor had this power wad not contended for by the Crown lawyers then. This Court will require it to be shewn that there have been ancient commitments of this sort; neither the Secretary of State or a Privy Counsellor ever claimed a right to administer an oath (but they employ a person as a law-clerk, who is a justice of peace, to administer oaths, and take recognizances); Sir Barth. Shower in *Kendale and Roe's case*, insisted they never had such power. It would be a solecism in our law to say, there is a person who has power to commit, and has not power to examine on oath, and bail the party; therefore whoever has power to commit has power to bail; it was a question formerly, whether a constable as an ancient conservator of the peace could take a recognizance or bond? In the time of Queen Eliz. there was a

case wherein some of the Judges were of one opinion and some of another. A Secretary of State was so inconsiderable formerly, that he is not mentioned in the Statute of Scandalum Magnatum; his office was thought of no great importance; he takes no oath of office as Secretary of State, gives no kind of security for the exercise of such judicial power as he now usurps. If this was an ancient power it must have been annexed to his office anciently, it cannot now be given to him by the King; the King cannot make two Chief Justices of the Common Pleas, nor could the King put the Great Seal in commission before an Act of Parliament was made for that purpose. There was only one Secretary of State formerly, there are now two appointed by the King; if they have this power of magistracy, it should seem to require some law to be made to give that power to two Secretaries of State which was formerly in one only. As to commitments per mandatum Regis, see Samf. Pl. Corn. 72. 4 Inst. c. 5, Court of Star-Chamber. Admitting they have power to commit in high treason, it will not follow they have power to commit for a misdemeanor; it is of necessity that they can commit in high treason, which requires immediate interposition for the benefit of the public. In the case of commitment by Walsingham Secretary of State, 1 Leon. 71, it was returned on the habeas corpus at least, that the party was committed ex sentention & mandate totius Concilii Privati dominae Reginae; because he found he had not that power of himself, he had recourse to the whole Privy Council's power; so that this case is rather for the plaintiff. Commitment by the High Commission Court of York was declared by Parliament illegal from the beginning; so in the case of ship-money the Parliament declared it illegal.

Counsel for the defendants on the second argument. The most able Judges and advocates ever since the Revolution, seem to have agreed that the Secretaries of State have this power to commit for a misdemeanor. Secretaries of State have been looked upon in a very high light for two hundred years past. 27 H. 8, c. 11, their rank and place is settled by 31 H. 8, c. 10. 4 Inst. 362, cap. 77, of precedency. 4 Inst. 56, Selden's Titles of Honour, C. Officers of State; so that a Secretary of State is something more than a mere clerk, as was said. Minshew ver. Secretary; he is e Secretioribus Concillis domini Regis. Serjeant Pengelly moved that Sir Wm. Windham might be bailed; if he could not be committed by the Secretary of State for something less than treason, why did he move to have him bailed? This seems a concession that he might be committed in that case for something less than treason. Lord Holt seems to agree that a commitment by a Secretary of State is good. Skin. 598. 1 Ld. Raym. 65. There is no case in the books that says in what cases a Secretary of State can or cannot commit; by what power is it that he can commit in the case of treason, and in no other case? The resolution of the House of Commons touching the Petition of Right, Selden, last volume, Parliamentary History, vol. 8, fol. 95, 96. Secretary Coke told the Lords, it was his duty to commit by the King's command. *Yoxley's case*, Carth. 291: He was committed by the Secretary of State on the Statute of Eliz. for refusing to answer whether he was a Romish priest; *The Queen and Derby*, Fortescue's Rep. the commitment by the Secretary of State, Mich. 10 Annae, for a libel, and held good. (Note; Bathurst, J. said, he had seen the habeas corpus and the return, and that this was a commitment by a Secretary of State.) *The King and Earbury*, Mich. 7 Geo. 2, 2 Bernard. 346, was a motion to discharge a recognizance entered into for writing a paper called the *Royal Oak*. Lord Hardwicke said it was settled in *Kendale and Roe's case*, that a Secretary of State might apprehend persons suspected of treasonable practices; and there are a great number of

precedents in the Crown-Office of commitments by Secretaries of State for libels against the Government. After time taken to consider, the whole Court gave judgment this term for the plaintiff.

Curia. The defendants make two defences; first, that they are within the stat. 24 Geo. 2, c. 44; 2dly, that such warrants have frequently been granted by Secretaries of State ever since the Revolution, and have never been controverted, and that they are legal; upon both which defences the defendants rely.

A Secretary of State, who is a Privy Counsellor, if he be a conservator of the peace, whatever power he has to commit is by the common law: if he be considered only as a Privy Counsellor, he is the only one at the board who has exercised this authority of late years; if as a conservator, he never binds to the peace; no other conservator ever did that we can find: he has no power to administer an oath, or take bail; but yet it must be admitted that he is in the full exercise of this power to commit, for treason and seditious libels against the Government, whatever was the original source of that power; as appears from the cases of *The Queen and Derby*, *The King and Earbury*, and *Kendale and Roe's case*.

We must know what a Secretary of State is, before we can tell whether he is within the stat. 24 Geo. 2, c. 44. He is the keeper of the King's signet wherewith the King's private letters are signed. 2 Inst. 556. Coke upon Articuli Super Chartas, 28 Ed. 1. Lord Coke's silence is a strong presumption that no such power as he now exercises was in him at that time; formerly he was not a Privy Counsellor, or considered as a magistrate; he bagan to be significant about the time of the Revolution, and grew great when the princes of Europe sent ambassadors hither; it seems inconsistent that a Secretary of State should have power to commit, and no power to administer an oath, or take bail; who can commit and not have power to examine? The House of Commons indeed commit without oath, but that is nothing to the present case; there is no account in our law-books of Secretaries of State, except in the few cases mentioned; he is not to be found among the old conservators; in Lambert, Crompton, Fitzherbert, etc. etc. nor is a Privy Counsellor to be found among our old books till *Kendall and Roe's case*, and 1 Leon. 70, 71, 29 Eliz. is the first case that takes notice of a commitment by a Secretary of State; but in 2 Leon. 175 the Judges knew no such committing magistrate as the Secretary of State. It appears by the Petition of Right, that the King and Council claimed a power to commit; if the Secretary of State had claimed any such power, then certainly the Petition of Right would have taken notice of it; but from its silence on that head we may fairly conclude he neither claimed nor had any such power; the Stat. 16 Car. 1, for Regulating the Privy Council, and taking away the Court of Star-Chamber, binds the King not to commit, and in such case gives a habeas corpus; it is strange that House of Commons should take no notice of the Secretary of State, if he then had claimed power to commit. This power of a Secretary of State to commit was derivative from the commitment per mandatum Regis: Ephemeris Parliamentaria. Coke says in his speech to the House, "If I do my duty to the King, I must commit without shewing the cause;" 1 Leon. 70, 71, shews that a commitment by a single Privy Counsellor, was not warranted. By the Licensing Statute of 13 & 14 Car. 2, cap. 33, sec. 15, licence is given to a messenger under a warrant of the Secretary of State to search for books unlicensed, and if they find any against the religion of the Church of England, to bring them before the Secretary of State; the warrant in that case expressed that it was by the King's command. See Stamford's comment on the mandate of the King, and Lambert, cap. Bailment. All the Judges temp. Eliz. held that in a

warrant of commitment by one Privy Counsellor he must shew it was by the mandate of the King in Council. See And. 297, the opinion of all the Judges; they remonstrated to the King that no subject ought to be committed by a Privy Counsellor against the law of the realm. Before the 3 Car. 1 all the Privy Counsellors exercised this power to commit; from that aera they disused this power, but then they prescribed still to commit per mandatum Regis. Journal of the House of Commons 195. 16 Car. 1. Coke, Selden, etc. argued that the King's power to commit, meant that he had such power by his Courts of Justice. In the case of The Seven Bishops all the Court and King's Council admit, that supposing the warrant had been signed out of the Council, that it would have been bad, but the Court presumed it to be signed out of the board; Pollexfen in his argument says, we do not deny but the Council board have power to commit, if there had been any such power they could not have been ignorant of it; and this power was only in cases of high treason, they never claimed it in any other case. It was argued that if a Secretary of State hath power to commit in high treason, he hath it in cases of lessor crimes: but this we deny, for it appears that he hath power to commit in one case only, how can we then without authority say he has that power in other cases? He is not a conservator of the peace; Justice Rokeby only says he is in the nature of conservator of the peace: we are now bound by the cases of *The Queen and Derby*, and *The King and Earbury*.

The Secretary of State is no conservator nor a justice of the peace, quasi secretary, within the words or equity of the Stat. 24 Geo. 2, admitting him (for arguments sake) to be a conservator, the preamble of the statute shews why it was made, and for what purpose; the only grantor of a warrant therein mentioned, is a justice of the peace; justice of the peace and conservator are not convertible terms; the cases of construction upon old statutes, in regard to the warden of the Fleet, the Bishop of Norwich, etc. are not to be applied to cases upon modern statutes. The best way to construe modern statutes is to follow the words thereof; let us compare a justice of peace and a conservator; the justice is liable to actions, as the statute takes notice, it is applicable to him who acts by warrant directed to constables; a conservator is not intrusted with the execution of laws, which by this Act is meant statutes, which gives justices jurisdiction; a conservator is not liable to actions; he never acts: he is almost forgotten; there never was an action against a conservator of the peace as such; he is antiquated, and could never be thought of when this Act was made; and ad ea que frequenter accident jura adaptantur. There is no act of constable or tithingman as conservator taken notice of in the statute; will the Secretary of State be ranked with the highest or lowest of these conservators? The Statute of Jac. 1, for officers acting by authority to plead the general issue, and give the special matter in evidence, when considered with this Statute of 24 Geo. 2, the latter seems to be a second part of the Act of Jac. 1, and we are all clearly of opinion that neither the Secretary of State, nor the messengers, are within the Stat. 24 Geo. 2, but if the messengers had been within it, as they did not take a constable with them according to the warrant, that alone would have been fatal to them, nor did they pursue the warrant in the execution thereof, when they carried the plaintiff and his books, etc. before Lovel Stanhope, and not before Lord Halifax; that was wrong, because a Secretary of State cannot delegate his power, but ought to act in this part of his office personally.

The defendants having failed in their defence under the Statute 24 Geo. 2; we shall now consider the special justification of the Secretary of State; for if he has no jurisdiction to grant a warrant to break open doors, locks, boxes, and to seize a man and all his books, etc. in the first

instance upon an information of his being guilty of publishing a libel, the warrant will not justify the defendants: it was resolved by B. R. in the case *Shergold v. Holloway*, that a justice's warrant expressly to arrest the party will not justify the officer, there being no jurisdiction. 2 Stran 1002. The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing the plaintiff, or proof that he was the author of the supposed libels; a power claimed by no other magistrate whatever (Scroggs C.J. always excepted); it was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did; for they were to seize all papers, bank bills or any other valuable papers they might take away if they were so disposed; there might be nobody to detect them. If this be lawful, both Houses of Parliament are involved in it, for they have both ruled, that privilege doth not extend this case. In the case of Wilkes, a member of the Commons House, all his books and papers were seized and taken away; we were told by one of these messengers that he was obliged by his oath to sweep away all papers whatsoever; if this is law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. The defendants have no right to avail themselves of the usage of these warrants since the Revolution, and if that would have justified them they have not averred it in their plea, so it could not be put, nor was in issue at the trial; we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have. This case was compared to that of stolen goods; Lord Coke denied the lawfulness of granting warrants to search for stolen goods, 4 Inst. 176, 177, though now it prevails to be law; but in that case the justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and his strong reason to believe they are concealed in such a place; but if the goods are not found there, he is a trespasser; the officer in that case is a witness; there are none in this case, no inventory taken; if it had been legal many guards of property would have attended it. We shall now consider the usage of these warrants since the Revolution; if it began then, it is too modern to be law; the common law did not begin with the Revolution; the ancient constitution which had been almost overthrown and destroyed, was then repaired and revived; the Revolution added a new buttress to the ancient venerable edifice: the K.B. lately said that no objection had ever been taken to general warrants, they have passed sub silentio: this is the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house, search for and take away all his books and papers in the first instance, to be law, which is not to be found in our books. It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful till this time. We are inclined to think the present warrant took its first rise from the Licensing Act, 13 & 14 Car. 2, c. 33, and are all of opinion that it cannot be justified by law, notwithstanding the resolution of the Judges of that time that a house may be searched for a libel, but the twelve Judges cannot make law; and if a man is punishable for having a libel in his private

custody, as many cases say he is, half the kingdom would be guilty in the case of a favourable libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit. It is said it is better for the Government and the public to seize the libel before it is published; if the Legislature be of that opinion they will make it lawful. Sir Samuel Astry was committed to the Tower, for asserting there was a law of State distinct from the common law. The law never forces evidence from the party in whose power it is; when an adversary has got your deeds, there is no lawful way of getting them again but by an action. 2 Stran. 1210, *The King and Cornelius*. *The King and Dr. Purnel*, Hil. 22 Geo. B.R. Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers: upon the whole, we are all of opinion that this warrant is wholly illegal and void. One word more for ourselves; we are no advocates for libels, all Governments must set their faces against them, and if juries do not prevent them they may prove fatal to liberty, and the worst Government better than none at all.

Judgment for the plaintiff.

Europa Oil (NZ) Ltd v Commissioner of Inland Revenue

[1976] 1 NZLR 546 (PC)

Judicial Committee
14, 15, 16, 21, 22, 23, 24 July 1975; 13 January 1976
Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Edmund-Davies and Sir Garfield Barwick

The majority judgment of their Lordships was delivered by

LORD DIPLOCK.

....

The taxpayer company is one of a group of associated companies which it is convenient to refer to as "the Todd group". The effective management of all the companies in the group is exercised by Mr Bryan Todd. The principal business of the taxpayer company is the marketing in New Zealand of petroleum products from the "light end" of refining - predominantly motor gasoline but including some gas oil. Its principal competitors in New Zealand are companies controlled by or associated with one or other of the major international oil companies which have interests in oilfields and refineries in the Middle East or elsewhere east of Suez from which their requirements of light end products can be obtained. In contrast to its competitors the Todd Group has no interest in any oil field and during the period covered by the first set of contracts it had no interest in any refinery. It had to purchase its stock-in-trade in bulk from one or other of the major international oil companies in the fully refined form in which it was marketed in New Zealand.

Gulf Oil Corporation ("Gulf"), an American company, is one of the major international oil companies. By itself or through its subsidiary companies (hereafter referred to as "the Gulf group") it had interests in oilfields in the Middle East and access to refinery capacity there. The group had ample outlets east of Suez for the heavy end products of refining crude oil from its oilfields, but an inadequate market for the light end products, and no outlet for these products in New Zealand. So the petroleum products of which it had a surplus to dispose of were those of which the Todd group needed an assured source of supply. In this respect the business interests of the two groups were complementary.

The prices at which bulk supplies of crude oil and refined products were bought and sold on the world market were, at the relevant periods, tightly controlled by the major international oil companies. Sales were at "posted prices", the posted price for a refined product being greater than the posted price for crude oil by an amount equivalent to the cost of refining with the addition of a refiner's profit.

In order to secure an assured outlet for the surplus light ends of the crude oil that it refined in the Middle East it was in the business interest of

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the Gulf group to forgo some part of the refiner's profit included in the posted prices applicable to those refined products which it supplied to the Todd group. The amount to be forgone was the subject of hard bargaining between the two groups in 1956.

It was ultimately fixed at 2.5 cents per gallon of gasoline or gas oil supplied to the taxpayer company. The Gulf group, however, was for business reasons unwilling to depart from the established system of posted prices by making this concession in the form of a reduction in the price at which it sold the refined products to the taxpayer company. So the benefit of the concession of 2.5 cents per gallon had to be given by the Gulf group to the Todd group in some other form. For the period from 1956 to 1964 this was done under the 1956 contracts.

…

Common to both sets of contracts, however, was the form in which the Todd group obtained the benefit of that part of the refiner's profit included in the posted prices that the Gulf group was willing to forgo in order to obtain an outlet for its light end products, as under. For this purpose the two groups in 1956 caused to be incorporated in the Bahamas a company, Pan Eastern Refining Co Ltd ("Pan Eastern"), of which one half of the share capital was held by a wholly owned subsidiary of the taxpayer company, Associated Motorists Petrol Co Ltd ("AMP"), and the other half by a company in the Gulf group. The 1956 contracts included a contract between Gulf and Pan Eastern ("the processing contract") under which it was agreed that Pan Eastern should purchase from Gulf and Gulf should sell to Pan Eastern at posted prices the quantity of crude oil needed to provide the finished products to be purchased by the taxpayer company under the products contract. Gulf undertook to refine the crude oil on behalf of Pan Eastern for a processing fee and to purchase from Pan Eastern the resulting finished products at prices fixed in such a way as to ensure that Pan Eastern should make a profit out of the processing contract equivalent to approximately 5 cents per gallon on the finished products purchased by the taxpayer company from the Gulf group under the products contract of which AMP's share by way of dividend would be 2.5 cents per gallon. In 1964 a contract in similar terms ("the new processing contract") was entered into between Gulf and Pan Eastern relating to the feedstocks to be purchased by Europa Refining under the supply contract and the crude oil needed to provide those feedstocks.

Pan Eastern itself did no refining. Under the processing contract and the new processing contract this was done exclusively by the Gulf group. What the contracts did was to provide the means by which a share of the refiner's profit on finished products and feedstocks sold by the Gulf group to the Todd group would be obtained by the Todd group in the form of dividends on the shares in Pan Eastern held by AMP.

In the instant appeal as in the previous appeal (*Commissioner of Inland Revenue v Europa Oil (NZ) Ltd* [1971] NZLR 641; [1971] AC 760) their Lordships are concerned only with the liability of the taxpayer company for New Zealand income tax - not with the liability of any other members of the Todd group of companies. It is common ground that the dividends receivable by AMP from Pan Eastern or by the taxpayer company from AMP do not, as such, form part of the assessable income of the taxpayer company. Although he relies also on s 108 of the Land and Income Tax Act 1954, the main ground on which the Commissioner of Inland Revenue has sought to recover tax upon them indirectly is by

attacking the claim of the taxpayer company under s 111 to deduct as expenditure incurred in the production of its assessable income from its business of marketing petroleum products in New Zealand, so much of the price paid by the taxpayer company for the motor gasoline and gas oil under the 1956 contracts or for the feedstocks under the 1964 contracts as is equivalent to AMP's share of the profits made by Pan Eastern under the processing agreement or the new processing agreement. He contends that upon a true analysis of the legal nature of both sets of

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contracts the sums which were described in the relevant contracts as being the price of the product sold to the taxpayer company, were paid for a compound consideration consisting partly of goods sold and delivered and partly of other advantages to be received, that is, profits to be derived by the taxpayer company through Pan Eastern and AMP.

…

In 1968 section 111 of the Land and Income Tax Act 1954 was amended to read:

> "In calculating the assessable income of any taxpayer, any expenditure or loss to the extent to which it –
>
> (a) Is incurred in gaining or producing the assessable income for any income year; or
>
> (b) Is necessarily incurred in carrying on a business for the purpose of gaining or producing the assessable income for any income year –
>
> may, except as otherwise provided in this Act, be deducted from the total income derived by the taxpayer in the income year in which the expenditure or loss is incurred".

In the last four years of assessment the taxpayer company's claim to the deduction made under para (a) of the amended section. In their Lordships' view the amendment of the section in 1968 makes no difference for the purposes of the instant appeal.

The actual language of s 111, both before and after the 1968 amendment, is simple enough. It does not, in their Lordships' view, need any detailed exegesis. The general principles of construction of a taxing statute are well established. Those of particular relevance to s 111 are referred to in the majority judgment of this Board in the previous appeal where there are cited with approval two leading decisions of the High Court of Australia on the corresponding section in the Australian taxing statute (*Ronpibon Tin NL v Federal Commissioner of Taxation* (1949) 78 CLR 47 and *Cecil Bros Pty Ltd v Federal Commissioner of Taxation* (1964) 111 CLR 430). Their Lordships do not find it necessary to repeat them here; they content themselves with emphasising that it is not the economic results sought to be obtained by making the expenditure that is determinative of whether the expenditure is deductible or not; it is the legal rights enforceable by the taxpayer that he acquires in return for making it. The difficulty to which the section gives rise is not one of interpretation of the words it uses, but of the application of those words to particular transactions which may be entered into in the course of business where those contractual arrangements are complicated and involve a multiplicity of parties.

…

In this appeal, as in the previous appeal, the particular expenditure claimed to be deductible under the section consists of monies paid by the taxpayer company under contracts for the sale of goods whereby the property in the goods was transferred by the seller to the taxpayer company. The monies so paid were stated in those contracts to be the price at which the goods were sold; and since the goods were acquired by the taxpayer company as stock-in-trade for its business of marketing petroleum products in New Zealand, there is no question that, if those contracts had stood alone, the whole of the monies payable under them would be expenditure by the taxpayer company that was deductible under s 111. Those contracts, however, did not stand alone. They formed part of a complex of interrelated contracts entered into by various companies that were members of the Todd group or the Gulf group in connection with the same goods. The question in both appeals can accordingly be stated thus: Is the legal effect - as distinct from the economic consequences - of the provisions of the relevant interrelated contracts such that when the taxpayer company orders goods under the contract of sale and accepts the obligation to pay the sum stipulated in that contract as the purchase price, the taxpayer company by the performance of that obligation acquires a legally enforceable right not only to delivery of the goods but also to have some other act performed which confers a benefit in money or in money's worth upon the taxpayer company or some other beneficiary?

If the answer is "No", the full amount of the sum stipulated as the purchase price is deductible under s 111. If the answer is "Yes", the sum stipulated as the purchase price falls to be apportioned as to part to expenditure incurred in purchasing the goods and as to the remainder to expenditure incurred in obtaining performance of the other act, which in the instant case would not be deductible.

In their Lordships' view there is a difference that is crucial to the answer to this question in the legal character of payments made by the taxpayer company when it purchased motor gasoline and gas oil under the 1956 contracts and those made when it purchased feedstocks under the 1964 contracts.

…

It follows that whenever the taxpayer company entered into a contract with Europa Refining for the sale and delivery of one or more cargo lots of feedstocks and thereby accepted an obligation to pay the sum stipulated in that contract as the purchase price, the only right that it thereby acquired which was legally enforceable against anyone was the right to delivery of the feedstocks by Europa Refining.

In their Lordships' view the result upon the commissioner's claim under s 111 is that it must fail. The true legal character of the whole of the expenditure claimed to be deductible is that of the purchase price of stock-in-trade for the taxpayer company's business of marketing petroleum products and nothing else. As such it is deductible in full in calculating the taxpayer company's assessable income from that business.

Their Lordships must accordingly now turn to the alternative claim by the commissioner under s 108 of the Land and Income Tax Act 1954. During the years of assessment that are in issue in the instant

appeal it was substantially in the following terms, which, however, incorporate a minor amendment made in 1968 that does not affect the issue in the instant appeal:

> "Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void as against the Commissioner for income tax purposes in so far as, directly or indirectly, it has or purports to have the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax".

There are several things to be noted in connection with the application of this section.

First, it is not a charging section; all it does is to entitle the commissioner when assessing the liability of the taxpayer to income tax to treat any

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contract, agreement or arrangement which falls within the description in the section as if it had never been made. Any liability of the taxpayer to pay income tax must be found elsewhere in the Act. There must be some identifiable income of the taxpayer which would have been liable to be taxed if none of the contracts, agreements or arrangements avoided by the section had been made.

Secondly, the description of the contracts, agreements and arrangements which are liable to avoidance presupposes the continued receipt by the taxpayer of income from an existing source in respect of which his liability to pay tax would be altered or relieved if legal effect were given to the contract, agreement or arrangement sought to be avoided as against the commissioner. The section does not strike at new sources of income or restrict the right of the taxpayer to arrange his affairs in relation to income from a new source in such a way as to attract the least possible liability to tax. Nor does it prevent the taxpayer from parting with a source of income.

Thirdly, the references in the section to "the incidence of income tax" and "liability to pay income tax" are reference to New Zealand income tax. The section is not concerned with the fiscal consequences of the impugned contracts, agreements or arrangements in any other jurisdiction. In the instant case it would have made no difference if Pan Eastern, instead of being established in a tax haven, had been established in the United Kingdom and incurred liability to pay corporation tax there upon its profits under the new processing agreement.

Fourthly, the section in any case does not strike down transactions which do not have as their main purpose or one of their main purposes tax avoidance. It does not strike down ordinary business or commercial transactions which incidentally result in some saving of tax. There may be different ways of carrying out such transactions. They will not be struck down if the method chosen for carrying them out involves the payment of less tax than would be payable if another method was followed. In

such cases the avoidance of tax will be incidental to and not the main purpose of the transaction or transactions which will be the achievement of some business or commercial object: *Newton v Commissioner of Taxation* [1958] AC 450, 465; [1958] All ER 759, 764, *Mangin v Commissioner of Inland Revenue* [1971] NZLR 591 [1971] AC 739, *Ashton v Commissioner of Inland Revenue* [1975] 2 NZLR 717.

Their Lordships' finding that the monies paid by the taxpayer company to Europa Refining is deductible under s 111 as being the actual price paid by the taxpayer company for its stock-in-trade under contracts for the sale of goods entered into with Europa Refining, is incompatible with those contracts being liable to avoidance under s 108. In order to carry on its business or marketing refined petroleum products in New Zealand the taxpayer company had to purchase feedstocks from someone. In respect of these contracts the case is on all fours with *Cecil Bros Pty Ltd v Federal Commissioner of Taxation* (1964) 111 CLR 430 in which it was said by the High Court of Australia "it is not for the Court of the commissioner to say how much a taxpayer ought to spend in obtaining his income" (ibid, 434), to which their Lordships would add: it is not for the court or commissioner to say from whom the taxpayer should purchase the stock-in-trade acquired by him for the purpose of obtaining his income.

The commissioner must, therefore, be able to point to some other of the 1964 contracts the avoidance of which would have the legal effect of making the profits earned by Pan Eastern under the new processing contract, or the

dividends payable out of these profits to AMP, part of the assessable income of the taxpayer company.

He seeks first to avoid the original 1956 organisation contract pursuant to which Pan Eastern was incorporated in the Bahamas. As was held by the Court of Appeal in the previous appeal, there were good commercial reasons, unconnected with the liability of the taxpayer company to New Zealand income tax, for incorporating Pan Eastern and for selecting the Bahamas as its seat. Furthermore the 1956 organisation contract created a new source of income for the taxpayer company which did not exist before the 1956 processing contract came into force. The taxpayer company was perfectly entitled to make arrangements whereby the income from that source was received by it in the form of dividends upon the shares of its wholly owned subsidiary AMP paid out of AMP's share of profits earned by Pan Eastern. In their Lordships' vie there is no ground upon which the original 1956 organisation contract could be treated as void under s 108.

…

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the orders of the Court of Appeal and the Supreme Court set aside, and the matter remitted to the Supreme Court with a direction that it answer in the affirmative the question posed in the case stated by the Commissioner of Inland Revenue on 24 October 1972 and amend the assessments accordingly.

…

[Dissenting judgment of the Court delivered by Lord Wilberforce omitted]

…

GREGORY v. HELVERING, COMMISSIONER OF INTERNAL REVENUE No. 127□ SUPREME COURT OF THE UNITED STATES

293 U.S. 465; 55 S. Ct. 266; 79 L. Ed. 596; 1935 U.S. LEXIS 4; 35-1 U.S. Tax Cas. (CCH) P9043; 14 A.F.T.R. (P-H) 1191; 97 A.L.R. 1355; 1935 P.H. P687

PRIOR HISTORY:

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CERTIORARI * to review a judgment reversing a de- cision of the *Board of Tax Appeals, 27 B. T. A. 223,* which set aside an order of the Commissioner determining a deficiency in income tax.

* See Table of Cases Reported in this volume.

DISPOSITION:

69 F.2d 809, affirmed.

LexisNexis(R) Headnotes

SYLLABUS:

1. A corporation wholly owned by a taxpayer trans- ferred 1000 shares of stock in another corporation held by it among its assets to a new corporation, which thereupon issued all of its shares to the taxpayer. Within a few days the new corporation was dissolved and was liquidated by the distribution of the 1000 shares to the taxpayer, who immediately sold them for her individual profit. No other business was transacted, or intended to be transacted, by the new corporation. The whole plan was designed to conform to § 112 of the Revenue Act of 1928 as a "re- organization," but for the sole purpose of transferring the shares in question to the taxpayer, with a resulting tax liability less than that which would have ensued from a direct transfer by way of dividend. *Held*: while the plan conformed to the terms of the statute, there was no reor- ganization within the intent of the statute. P. 468.

2. By means which the law permits, a taxpayer has the right to decrease the amount of what otherwise would be his taxes, or altogether to avoid them. P. 469.

3.The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation here, because the transaction upon its face lies outside the plain intent of the statute. P. 470.

COUNSEL:

Mr. Hugh Satterlee, with whom Messrs. George W. Saam, Rollin Browne, and Charles A. Roberts were on the brief, for petitioner.

Solicitor General Biggs, with whom Assistant Attorney General Wideman and Messrs. Sewall Key and Norman D. Keller were on the brief, for respondent.

By leave of Court, briefs of amici curiae were filed by Messrs. Ellsworth C. Alvord and Edward H. McDermott, and by Messrs. Albert E. James, A. Calder Mackay, George M. Morris, Willis D. Nance, Charles B. Rugg, Whitney North Seymour, and Harry N. Wyatt, in support of petitioner's contentions.

JUDGES:

Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, Cardozo

OPINIONBY:

SUTHERLAND

OPINION: [*467] [266]**

December 4, 5, 1934, Argued January 7, 1935, Decided

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner in 1928 was the owner of all the stock of United Mortgage Corporation. That corporation held among its assets 1,000 shares of the Monitor Securities Corporation. For the sole purpose of procuring a transfer of these shares to herself in order to sell them for her individual profit, and, at the same time, diminish the amount of income tax which would result from a direct transfer by way of dividend, she sought to bring about a "reorganization" under § 112 (g) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 818, set forth later in this opin- ion. To that end, she caused the Averill Corporation to be organized under the laws of Delaware on September 18, 1928. Three days later, the United Mortgage Corporation transferred to the Averill Corporation the 1,000 shares of Monitor stock, for which all the shares of the Averill Corporation were issued **[**267]** to the petitioner. On September 24, the Averill Corporation was dissolved, and liquidated by distributing all its assets, namely, the Monitor shares, to the petitioner. No other business was ever transacted, or intended to be transacted, by that com- pany. Petitioner immediately sold the Monitor shares for $133,333.33. She returned for taxation as capital net gain the sum of $76,007.88, based upon an apportioned cost of $57,325.45. Further details are unnecessary. It is not disputed that if the interposition of the so-called reorganization was ineffective, petitioner became liable for a much larger tax as a result of the transaction.

The Commissioner of Internal Revenue, being of opinion that the reorganization attempted was without substance and must be disregarded, held that petitioner was liable for a tax as though the United corporation had paid her a dividend consisting of the amount realized from the sale of the Monitor shares. In a proceeding before the **[*468]** Board of Tax Appeals, that body rejected the com-

[*598]**

missioner's view and upheld that of petitioner. *27 B. T. A. 223.* Upon a review of the latter decision, the circuit court of appeals sustained the commissioner and reversed the board, holding that there had been no "reorganization" within the meaning of the statute. *69 F.2d 809.* Petitioner applied to this court for a writ of certiorari, which the government, considering the question one of importance, did not oppose. We granted the writ.

Section 112 of the Revenue Act of 1928 deals with the subject of gain or loss resulting from the sale or exchange of property. Such gain or loss is to be recognized in computing the tax, except as provided in that section. The provisions of the section, so far as they are pertinent to the question here presented, follow:

"Sec. 112. (g) *Distribution of stock on reorganiza- tion.* -- If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distribu- tee from the receipt of such stock or securities shall be recognized. . . .

"(i) *Definition of reorganization.* -- As used in this section . . .

"(1) The term 'reorganization' means . . . (B) a transfer by a corporation of all or a part of its assets to another cor- poration if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, . . ."

[*HR1] [***HR2]** It is earnestly contended on be- half of the taxpayer that since every **[***599]** element required by the foregoing subdivision (B) is to be found in what was done, a statutory reorganization was effected; and that the motive of the taxpayer thereby to escape pay- ment of a tax will not alter the result **[*469]** or make unlawful what the statute allows. It is quite true that if a reorganization in reality was effected within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or al- together avoid them, by means which the law permits, cannot be doubted. *United States v. Isham, 17 Wall. 496, 506; Superior Oil Co*. v. *Mississippi, 280 U.S. 390, 395- 6; Jones v. Helvering, 63 App. D. C. 204; 71 F.2d 214, 217.* But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. The reasoning of the court below in justification of a negative answer leaves little to be said.

When subdivision (B) speaks of a transfer of assets by one corporation to another, it means a transfer made "in pursuance of a plan of

reorganization" [§ 112(g)] of corporate business; and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here. Putting aside, then, the question of motive in re- spect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corpo- rate purpose -- a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created. But that corporation was nothing more than a contrivance **[**268]** to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. **[*470]** When that limited function had been exercised, it immediately was put to death.

In these circumstances, the facts speak for themselves and are susceptible of but one interpretation. The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganiza-

293 U.S. 465, *467; 55 S. Ct. 266, **266; 79 L. Ed. 596, ***598; 1935 U.S. LEXIS 4

Page 2

tion, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose. *Judgment affirmed*.

REFERENCES: Return To Full Text Opinion

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DIARY

Daniel Hannan

Here's a piece of news you may have missed. The EU has shelved its trade talks with India. At the same time, the tiny European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland) is looking forward to a comprehensive FTA with India later this year. Given that India grew by 4.6 per cent in 2013 while the eurozone *shrank* by 0.4 per cent, I'd say the EU is missing an opportunity. The worst loser, naturally, is the United Kingdom. India is a common-law democracy which, at least for business purposes, is English-speaking. It is the fourth-largest investor in the UK, owning Tetley tea and Jaguar cars among other things. There are 1.4 million Britons of Indian origin. Yet we can't sign an FTA with India — nor with anyone else. We gave that power to Brussels on the day we ceased to be sovereign, 1 January 1973.

Then, Western Europe accounted for 36 per cent of the world's economy. Today, the figure is 22 per cent, and in 2020 it will be 15 per cent. I made a throwaway remark the other day to the effect that every continent on the planet was now growing economically except Europe and Antarctica. A Spanish friend got in touch crossly, submitting reams of statistics to dispute my claim. His figures were unarguable: Antarctica is returning to growth as the cruise ships come back in record numbers. Only Europe dwindles.

Much of the world's growth is coming in English-speaking countries. Here, according to the Heritage Foundation, are the freest economies on earth in 2014:

1. Hong Kong
2. Singapore
3. Australia
4. Switzerland
5. New Zealand
6. Canada

Only in our present age would anyone think it impolite to point out what five of the six have in common.

What's so special about the Anglosphere? Chiefly the common law. While other legal systems are deductive, in the sense that a law is written down in the abstract and then applied to particular cases, the common law builds up case by case, like coral. It concerns itself, not with theoretical principles, but with actual disputes. In consequence — and no one is really sure how this came about — it rises from the people rather than descending from the government, assuming residual rights and personal liberty. If something is not expressly prohibited, we expect to be able to do whatever we bloody well like. That attitude makes for a strong economy and a free society.

One man who knows this in his bones is Tony Abbott. He is the most flattering kind of Anglophile: one who sees us British as we are, 'with all our crimes broad blown, as flush as May', and yet likes us anyway. But he has given up using the word 'Anglosphere' since, whenever he does so, his opponents affect to see connotations of nostalgia, colonial cringe and even racism. In fact, of course, the Anglosphere concept is about institutions, not ancestry. It explains why Bermuda is not Haiti, why Hong Kong is not China, why Singapore is not Indonesia. Regular elections, uncensored newspapers, *habeas corpus*, sanctity of contract, individual freedom, open markets — these things are not the natural condition of an advanced state. They were evolved overwhelmingly in the language in which you are reading these words. When we call these precepts 'Western', we're being polite: they became Western because of a series of military victories by the English-speaking peoples.

Which countries are in the Anglosphere? Good question. Everyone includes the US and Canada, Britain and Ireland, Australia and New Zealand. Almost all add Hong Kong and Singapore together with the remnants of Britain's colonial archipelago (the Falklands, Gibraltar and so on). Some count South Africa, or at least its Anglophone provinces, and some the more democratic Caribbean states. The elephant — for once the metaphor is precisely apt — is India which, if included, would make up two thirds of the Anglosphere's population. I'm optimistic about the great subcontinent: its soldiers don't get involved with politics, its elections are free and, critically, its legal system is a mechanism for individuals seeking redress, not an instrument of state control. For decades, India underlined its independence by promoting the Hindi language, economic protectionism and equidistance between Washington and Moscow, but that is now past. George Bush welcomed India into an American alliance and, though Barack Obama has neglected that relationship, Tony Abbott and David Cameron have worked to draw India deeper into the community of English-speaking peoples. Whether or not they succeed is arguably the most important geopolitical question of the century. An Anglosphere military alliance, resting on a free trade area and including India, could exert a benign pull on mankind. Such a free trade area would, of course, require the UK and Ireland to leave the European Union — which would be a delicious bonus.

The first thing we should do when we leave is to restore to Australian and New Zealand nationals the automatic airport access currently enjoyed by EU citizens. Who has a stronger claim on our friendship? There were no queues at Gallipoli.

Daniel Hannan is a Conservative Member of the European Parliament. His book How We Invented Freedom and Why It Matters *is published by Head of Zeus and is available through Amazon.*

More British than Britain

In the interests of a more civilised world, let the Commonwealth leaders trump democratic values

SIMON HEFFER

I went to the Falkland Islands last month. The territory is at something of a turning-point in its history. There are reserves of oil in its waters, and both British and American firms are there seeking the means to extract them economically. If they succeed, these windswept islands could end up being the richest place per capita on the planet, with a sovereign wealth fund, and occasioning even more jealousy than usual from Argentina, which still claims sovereignty of them.

On my trip I encountered a predictable level of antipathy towards Argentina, but a surprising level of affection towards Great Britain, and towards the idea of the Commonwealth. This is not just for the simple reason that the Falklanders remember who liberated them in 1982, and at what cost — 255 British lives — but for a more profound reason. Looking across the water to Argentina, the islanders see a country where democracy has a tenuous hold, where diplomacy is a joke, where economic figures are fiddled and fabricated to an extent where they are formally ignored by much of the rest of the world and where discontent seethes below the surface. What they like about Britain and the Anglo-Saxon world are its values, not least of self-determination, democracy and probity in government. And they consciously identify those values as being at the core of the way of life they seek to preserve by keeping Argentina away from the islands.

I must admit to being something of a Commonwealth sceptic. The way Britain largely abandoned the organisation of its former colonies and dominions when it joined Europe in 1973 was, to many of us, utterly shameful. Blood is thicker than water, however, and when one experiences the importance of democratic values — as one does when talking to a Commonwealth people who live under threat of invasion and within earshot of sabre-rattling — it is rather humbling.

The British government these days certainly does take the Commonwealth seriously. This may be partly an effect of the mounting disillusion with Europe, but it is also because of a new recognition that the ties of shared history binding the Commonwealth count for something significant in an increasingly unstable world. This is also true in Australia, a country infinitely larger and more populous than the Falklands, but built on the same values and a common pioneer spirit. A recent poll showed that support for the idea of a republic in Australia has fallen by 15 per cent since the referendum of 1999, suggesting that the Anglo-Saxon notion of a constitutional monarch and a non-political head of state continues to hold great attraction even in the 21st century.

But before one gets carried away on a tide of nostalgic affection for the idea of the Commonwealth, one should pause to consider the fragility of the institution itself. Word is that behind the scenes at the last Heads of Government Meeting in Sri Lanka in the autumn of 2013 there were some fraught discussions based not on cultural misunderstandings but on sheer cultural differences between some of the players. One is loath to talk about a 'white Commonwealth', but there does seem, with certain important exceptions, to be a measure of polarisation between those countries that were settled by British emigrants and those that were conquered and colonised by them.

Polls show support for an Australian republic has fallen by 15 per cent in 15 years

Zimbabwe was suspended from the club for serial human rights violations under the Mugabe regime in 2002; and it chose to leave the organisation altogether in 2003, determined not to accept the view that other nations had of it. Since then certain other black African countries have lobbied relentlessly to allow its readmission, despite the evidence that nothing much has changed in Zimbabwe, and will not do so until Mugabe (who has just celebrated his 90th birthday) has gone to the final reckoning.

One of those interceding on Mugabe's behalf is Jacob Zuma, whose own conduct of office in South Africa increasingly leaves much to be desired: Nelson Mandela he is not. South Africa is seen as increasingly corrupt, cronyist, dangerous and authoritarian, and it sits increasingly uncomfortably within a Commonwealth template of advancing democracy, civilisation and political integrity.

It would be fatal for the Commonwealth to become polarised between 'white' and 'black' countries, not least because some nations whose rulers are not of Anglo-Saxon descent behave perfectly reasonably and honourably. Yet there is a growing challenge as some nations within the family behave in a fashion unacceptable in polities such as Australia, Britain, Canada or New Zealand. At the end of February Yoweri Museveni, the president of Uganda, signed into law a Bill making homosexuality (which was already illegal) and same-sex marriages crimes punishable by life sentences, and the promotion of homosexuality a crime carrying a still heavy sentence of seven years. Hitherto such sanctions as existed applied only to men: now lesbians will feel the force of the law too. After the furore surrounding President Putin's homophobic policies in the context of the Sochi Winter Olympics, it will be hard for the Commonwealth to turn a blind eye to Uganda locking up people for life because they are homosexual; we must wait and see.

In an ideal world, an institution such as the Commonwealth would lead all its members along the path to enlightenment. The most significant country in this respect is India, which has become progressively more westernised as it has put its considerable economic and human capital to work on becoming one of the great business success stories of the 21st centuries. Without considerable leadership from the non-white Commonwealth, extending the values of Australians, Britons and Falklanders into parts where they hitherto have not reached may be problematic at best, and impossible at worst. Had South Africa produced another Mandela, he — or she — would have had this leadership role, because (other than Pakistan, which has nightmares all of its own) the part of the Commonwealth where those values are most under threat is the collection of Britain's former colonies and possessions in Africa. It used to be called the white man's burden; but in the interests of good government, liberty, prosperity and decent human rights it can no longer be his alone.

The great challenge of the Commonwealth now, if its continued existence is to have a point, is to make those values an abiding concern to those who do not trace their ancestry back to a windswept island in the north Atlantic, or who live on smaller, even more windswept ones in the south.

Simon Heffer is the author of High Minds: The Victorians and the Birth of Modern Britain *(Random House).*

Loop v Litchfield 42 N.Y. 351 (1870)

Court of Appeals of New York
Argued March 23, 1870
Decided June 21, 1870.

The complaint alleged that in 1861 the defendants were partners in manufacturing iron castings and machinery, and made a cast-iron balance wheel to be used with a circular saw. That the balance wheel had a large hole in its rim, occasioned by negligence in casting it, by which its thickness and strength were diminished, and by defendants' wrongful act this hole was concealed by filling it with lead and finishing***352** the surface of the rim so as to resemble a sound wheel. The strength of the rim was further diminished by boring through it, so as to insert a rivet to hold the lead in the hole, and by the wrongful act of defendants they sold this wheel to Leverett Collister as a sound wheel and fit for use. That in 1864 Collister leased to Jeremiah Loop a frame for a circular wood saw, to be used with a circular saw for the purpose of sawing wood, to the arbor shaft on which frame said balance wheel was attached. That Loop put a saw on the arbor, and used the saw, balance wheel and frame in sawing wood for himself and Collister and for others, without knowledge of the hole in the rim of the balance wheel, and in the belief that it was a sound balance wheel and fit for use. That in October, 1866, Loop was so using the saw and balance wheel attached in sawing wood for one Van Rensselaer Loop, in a careful and prudent manner, when the balance wheel burst in the hole in its rim and directly through the hole made to insert the rivet to hold the lead in its place. That such bursting was caused by said hole and boring in the rim, and that a fragment of the wheel when it burst hit Jeremiah Loop in his side and inflicted a mortal wound, of which he died on the 29th of October, 1866. That such death was occasioned by said wrongful act and negligence of defendants, and plaintiffs bring this action as his legal representatives, for the benefit of his widow and next of kin. There was a motion for a nonsuit at the close of the plaintiffs' evidence and also at the close of all the evidence in the case, on the ground, amongst others, that the plaintiffs had failed to make out a case entitling them to recover; and to the refusal of the court denying this motion, the defendants excepted. There was evidence tending to show that when the defendants sold the wheel to Collister they pointed out to him the defect in the rim of the wheel, and that lead was fastened in the hole by means of a rivet, and that Collister selected and purchased it with full knowledge of such defect, because it was lighter and cheaper than heavier balance wheels which the defendants were accustomed to put upon horse-power for sawing ***353** wood, and after he was informed of that fact. The judge stated that the only question upon which counsel could go to the jury would be, whether, in the manufacture and sale of the balance wheel, the defendants were guilty of negligence, which negligence produced the injury complained of.

The defendants requested the court to charge, "that if the jury find from the evidence that the defendants notified Collister of the defects in the wheel before he purchased it, the plaintiffs are not entitled to recover." The court declined and the defendants accepted.

The defendants requested the court to charge, "that if the jury find from the evidence that the deceased, at the time he received the injury, was using the wheel

without the assent of Collister, the plaintiffs cannot recover." The court declined and the defendants accepted.

The defendants requested the court to charge, "that unless the jury find from the evidence that the defendants manufactured the wheel for the purpose for which it was used, plaintiffs cannot recover." The court declined and the defendants excepted.

The court charged, "if they find from the evidence that the defendants made this defective wheel for use, and that it broke by reason of the defect, that defendants were liable for the defect to whoever used it." To this charge the defendants excepted.

The court further charged, "that the rule that an injured party, in an action for negligence, should be free from negligence, meant, that he should use such care as a person of ordinary prudence would use, and that he need not use greater care," also "that one by whose negligence or wrongful act the death of another is caused, is not exonerated by slight negligence on the part of the deceased, although if he had used the utmost possible care, the accident would not have happened." To each of these charges the defendants excepted separately.

The jury found a verdict for the plaintiff.

On appeal to the General Term, the judgment was reversed ***354** and a new trial ordered, from which the plaintiffs appeal to this court, with the usual stipulation.

[Arguments of counsel omitted]

HUNT, J.

A piece of machinery already made and on hand, having defects which weaken it, is sold by the manufacturer to one who buys it for his own use. The defects are pointed out to the purchaser and are fully understood by him. This piece of machinery is used by the buyer for five years, and is then taken into the possession of a neighbor, who uses it for his own purposes. While so in use, it flies apart by reason of its original defects, and the person using it is killed. Is the seller, upon this state of facts, liable to the representatives of the deceased party? I omit at this stage of the inquiry the elements, that the deceased had no authority to use the machine; that he knew of the defects and that he did not exercise proper care in the management of the machine. Under the circumstances I have stated, does a liability exist, supposing that the use was careful, and that it was by permission of the owner of the machine?

To maintain this liability, the appellants rely upon the case of Thomas v. Winchester (6 N. Y., 2 Seld., 397). In that case, the defendant was engaged in the manufacture and sale of vegetable extracts for medicinal purposes. The extracts were put up in jars with appropriate labels. The defendant sold the articles to Mr. Aspinwall, a druggist of New York. Aspinwall sold to Dr. Ford, a physician and druggist of Cazenovia, where the plaintiff resided. Mrs. Thomas, one of the plaintiffs, being ill, her physician prescribed for her a *358 dose of the extract of dandelion, which is a simple and harm less medicine. The article furnished by Dr. Ford in response to this prescription was the extract of belladonna, a deadly poison. The jar from which this medicine was taken was labelled "1/2 lb. dandelion, prepared by A. Gilbert, 108 John St., N. Y., Jar 8 oz.," and thus labeled was sold to Dr. Ford. He relied upon the label, believed the medicine to be dandelion, and sold and delivered it to the plaintiffs as such. Mrs. Thomas

suffered a severe illness by reason of this mistake. It was conceded by the counsel in that case and held by the court, that there was no privity of contract between Winchester and Thomas, and that there could be no recovery upon that ground. The court illustrate the argument by the case of a wagon built by A, who sells it to B, who hires it to C, who, in consequence of negligence in the building, is overturned and injured. C cannot recover against A, the builder. It is added: "Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life." So, if a horse, defectively shod, is hired to another, and by reason of the negligent shoeing, the horse stumbles, the rider is thrown and injured, no action lies against the smith. In these and numerous other cases put in the books, the answer to the action is, that there is no contract with the party injured, and no duty arising to him by the party guilty of negligence. "But," the learned judge says "the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label." "The defendant's neglect puts human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution?"

The appellants recognize the principle of this decision, and seek to bring their case within it, by asserting that the fly ***359** wheel in question was a dangerous instrument. Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially, and in their elements, instruments of danger. Not so, however, an iron wheel, a few feet in diameter and a few inches in thickness, although one part may be weaker than another. If the article is abused by too long use, or by applying too much weight or speed, an injury may occur, as it may from an ordinary carriage wheel, a wagon axle, or the common chair in which we sit. There is scarcely an object in art or nature, from which an injury may not occur under such circumstances. Yet they are not in their nature sources of danger, nor can they, with any regard to the accurate use of language, be called dangerous instruments. That an injury actually occurred by the breaking of a carriage axle, the failure of the carriage body, the falling to pieces of a chair or sofa, or the bursting of a fly wheel, does not in the least alter its character.

It is suggested that it is no more dangerous or illegal to label a deadly poison as a harmless medicine than to conceal a defect in a machine and paint it over so that it will appear sound. Waiving the point that there was no concealment, but the defect was fully explained to the purchaser, I answer, that the decision in Thomas v. Winchester was based upon the idea that the negligent sale of poisons is both at common law and by statute an indictable offence. If the act in that case had been done by the defendant instead of his agent, and the death of Mrs. Thomas had ensued, the defendant would have been guilty of manslaughter, as held by the court. The injury in that case was a natural result of the act. It was just what was to have been expected from putting falsely labeled poisons in the market, to be used by whoever should need the true

articles. It was in its nature an act imminently dangerous to the lives of others. Not so here. The bursting of the wheel and the injury to human life was not the natural ***360** result or the expected consequence of the manufacture and sale of the wheel. Every use of the counterfeit medicines would be necessarily injurious, while this wheel was in fact used with safety for five years.

It is said that the verdict of the jury established the fact that this wheel was a dangerous instrument. I do not see how this can be, when there is no such allegation in the complaint, and no such question was submitted to the jury. "The court stated to the counsel that the only question on which they would go to the jury would be that of negligence. Whether in the manufacture and sale of this article, the defendants are guilty of negligence, which negligence produced the injury complained of." If the action had been for negligence in constructing a carriage, sold by the defendants to Collister, by him lent to the deceased, which had broken down, through the negligence of its construction, it might have been contended with the same propriety, that the finding of those facts by the jury established that a carriage was a dangerous instrument, and thereby the liability of the defendants became fixed. The jury found simply that there was negligence in the construction of the wheel, and that the injury resulted therefrom. It is quite illogical to deduce from this, the conclusion that the wheel was itself a dangerous instrument.

Upon the facts as stated, assuming that the deceased had no knowledge of the defects complained of, and assuming that he was in the rightful and lawful use of the machine, I am of the opinion that the verdict cannot be sustained. The facts constitute no cause of action.

Magna Carta, 1215, British Library Translation

Magna Carta does not number its clauses. The numbers below reflect the version translated by the British Library.

Taxation

(2) [Feudal counterpart of death taxes] If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a 'relief', the heir shall have his inheritance on payment of the ancient scale of 'relief'. That is to say, the heir or heirs of an earl shall pay £100 for the entire earl's barony, the heir or heirs of a knight 100s. at most for the entire knight's 'fee', and any man that owes less shall pay less, in accordance with the ancient usage of 'fees'

* (12) No 'scutage'[1] or 'aid'[2] may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable 'aid' may be levied. 'Aids' from the city of London are to be treated similarly.

+ (13) The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.

* (14) To obtain the general consent of the realm for the assessment of an 'aid' - except in the three cases specified above - or a 'scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.

* (25) Every county, hundred, wapentake, and riding shall remain

[1] In feudal society, the king's barons held their lands 'in fee' (feudum) from the king, for an oath to him of loyalty and obedience, and with the obligation to provide him with a fixed number of knights whenever these were required for military service. At first the barons provided the knights by dividing their estates (of which the largest and most important were known as 'honours') into smaller parcels described as 'knights' fees', which they distributed to tenants able to serve as knights. But by the time of King John it had become more convenient and usual for the obligation for service to be commuted for a cash payment known as 'scutage', and for the revenue so obtained to be used to maintain paid armies.

[2] Besides military service, feudal custom allowed the king to make certain other exactions from his barons. In times of emergency, and on such special occasions as the marriage of his eldest daughter, he could demand from them a financial levy known as an 'aid' (auxilium).

at its ancient rent, without increase, except the royal demesne manors.

Criminal law

(20) For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a villein the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

(21) Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.

(22) A fine imposed upon the lay property of a clerk in holy orders shall be assessed upon the same principles, without reference to the value of his ecclesiastical benefice.

Procedure and Courts

(36) In future nothing shall be paid or accepted for the issue of a writ of inquisition of life or limbs. It shall be given gratis, and not refused.

(37) If a man holds land of the Crown by 'fee-farm', 'socage', or 'burgage', and also holds land of someone else for knight's service, we will not have guardianship of his heir, nor of the land that belongs to the other person's 'fee', by virtue of the 'fee-farm', 'socage', or 'burgage', unless the 'fee-farm' owes knight's service. We will not have the guardianship of a man's heir, or of land that he holds of someone else, by reason of any small property that he may hold of the Crown for a service of knives, arrows, or the like.

(38) In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

+ (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

+ (40) To no one will we sell, to no one deny or delay right or justice.

* (45) We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.

(54) No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.

Civil Rights

(41) All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. This, however, does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how

our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too.

* (42) In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants - who shall be dealt with as stated above - are excepted from this provision.

Paul v Constance [1977] 1 WLR 527 (CA)

Court of Appeal
8 July 1976
Cairns , Scarman and Bridge LJJ

Trusts—Declaration of trust—Oral—Deceased paying damages received for personal injuries into deposit account—Facilities for plaintiff to draw on account—Further sums belonging to deceased and plaintiff deposited—One withdrawal and moneys divided between them—Deceased's frequent statement that moneys in account belonging to both of them—Whether amounting to declaration of trust

The deceased and the defendant were married and cohabited until their separation in 1965. In 1967 the deceased began to live with the plaintiff and they continued to live together as man and wife until the deceased's death in 1974. In 1969 the deceased was injured at his place of work and eventually received damages of £950. The deceased and the plaintiff then decided to deposit the money in a bank account and, in the course of a discussion with the local bank manager, revealed that they were not in fact married. It was then decided to place the money in a deposit account in the deceased's name, with special arrangements enabling the plaintiff to draw on it, after producing a note from the deceased authorising her to do so. Further amounts of money were paid into the account, including certain sums representing winnings at "bingo" which the deceased and the plaintiff played as a joint venture. On one occasion, the sum of £150 was withdrawn and after part of it had been spent on presents and food the deceased and the plaintiff divided the remainder between them. At different times, the deceased, when referring to the account, said to the plaintiff, "The money is as much yours as mine." On the deceased's death, the balance consisted largely of the original amount representing the deceased's damages for personal injuries. The deceased having died intestate, the defendant as his widow took out letters of administration of his estate. The plaintiff brought an action against the defendant, claiming the money in the account or such part of it as the court thought right on the ground that it had been held on express trust by the deceased for the benefit of the plaintiff and himself. The judge, after finding that the deceased and the plaintiff had intended to create a trust for the benefit of both of them, held that the deceased's frequent use of the words, "The money is as much yours as mine," amounted to an express declaration of trust for the benefit of both of them and awarded the plaintiff a half share of the trust fund.

On the defendant's appeal: —

Held, dismissing the appeal, that to create a trust by an express declaration, the disponent's words and actions had to show a clear intention to dispose of property or funds so that someone else should acquire a beneficial interest; that taking into account all the facts, the deceased's words, "The money is as much yours as mine," often repeated to the plaintiff, constituted a clear declaration of trust for the benefit of himself and the plaintiff; and that therefore the judge was right in awarding the plaintiff a half share of the fund.

Jones v. Lock (1865) L.R. 1 Ch.App 25 and Richards v. Delbridge (1874) L.R. 18 Eq. 11 distinguished .

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The following cases are referred to in the judgments:

Jones v. Lock (1865) L.R. 1 Ch.App. 25; 13 L.T. 514 .

Richards v. Delbridge (1874) L.R. 18 Eq. 11.

The following additional case was cited in argument:

Paradise Motor Co. Ltd., In re [1968] 1 W.L.R. 1125; [1968] 2 All E.R. 625, C.A.

APPEAL from Judge Rawlins sitting at Cheltenham County Court.

The deceased, Dennis Albert Constance, and the defendant, Bridget Frances Constance, were married, cohabiting until June 1965 when their marriage broke down and they separated. From 1967 the deceased and the plaintiff, Doreen Grace Paul, lived together as man and wife until the deceased's death in March 1974. The deceased having died intestate, the defendant, as his widow, took out letters of administration for his estate. The plaintiff brought an action against the defendant, claiming the sum of £897.39 plus interest or such part of it as the court should determine, on the ground that the money which was deposited in a bank account in the deceased's name at a branch of Lloyd's Bank, Cheltenham, had been held by the deceased on express trust for the benefit of himself and the plaintiff jointly. In August 1975, the judge, holding that the facts supported an intention by the deceased to create a trust for the benefit of himself and the plaintiff jointly, ordered that the defendant should pay the plaintiff £499.21 being her half share in the trust fund.

The defendant appealed on the ground, inter alia, that the judge was wrong in law in deciding that the sum in the account had been held by the deceased on trust for the plaintiff and himself jointly and should have decided that the sum belonged to the deceased alone.

The facts are stated in the judgment of Scarman L.J.

Representation

Mark Blythe for the defendant.

Nicholas Wilson for the plaintiff.

CAIRNS LJ

I will ask Scarman L.J. to deliver the first judgment.

SCARMAN LJ

The deceased, Dennis Albert Constance was a wage earner living in Cheltenham until he died on March 9, 1974. He was married to Bridget Frances Constance, the defendant in this action. But they parted in June 1965. In 1967 the deceased met Mrs. Doreen Grace Paul who is the plaintiff in this action. The two of them set up house together in December 1967 and they lived to all appearances as man and wife up to the date of the deceased's death. The house in which they lived was 42, Larput Place, St. Pauls, Cheltenham and it was the property of the plaintiff.

In August 1969, the deceased, who was employed as a fitter in or near Cheltenham, was injured at his work. He claimed damages against his employers and ultimately, in early 1973, after he had initiated legal proceedings, his claim was disposed of by the payment to him of a sum of £950. This money he received by cheque early in 1973. He discussed with the plaintiff what to do with the money, and the evidence is clear that they decided that it was to go into a bank account. The two of them went to see the manager of the St. George's Square branch of Lloyds Bank in Cheltenham, and there they had a discussion about opening ***529**

a bank account. According to the notes of evidence which the judge made, the two of them had a discussion with the bank manager. He explained to them the different sorts of accounts which they could open and the decision was taken to open a deposit account. At that stage the deceased revealed that they were not married. It is perhaps of some significance in understanding this interview if one recalls the evidence that was given by a Mr. Thomas, a fellow employee of the deceased, who said that he knew that the deceased and the plaintiff were not married, but most people did not. After the deceased had told the manager that they were not married, the manager said, "Well, it will be in your name only then?"

The deceased then said, "Yes," and asked the manager what was to happen if the plaintiff wanted to draw on the account, or if he wanted her to draw on it. The manager said that that could be done if the plaintiff used a note with the deceased's signature on it, authorising her to draw on the account.

The account that was opened on that day in February 1973 is at the very heart of this case. The account was maintained in the deceased's name from that date until the date of his death. Over the period between 1973 and his death, some 13 months later in 1974, further sums were paid into the account, including, in particular, some sums which represented "bingo" winnings. It is clear from the evidence that the deceased and the plaintiff did play "bingo" and they played it really as a joint venture. They did have winnings from time to time and at any rate three of such winnings, — none of them very great — were paid into the account. It is clear from the plaintiff's evidence that they thought of those winnings, as "their winnings": neither hers nor his alone, but theirs. Nevertheless, when the account was closed on the deceased's death, the ultimate balance, after the addition of interest, consisted largely of the initial sum of £950 representing the deceased's damages as a result of his injury at work. There was one withdrawal during this period, a sum of £150, and the evidence is that that money was divided between the two of them after part of it had been used for buying Christmas presents and some food.

The plaintiff began her action after the deceased's death against his lawful wife, the defendant, who took out letters of administration for his estate, since he died intestate. The plaintiff claims in the action that the hank account in the deceased's name, to which I have referred, was held by him on trust for the benefit of himself and the plaintiff jointly. She claims that it was an express trust declared orally by him on numerous occasions. The defendant, as administratrix, closed the account and she maintains that the whole fund contained in the account was the beneficial property cf the deceased at the time of his death and, as such, became part of his estate after death.

The matter came on for trial before Judge Rawlins in August 1975 and on August 12 the judge found in favour of the plaintiff. He found the existence of an express trust, a trust for the benefit of the plaintiff and the deceased jointly, and he ordered that the sum of £499.21 be paid to the plaintiff as representing one half-share of the fund to which she was beneficially entitled.

A number of issues were canvassed at the trial, but the only point taken by the defendant on her appeal to this court goes to the question whether or not there was, in the circumstances of this case, an express declaration of trust. It is conceded that, if there was, the trust would ***530**

be enforceable. The one question is whether there was an express declaration of trust.

The case has been argued with great skill and ability by counsel on both sides and I should like to express my appreciation for the way in which Mr. Blythe, for the defendant, opened the appeal and the way in which Mr. Wilson very shortly and vigorously, put his contentions on behalf of the plaintiff.

Mr. Blythe drew the attention of the court to the so-called three certainties that have to be established before the court can infer the creation of a trust. He referred us to Snell's Principles of Equity, 27th ed. (1973), p. 111, in which the three certainties are set out. We are concerned only with the first of the three certainties and it is this:

"The words" — that is the words of the declaration relied on — "must be so used that on the whole they ought to be construed as imperative … No particular form of expression is necessary for the creation of a trust, if on the whole it can

be gathered that a trust was intended. 'A trust may well be created, although there may be an absence of any expression of terms imposing confidence.' A trust may thus be created without using the word 'trust,' for what the court regards is the substance and effect of the words used."

Mr. Blythe has taken the court through the detailed evidence and submits that one cannot find anywhere in the history of events a declaration of trust in the sense of finding the deceased saying: "I am now disposing of my interest in this fund so that you, Mrs. Paul, now have a beneficial interest in it." Of course, the words which I have just used are stilted lawyers' language and Mr. Wilson, for the plaintiff, was right to remind the court that we are dealing with simple people, unaware of the subtleties of equity, but understanding very well indeed their own domestic situation. It is, of course, right that one should consider the various things that were said and done by the plaintiff and the deceased during their time together against their own background and in their own circumstances.

Mr. Blythe drew our attention to two cases, both of them well enough known, (at any rate in Lincoln's Inn, since they have been in the law reports for over 100 years), and he relies on them as showing that, though a man may say in clear and unmistakable terms that he intends to make a gift to some other person, for instance, his child or some other member of his family, yet that does not necessarily disclose a declaration of trust. Indeed, in the two cases to which we have been referred the court held that, though there was a plain intention to make a gift, it was not right to infer any intention to create a trust.

In the first of the two cases, Jones v. Lock (1865) L.R. 1 Ch.App. 25 , Mr. Jones, returning home from a business trip to Birmingham, was scolded for not having brought anything back for his baby son. He went upstairs and came down with a cheque made out in his own name for £900 and said in the presence of bis wife and the nurse: "Look you here, I give this to baby," and he then placed the cheque in the baby's hand. It was obvious that he was intending to make a gift of the cheque to his baby son, but it was clear, as Lord Cranworth L.C. held, that there was no effective gift then and there made of the cheque: it was in his name and had not been endorsed over to the baby. Other evidence showed that Mr. Jones had in mind to go and see his solicitor, Mr. Lock, to make ***531**

proper provision for the baby boy, but unfortunately he died before he could do so. Jones v. Lock was a classic case where the intention to make a gift failed because the gift was imperfect. So an attempt was made to say: "Well, since the gift was imperfect, nevertheless, one clan infer the existence of a trust." But Lord Cranworth L.C. would have none of it.

In the second case to which Mr. Blythe referred us, Richards v. Delbridge (1874) L.R. 18 Eq. 11 , the facts were that Mr. Richards, who employed a member of his family called Edward in his business, was minded to give the business to the young man. He evidenced his intention to make this gift by endorsing on the lease of the business premises a short memorandum to the effect:

"This deed" — that is the deed of leasehold — "and all thereto belonging I give to Edward from this time forth with all the stock in trade."

Sir George Jessel M.R., who decided the case, said that there was in that case the intention to make a gift, but the gift failed because it was imperfect; and he refused to draw from the circumstances of the imperfect gift the inference of the existence of a declaration of trust or the intention to create one. The ratio decidendi appears clearly from the report. It is a short passage and because of its importance I quote it. Sir George Jessel M.R. said, at p. 15:

"In Milroy v. Lord (1862) 4 De G.F. & J. 264 Turner L.J. after referring to the

two modes of making a voluntary settlement valid and effectual, adds these words: 'The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.' It appears to me that that sentence contains the whole law on the subject."

There is no suggestion of a gift by transfer in the present case. The facts of the two cases do not, therefore, very much help the submission of Mr. Blythe but he was able to extract from them this principle: that there must be a clear declaration of trust and that means there must be clear evidence from what is said or done of an intention to create a trust — or, as Mr. Blythe put it, "an intention to dispose of a property or a fund so that somebody else to the exclusion of the disponent acquires the beneficial interest in it." He submitted that there was no such evidence.

When one looks at the detailed evidence to see whether it goes as far as that — and I think that the evidence does have to go as far as that — one finds that from the time that the deceased received his damages right up to his death he was saying, on occasions, that the money was as much the plaintiff's as his. When they discussed the damages, how to invest them or what to do with them and when they discussed the bank account, he would say to her: "The money is as much yours as mine."

The judge, rightly treating the basic problem in the case as a question of fact, reached this conclusion. He said: ***532**

"I have read through my notes and I am quite satisfied that it was the intention of Mrs. Paul and Mr. Constance to create a trust in which both of them were interested."

In this court the issue becomes: was there sufficient evidence to justify the judge in reaching that conclusion of fact? In submitting that there was, Mr. Wilson draws attention first and foremost to the words used. When one bears in mind the unsophisticated character of the deceased and his relationship with the plaintiff during the last few years or his life, Mr. Wilson submits that the words that he did use on more than one occasion, "This money is as much yours as mine," convey clearly a present declaration that the existing fund was as much the plaintiff's as his own. The judge accepted that conclusion. I think that he was well justified in doing so and, indeed, I think that he was right to do so. There are, as Mr. Wilson reminded us, other features in the history of the relationship between the plaintiff and the deceased which support the interpretation of those words as an express declaration of trust. I have already described the interview with the bank manager when the account was opened. I have mentioned also the putting of the "bingo" winnings into the account and the one withdrawal for the benefit of both of them.

It might, however, be thought that this was a borderline case, since it is not easy to pin-point a specific moment of declaration, and one must exclude from one's mind any case built upon the existence of an implied or constructive trust, for this case was put forward at the trial and is now argued by the plaintiff as one of express declaration of trust. It was so pleaded and it is only as such that it may be considered in this court. The question, therefore, is whether, in all the circumstances, the use of those words on numerous occasions as between the deceased and the plaintiff constituted an express declaration of trust. The judge found that they did. For myself, I think that he was right so to find. I therefore would dismiss the appeal.

BRIDGE LJ

I agree. In delivering his judgment in Richards v. Delbridge, L.R. 18 Eq. 11, 14 , Sir George Jessel M.R., discussing the requisities of a valid declaration of trust, said:

"It is true he need not use the words 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning, for, however anxious the court may be to carry out a man's intentions, it is not at liberty to construe words otherwise than according to their proper meaning."

The plaintiff gave evidence, which the judge accepted, that on frequent occasions the deceased told her that the money in his deposit account at Lloyds Bank was as much her money as his. In the last analysis, accordingly, the whole question in this case, as it seems to me, is whether the judge was right, construing those words according to their proper meaning and in the context in which the words were spoken as disclosed by the evidence, to conclude that, by using those words, the deceased had done something which was equivalent to declaring himself a trustee of the moneys in the account for himself and the plaintiff in equal shares.

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For the reasons given by Scarman L.J., I think that the judge was right in coming to that conclusion and I too would dismiss the appeal.

CAIRNS LJ

I agree.

Representation

Solicitors: Oswald Hickson, Collier & Co. for Stannard & Moss, Cheltenham; Elgoods, Cheltenham.

Appeal dismissed with costs in Court of Appeal and below. Assessment under Legal Aid and Advice Act to be made in county court.

Ronpibon Tin NL and Tongkah Compound NL v Federal Commissioner of Taxation

(1949) 78 CLR 47

11 May 1949, 12 May 1949; 6 June 1949. Melbourne

Latham C.J., Rich , Dixon , McTiernan and Webb JJ.

Cur. adv. vult.

THE COURT delivered the following written judgment:-

June 6
Latham C.J., Rich , Dixon , McTiernan and Webb JJ.

These are two appeals from assessments to income tax which were brought on to be heard before the Chief Justice as associated matters.

His Honour at the joint request of the parties took steps to have the question which the appeals raise submitted for the decision of the Full Court. The matters are now before us as upon cases stated under s. 198 of the Income Tax Assessment Act 1936-1944.

In each case the appellant is a no-liability mining company registered in Victoria. Up to the outbreak of war with Japan the chief business of the companies was tin mining. Ronpibon Tin No Liability owned and worked a tin mine in Siam under leases from the Siamese Government. Tongkah Compound No Liability owned and worked a tin mine at Seremban in Malaya and it held shares in other companies which owned and worked tin mines at the same place. Each of the appellant companies had derived substantial revenues from the tin mining so carried on. But these revenues formed no part of the assessable income of the companies. It was admitted by the parties in each case that the income from tin mining had been exempt from income tax under the provisions of s. 23 (q) of the Income Tax Assessment Act. It does not appear why this was so in the case of Malaya, that is to say whether the income from tin mining was not exempt from income tax in that country or the tin won was subject to a royalty or an export duty. But it is to be gathered from the material before the Court that in Siam an income tax was imposed and, further, that the company was required to pay a royalty in respect of the tin. After the Japanese obtained control of Siam and of Malaya the companies were of course cut off from all access to their workings, which fell into enemy hands. The mining manager and the assistant mining manager of Ronpibon Tin No Liability were interned, but the wife of one and the wife and children of the other had been sent to Australia. There the company continued to pay them an allotment ***52** or allowance for their support. The last accounting period in which either company received income from tin mining carried on during the period was the accounting period which included the last months of the calendar year 1941. That accounting period for Ronpibon Tin No Liability was the year ending 30th June 1942 and for Tongkah Compound No Liability the year ending 30th September 1942. In assessing the respective companies to income tax upon the income derived during the successive accounting periods up to that time, the commissioner had necessarily to deal with the question to what extent the outgoings incurred by the companies in Australia were referable to the mining operations in Malaya or Siam and to what extent they were referable to the derivation of income from other sources. The other sources of income consisted only in interest upon money invested either in Treasury Bonds or upon fixed deposit.

The dividends of Tongkah Compound No Liability from the shares of other tin-mining companies were treated as exempt, like the

profits of the company's own operations. In Melbourne, where each company had its registered office, expenditure was incurred in the central administration of the affairs of the respective companies. There were the directors' fees, the expenses of management and the cost of cables, postages, stationery, audit fees and some minor incidental expenditure. Each company followed the practice common among mining companies of employing a legal manager at an over-all annual fee in return for which he allowed the company to use his premises as its registered office and did, or caused to be done by his staff, the clerical and other work of management, charging other out-of-pocket expenses to the company. It was evident that the principal work both of the legal manager and of the directors was concerned with mining and not investment. For example, for the twelve months ending 30th June 1941 the receipts of Ronpibon Tin No Liability from the proceeds of tin fell not much short of £100,000 while the interest from money invested did not quite reach £1,000. In dealing with the question what amount of the expenses incurred in Melbourne should be considered referable to the income from investments and allowed accordingly as a deduction from that income, forming as it did the only non-exempt or assessable income, the commissioner took a short cut. He fixed two and one-half per cent of the income from investments as an adequate charge against that form of income and allowed as a deduction an amount so calculated. In doing so he followed a method which apparently he has found it convenient to employ in cases where it becomes necessary to apportion to income from ***53** investments part of the general expenses incurred by a company which has some other main purpose. Neither of the appellant companies objected to this method of distributing their Melbourne expenses between their exempt income and their assessable income. But in the accounting periods following those on foot at the time of the entry of Japan into the war, the commissioner applied the same method of ascertaining how much of the expenditure incurred in administering the affairs of the companies was referable to the assessable income. He did this notwithstanding that in these accounting periods the companies were conducting no mining operations in Malaya and Siam. No doubt the commissioner considered that, for whatever purpose the administrative structure of each company was maintained, no greater part of the expenditure it entailed could be treated as incurred in the course of holding and superintending the investments and receiving the interest thereon. It could not matter whether the administrative structure established for the main purpose of winning tin in Malaya or Siam was maintained for that purpose, as it was in prior accounting periods, or for the purpose of awaiting in a state of preparedness the ultimate restoration of the companies' undertakings and in the meantime dealing with questions growing out of the past or present situation or for any other purpose. It would still remain true, so the commissioner appears to have considered, that only a small part of the total expenditure could be referred to the gaining of assessable income from investments.

The companies, however, challenged this view. They carried in objections to the assessments of the taxable income for the accounting periods ending respectively 30th June 1944 and 30th September 1943 and claimed that the whole of what they called the Melbourne office expenses should be allowed as a deduction from the assessable income from investments because they were outgoings incurred in gaining the assessable income or in carrying on a business for the purpose of gaining such income. It is as well to state in more detail the material facts. In the accounting period ending 30th June 1944 Ronpibon Tin No Liability derived £1,374 as interest from government loans and £459 as interest from fixed deposits, making in all £1,833. It had no other income. On the expenditure side, the company paid £450 as the fee or salary for management. The legal manager had been paid £500 and then £600 per annum but a reduction in the rate had been made in view of the changed situation. It paid in directors' fees £200. This again was a reduced amount. Formerly the directors' fees had been £600, but they had fallen to £450 in a previous accounting period. The ***54** expenditure on cables, postages, stationery, audit fees and travelling and general expenses amounted to £136. The expenditure on cables related to matters arising out of the production of tin in Siam. About 1938 the International Tin Committee formed a pool of tin stocks as a cushion or buffer to control the effects of an

under or over supply of tin. The pool was called the "Buffer Stock Scheme," and it was this scheme and the disposal of tin in the pool which occasioned the cables. The expenditure in travelling arose from the fact that one of the directors journeyed to meetings from another State. The last item on the expenditure side consisted in allotments to the dependants of the mine manager and the assistant mine manager who had been interned in Siam. This amount was £420. The total of these items of expenditure is £1,206, which forms the deduction claimed by Ronpibon Tin No Liability.

It is perhaps desirable to add that the work done in the management of the company covered the registration of transfers of shares, in which there was some movement, and the interviewing of the many shareholders about the prospects of the company, particularly with reference to its Siamese assets. The directors had caused some investigation to be made of possible mining enterprises in Australia. During the accounting period in question, however, only one such prospective venture was looked into and that was done by or through one of the directors who had formerly been the company's consulting engineer. He acted in his capacity of director.

The case of Tongkah Compound No Liability is of the same nature but there are differences in the precise facts. In that company there was no attempt to look for other ventures. The expenditure included no items for allotments or sustenance of the mining staff or any of their dependants. On the other hand the receipts of the company for the accounting period ending 30th September 1943 included a sum of £4,999 paid from "The Buffer Stock Scheme" as the company's share of the proceeds of realizing the stock held. The realization had taken place in the previous accounting period. The interest of the company in the Pool had stood in the balance sheet at £1,081 and the difference was taken into the profit and loss account at £3,913 (sic). In assessing the company the commissioner appears to have treated this item as exempt income. The company derived £2,809 from government loans and fixed deposits. It expended £300 in directors' fees and £590 in meeting the manager's salary, audit fees, postages, printing, stationery and advertising. It seeks to deduct from the assessable income consisting of the interest the total of these two amounts, namely £890.***55**

Upon the foregoing facts the Chief Justice has submitted for the opinion of the Full Court the question, in each case, whether in point of law he is at liberty to find that in assessing the taxpayer to income tax in respect of income derived during the accounting period the commissioner acted rightly in disallowing in whole or in any and what part the deduction claimed.

The answer to this question depends primarily on s. 51 (1) of the Income Tax Assessment Act 1936-1944. That provision is in great part made up of expressions taken from ss. 23 (1) (a) and 25 (b) of the Income Tax Assessment Act 1922-1934, expressions that have been elucidated by many decided cases. But there are very important differences between the operation which the present s. 51 (1) is framed to produce and the manner in which the former s. 23 (1) (a) and s. 25 worked. Some of these differences it is desirable to mention. In the first place the principle expressed by the former s. 25 (e) has been abandoned. The principle was, in the words of that provision, that a deduction should not in any case be made in respect of money not wholly and exclusively laid out or expended for the production of assessable income. Instead of imposing a condition that the expenditure shall wholly and exclusively be for the production of assessable income the present s. 51 (1) adopts a principle that will allow of the dissection and even apportionment of losses and outgoings. It does this by providing for the deduction of losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income. In the second place it introduces an alternative ground or head of deduction; it allows the deduction of all losses and outgoings to the extent to which they are necessarily incurred in carrying on a business for the purpose of gaining or producing such income.

It had been repeatedly contended on the part of the commissioner under the former provisions that an expenditure directed not to obtain or increase revenue but to avoid or reduce expenditure in a business was not incurred in gaining or producing the assessable income or

at all events was not wholly and exclusively laid out or expended for the production of assessable income: see Federal Commissioner of Taxation v. Gordon[1] and W. Nevill & Co. Ltd. v. Federal Commissioner of Taxation.[2] No such contention could be sustained in a case falling under the alternative head of deduction of s. 51 (1) and that may be one reason why the alternative was introduced. It must, however, be conceded that no actual decision of this Court had given positive effect to the particular contention ***56** so often made by the commissioner. The word "necessarily" no doubt limits the operation of the alternative, but probably it is intended to mean no more than "clearly appropriate or adapted for": cf. per Higgins J. in Commonwealth v. Progress Advertising & Press Agency Co. Pty. Ltd.[3]

The word "business" is defined by s. 6 (1) to include profession, trade, employment, vocation or calling, but not occupation as an employee. The alternative in s. 51 (1) therefore covers a wide description of activities. But in actual working it can add but little to the operation of the leading words, "losses or outgoings to the extent to which they are incurred in gaining or producing the assessable income." No doubt the expression "in carrying on a business for the purpose of gaining or producing" lays down a test that is different from that implied by the words "in gaining or producing." But these latter words have a very wide operation and will cover almost all the ground occupied by the alternative. The words "such income" mean "income of that description or kind" and perhaps they should be understood to refer not to the assessable income of the accounting period but to assessable income generally. If they were so interpreted, they would cover a case where the business had not yet produced or had failed to produce assessable income and the alternative would then itself suffice to authorize the deduction of a loss made in a distinct business.

The third matter to be mentioned is the express exception with which s. 51 (1) concludes. To except losses and outgoings of capital is both necessary and logical. But to except losses and outgoings to the extent to which they are incurred in relation to the gaining or production of exempt income seems to except something from the primary description which could not fall within it. For exempt income can never be assessable income. They are mutually exclusive categories. The explanation doubtless is the desire to declare expressly that so much of the losses and outgoings as might be referable to exempt income should not be deductible from the assessable income. Although it may not be strictly logical to express the declaration in the form of an exception, the declaration serves the not unimportant purpose of making an express contrast.

The present case, however, can be decided by reference to the earlier or positive part of the sub-section, that which makes the deduction of losses and outgoings allowable.

For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the assessable income it must be incidental and relevant to that end. The words "incurred in ***57** gaining or producing the assessable income" mean in the course of gaining or producing such income. Their operation has been explained in cases decided under the provisions of the previous enactments: see particularly Amalgamated Zinc (de Bavay's) Ltd. v. Federal Commissioner of Taxation[4] and W. Nevill & Co. Ltd. v. Federal Commissioner of Taxation.[5]

Notwithstanding the differences in other respects in the present provision, the expression "incurred in gaining or producing the assessable income" has been left unchanged and bears the same meaning. In brief substance, to come within the initial part of the sub-section it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income. It is by this standard that the question raised by the present cases must

[1] (1930) 43 C.L.R. 456, at pp. 465, 469.
[2] (1937) 56 C.L.R. 290, at pp. 296, 301, 304, 306-307, 308-309.
[3] (1910) 10 C.L.R. 457, at p. 469.
[4] (1935) 54 C.L.R. 295, at pp. 303-304, 307, 309, 310.
[5] (1937) 56 C.L.R., at pp. 300, 301, 305-306, 308.

be determined. It is true that for the appellant companies it is claimed that if they fail by this standard there is an alternative standard by which they should succeed expressed in the reference contained in s. 51 (1) to losses and outgoings necessarily incurred in carrying on a business for the purpose of gaining or producing such income. The claim is that the course pursued by each company in the relevant accounting period in the conduct of its affairs amounted to the carrying on of a business, one entire business having for its purpose the gaining of assessable income. All the expenditure was incurred, so it was said, in carrying on the business: "necessarily" should receive a qualified meaning. If much that the companies did was attributable to a hope or expectation that eventually they would be able to resume mining operations in Malaya or Siam, that, it was contended, would not amount to a present purpose of gaining exempt income. There were too many contingencies under s. 23 (q), ranging from the future state of foreign tax laws to the satisfaction of the commissioner that future taxes would be paid. So many contingencies made it impossible to say that it was a purpose of gaining assessable income that would be exempt. With much of all this it is unnecessary to deal. Let it be assumed that neither company did more or less than carry on one single business when after the loss of its tin workings it pursued its way fulfilling the duties imposed by company law, concerning itself with the fate of its tin workings in South East Asia, holding itself in readiness to resume operations if and when fortune allowed, examining any prospective local venture that might be proposed and looking after the investment of its funds. Yet, ***58** excepting the income from investments, the subject of nearly all these activities was a concern of capital. When the companies were cut off from their undertakings in Siam and Malaya what they lost was the possession of capital assets. The re-establishment of the foreign mining businesses of which they had been deprived must be considered to be largely an affair of capital. So would the taking up of a fresh venture in Australia. Communications and business transacted with reference to the "Buffer Stock Scheme" may be put aside as a matter concerning exempt income. So far as anything else done by either company in the course of its inactive existence related to revenue, the only assessable income (as distinguished from capital) in view was interest upon investments. Accordingly, the reliance placed by the companies upon the second alternative in the positive part of s. 51 (1) will not advance their claim to deduct the full expenditure incurred in the respective accounting periods. It is therefore necessary to return to the opening words of s. 51 (1) and inquire to what extent the expenditure of the respective companies was incurred in gaining or producing the assessable income. The question is how far was it incurred in the course of, how far was it incidental and relevant to, gaining or producing the assessable income. Here again it is necessary to bear in mind that communications made and things done with reference to the buffer stock scheme relate to exempt income and that a consideration of a prospective new venture, like anything done with a view to the possibility of resuming the Siamese or Malayan operations, must largely be an affair of capital. Of course we are not here concerned with any very specific expenditure or any very definite operations. The whole matter relates to a few items the greatest of which are fees to directors and for management, but if their allowability is to depend on the nature of what was done, then principle requires that it should be borne in mind that the chief reasons for keeping up the structure of the companies on such a scale related to capital and not revenue.

In applying the foregoing test or standard separate and distinct items of expenditure should be dealt with specifically. To begin with there are the payments by Ronpibon Tin No Liability to the dependants of members of that company's Eastern staff. These payments amount to £420. Clearly this item is not allowable. The company could in the circumstances hardly do otherwise than make the payments but from the point of view of the income-tax law they could not be regarded as business expenditure, unless with reference to the past tin-mining operations which the company had carried on in Siam or to future operations there which it hoped to resume.***59**

In the next place the cost incurred by the same company in cables and other communications with reference to the buffer stock scheme cannot be deducted. That is also true of any expenses incurred by Tongkah Compound No

Liability in connection with the scheme and the receipt therefrom of the share of the proceeds of realization of stocks of tin in the pool. Sufficient details do not appear to say what other distinct and severable items are wholly incapable of reference to the gaining of assessable income.

The charges for management and the directors' fees are entire sums which probably cannot be dissected. But the provision contained in s. 51 (1), as has been already said, contemplates apportionment. The question what expenditure is incurred in gaining or producing assessable income is reduced to a question of fact when once the legal standard or criterion is ascertained and understood. This is particularly true when the problem is to apportion outgoings which have a double aspect, outgoings that are in part attributable to the gaining of assessable income and in part to some other end or activity. It is perhaps desirable to remark that there are at least two kinds of items of expenditure that require apportionment. One kind consists in undivided items of expenditure in respect of things or services of which distinct and severable parts are devoted to gaining or producing assessable income and distinct and severable parts to some other cause. In such cases it may be possible to divide the expenditure in accordance with the applications which have been made of the things or services. The other kind of apportionable items consists in those involving a single outlay or charge which serves both objects indifferently. Of this directors' fees may be an example. With the latter kind there must be some fair and reasonable assessment of the extent of the relation of the outlay to assessable income. It is an indiscriminate sum apportionable, but hardly capable of arithmetical or ratable division because it is common to both objects.

In such a case the result must depend in an even greater degree upon a finding by the tribunal of fact.

The reason why the commissioner has adopted the practice of allowing two and one-half per cent on income from investments as a deduction is no doubt because generally speaking it has been found to produce an adequate allowance and because he is forced by the exigencies of administration to provide his assessors with some fixed rule.

But it is a more or less arbitrary expedient to which it is scarcely possible to resort judicially when the Court is called upon to decide ***60** an appeal from an assessment. The Court must make an apportionment which the facts of the particular case may seem to make just, and the facts of the present cases are rather special. In making the apportionment the peculiarities of the cases cannot be disregarded. The taxpayers are companies. A directorate is necessary. The circumstances were such as to call for some consideration from time to time on the part of the directors of the investment of the money. Thus although the assessable income is only interest on government loans and fixed deposits, it is by no means a mere question of fixing a fair commission rate for handling the business. It is important not to confuse the question how much of the actual expenditure of the taxpayer is attributable to the gaining of assessable income with the question how much would a prudent investor have expended in gaining the assessable income. The actual expenditure in gaining the assessable income, if and when ascertained, must be accepted. The problem is to ascertain it by an apportionment. It is not for the Court or the commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent: see per Ferguson J. in Tooheys Ltd. v. Commissioner of Taxation;[6] per Williams J. in Tweddle v. Federal Commissioner of Taxation.[7] The question of fact is therefore to make a fair appointment to each object of the companies' actual expenditure where items are not in themselves referable to one object or the other. But this must be done as a matter of fact and therefore not by this Full Court. It will be enough for this Court in answer to the question submitted in each case to make a declaration in accordance with the principles stated. But before formulating the answers to the questions it is desirable to refer to two other provisions of the Act, in order to avoid misunderstanding.

In each of the cases before the Court a ground of objection under s. 103 (1) (b) was taken in the notice of objection. The ground was not

[6] (1922) 22 S.R. (N.S.W.) 432, at p. 440.
[7] (1942) 7 A.T.D. 186, at p. 190.

argued and clearly is untenable. But though no ground of objection under s. 77 was taken in the notice, that section was relied upon during the argument. It is sufficient to say that, even if it were open, the appellant companies could not succeed under s. 77 because neither taxpayer incurred in the year of income a loss in carrying on in Australia a business. Neither company had two distinct businesses in Australia for the purpose of the section. Though mining abroad and investment at home formed distinguishable sources of income, what was done in Australia with reference ***61** to these activities fell within operations of the company incapable of amounting to more than the business in Australia.

Ronpibon Tin No Liability v. The Commissioner of Taxation of the Commonwealth of Australia.-Question answered as follows:-"As a matter of law no part of the expenditure upon allotments to dependants of the Eastern staff of the company or upon cables is allowable as a deduction and the commissioner rightly disallowed that part of the expenditure as a deduction; subject to the foregoing declaration the learned judge should decide as a matter of fact what part or proportion of the remaining expenses was fairly and properly attributable to gaining the assessable income." Costs of case to be costs in the appeal.

Tongkah Compound No Liability v. The Commissioner of Taxation of the Commonwealth of Australia.-Question answered as follows:-"The learned judge should decide what part or proportion of the expenditure in respect of which the deduction is claimed was fairly and properly attributable to gaining the assessable income." Costs of case to be costs in the appeal.

Solicitors for the appellants: Haden Smith & Fitchett.

Solicitor for the respondent: K. C. Waugh, Acting Crown Solicitor for the Commonwealth.

Rylands v Fletcher (1868) LR 3 HL 330

House of Lords
17 July 1868
The Lord Chancellor (Lord Cairns), Lord Cranworth

Mine—Negligence—Use of own Property—Water.

Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages.

But if he brings upon his land any thing which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

A. was the lessee of mines. *B*. was the owner of a mill standing on land adjoining that under which the mines were worked. *B.*desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. *A*. had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded *A.'s*mine:—

Held, that *A*. was entitled to recover damages from *B*. in respect of this injury.

THIS was a proceeding in Error against a judgment of the Exchequer Chamber, which had reversed a previous judgment of the Court of Exchequer.

In November, 1861, *Fletcher* brought an action against Ryland & Horrocks, to recover damages for an injury caused to his mines by water overflowing into them from a reservoir which the Defendants had constructed. The declaration contained three counts, and each count alleged negligence on the part of the Defendants, but in this House the case was ultimately treated upon the principle of determining the relative rights of the parties independently of any question of personal negligence by the Defendants in the exercise of them.

The cause came on for trial at the *Liverpool* Summer Assizes of ***331** 1862, when it was referred to an arbitrator, who was afterwards directed, instead of making an award, to prepare a special case for the consideration of the Judges. This was done, and the case was argued in the Court of Exchequer in Trinity Term, 1865.

The material facts of the case were these:—The Plaintiff was the lessee of certain coal mines known as the *Red House Colliery* , under the Earl of *Wilton* . He had also obtained from two other persons, Mr *Hulton* and Mr. *Whitehead* , leave to work for coal under their lands. The positions of the various properties were these:—There was a turnpike road leading from *Bury* to *Bolton* , which formed a southern boundary to the properties of these different persons. A parish road, called the *Old Wood Lane* , formed their northern boundary. These roads might be described as forming two sides of a square, of which the other two sides were formed by the lands of Mr. *Whitehead* on the east and Lord *Wilton* on the west. The Defendants' grounds lay along the turnpike road, or southern boundary, stretching from its centre westward. On these grounds were a

mill and a small old reservoir. The proper grounds of the *Red House Colliery* also lay, in part, along the southern boundary, stretching from its centre eastward. Immediately north of the Defendants' land lay the land of Mr. *Hulton* , and still farther north that of Lord *Wilton* . On this land of Lord *Wilton* the Defendants, in 1860, constructed (with his Lordship's permission) a new reservoir, the water from which would pass almost in a southerly direction across a part of the land of Lord *Wilton* and the land of Mr. *Hulton* , and so reach the Defendant's mill. The line of direction from this new reservoir to the *Red Colliery* mine was nearly south-east.

The Plaintiff, under his lease from Lord *Wilton* , and under his agreements with Messrs. *Hulton* and *Whitehead* , worked the mines under their respective lands. In the course of doing so, he came upon old shafts and passages of mines formerly worked, but of which the workings had long ceased; the origin and the existence of these shafts and passages were unknown. The shafts were vertical, the passages horizontal, and the former especially seemed filled with marl and rubbish. Defendants employed for the purpose of constructing their new reservoir persons who were admitted to be competent as engineers and contractors to perform the work, ***332** and there was no charge of negligence made against the Defendants personally. But in the course of excavating the bed of the new reservoir, five old shafts, running vertically downwards, were met with in the portion of the land selected for its site. The case found that "on the part of the Defendants there was no personal negligence or default whatever in or about, or in relation to, the selection of the said site, or in or about the planning or construction of the said reservoir; but, in point of fact, reasonable and proper care and skill were not exercised by, or on the part of, the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear."

The reservoir was completed at the beginning of December, 1860, and on the morning of the 11th of that month the reservoir, being then partially filled with water, one of the aforesaid vertical shafts gave way, and burst downwards, in consequence of which the water of the reservoir flowed into the old passages and coal-workings underneath, and by means of the underground communications then existing between them and the Plaintiff's workings in the *Red House Colliery* , the colliery was flooded and the workings thereof stopped.

The question for the opinion of the Court was whether the Plaintiff was entitled to recover damages by reason of the matters hereinbefore stated. The Court of Exchequer, Mr. Baron *Bramwell* dissenting, gave judgment for the Defendants [1] . That judgment was afterwards reversed in the Court of Exchequer Chamber [2] . The case was then brought on Error to this House.

Sir *R. Palmer* , Q.C., and Mr. *T. Jones* , Q.C., for the Defendants (now Plaintiffs in Error):—

In considering this case it is important to remember that the communications between the workings of the Plaintiff and the old shafts and pits were not known to the Defendants. The question, therefore, is, whether they can be held responsible for an injury which, as the possible cause of it was unknown to them, they could not by any care on their part prevent. It is submitted that they ***333** are not liable. Every man has a right to use his own land for lawful purposes, and if he does so, and does so without knowledge that he will thereby occasion injury to another, he cannot be held responsible should injury occur. For that is a case which comes within the legal description of *damnum absque injuriâ* . The principle adopted by the Exchequer Chamber here, that though

a man uses his lawful rights without malice and without knowledge of danger, he may still be liable for any mischief occurring from such use, is too wide. It would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously. Now knowledge of possible mischief is of the very essence of the liability incurred by occasioning it: Acton v. Blundell [3] ; Chasemore v. Richards [4] . That has always been recognised as one of the principles of our law, and has, as such, been adopted by the Courts in *America* : Pixley v. Clark [5] . Smith v. Kenrick [6] shewed that where two rivers lay contiguous to each other, but neither was subject to a servitude to the other, each owner had a right to work ***334** his own mine in the best way for his own benefit, and, if he did so without negligence, was not liable to the other for prejudice to his property which might thereby arise. That case is very important, for there knowledge existed which it is not pretended existed here. In the time of *Bracton* the rule existed that injury created to one man by the lawful act of another, if that act was done without wilfulness or negligence, would not afford a title to a claim of damages [7] . That must be the rule in the present day, for otherwise no man could use his property, however carefully, without being liable to pay damages for mischief which, without any fault or even any knowledge of his own, might afterwards occur. Chadwick v. Trower [8] gives the answer to that proposition. There it was held that a man who pulled down his own wall was not bound to give notice to his neighbour of his intention to do so, and was not liable to that neighbour in damages merely because, in pulling it down, he damaged an underground wall of his neighbour's, of the existence of which he had no knowledge. That case, so far as principle is concerned, exactly resembles the present. Tenant v. Goldwin [9] does not affect the Defendants here, for there all the facts were fully known to both parties, and the Court merely decided that, that being so, the Defendant was bound to keep his own property in such a state that it should not injure his neighbour. Bagnall v. The North Western Railway Company [10] at first sight appears much nearer the present case; but there all the facts as to the condition of the soil and the parts worked through were known, and in that respect, therefore, the difference between the two cases is complete. The want of knowledge here is an essential ingredient in the case. The principle laid down by Mr. Baron *Bramwell* in this case, that a man in the use of his own property must take care that he does not injure that of his neighbour, is true in itself, but cannot be applied to a case like the present, where the injury which happens is merely consequential, and is the result of circumstances as to which neither knowledge of them, nor negligence in providing against them, can be imputable to the Defendants. Indeed, the fault, if any, is with the Plaintiff. He began the work in his mines some years ago, and in the ***335** progress of it he came to know of these passages. He ought to ave communicated his knowledge of them to the Defendants, who might then have provided against this mischief, but he did not. The obligation to give notice of the circumstances, if they were to be relied on as creating any liability in another party, was recognised in Partridge v. Scott [11] . Here, too, the Defendants employed competent persons to do something which was in itself perfectly lawful, and they cannot be held liable in damages without clear evidence of impropriety or negligence on their own parts. The person who actually does the work is alone liable: Baker v. Hunter [12] ; Richards v. Hayward [13] ;Peachey v. Rowland [14] ; Allen v. Hayward [15] . Sutton v. Clarke [16] is clearly in favour of the Defendants. No pretence for setting up this charge of neglect was suggested in this case. On the facts, therefore, as well

as on the principles of law, the judgment against the Defendants cannot be supported.

Mr. *Manisty* , Q.C., and Mr. *J. A. Russell* , Q.C., for the Plaintiff below (now the Defendant in Error):—

The mines here were worked in the ordinary way, and their owner is entitled to be protected against a flow of water which destroyed his works, and which was occasioned by the act of others. If the water had come into his mine from natural causes alone, he could not have complained; but it came in through the act of the Defendants in making their reservoir. They introduced there water which would not have come there in a natural way, and they were therefore bound to see that it did not produce mischief to any one. They brought the mischief on the land, and they were bound to guard against the consequences. Baird v. Williamson [17] really disposes of this case, on the ground of the distinction between water flowing on to land, from natural gravitation, and water brought there through the act of an adjoining landowner. Smith v. Kenrick [18] had established that each of two mine owners might work his own mine in the ordinary and proper way, and that if, from such working, and without negligence on the part of the one, an injury was ***336** occasioned to the property of the other, the former was not liable. That proposition is not contested; but that case implied that if the injury was occasioned by something which was not ordinary working, the injury thereby occasioned would be the subject of a claim for damages. Here the construction of the reservoir was not an ordinary working of the property of the Defendants. Baird v. Williamson completed what Smith v. Kenrick had left deficient, and the two, taken together, established beyond all question the title of the Plaintiff here to recover damages. The case of Sutton v. Clarke [19] merely decided that a public functionary acting to the best of his judgment and without malice, and obtaining the best assistance he can, is not liable to a claim for damages if what he does operates to the prejudice of an individual. That case does not affect the present, except that it indirectly confirms the doctrine now contended for, namely, that though the act was in itself lawful, yet if the doing of it occasions an injury to any one, the person injured has a right of action. The principle that an injury, though only consequent on an act, and not developing itself till some years after the act done, may still be the subject of a claim for damages, was settled in Backhouse v. Bonomi [20] , and there the act which occasioned the injury was in itself a lawful act, and there had been nothing but the mere ordinary working of the mines; yet, as it resulted in a mischief to the property of other people, it was held to be a subject for compensation. In Hodgkinson v. Ennor [21] the Defendant had polluted a stream by works on his own land, which works were not in themselves illegal, but they were not the natural mode of working the property, and they produced a mischief to his neighbour; he was therefore held responsible in damages. Lord Chief Justice *Cockburn* there said, that it was a case in which the maxim " *Sic utere tuo ut alienum non lædas* " applied; and Mr. Justice *Blackburn* declared "the law to be as in Tenant v. Goldwin [22] , that you must not injure the property of your neighbour, and, consequently, if filth is created on any man's land, 'he whose dirt it is must keep it that it may not trespass.'" Making a shaft to mine a is, no doubt, a part of the proper and ordinary way of working mining property, but the shaft must be so made and ***337** fenced that it shall not occasion injury to the property of others, and if not so made and kept, any injury thereby occasioned must be compensated. Williams v. Groucott [23] , and Imperial Gas Company v. Broadbent [24] , went altogether on that principle; so did

Bamford v. Turnley [25] , and Tipping v. St. Helen's Smelting Company [26] .

As was said in Lambert v. Bessey [27] , "if a man doeth a lawful act, yet if injury to another ariseth from it, the man who does the act shall be answerable;" and many illustrations of the principle are there given. Every one of them justifies the argument which seeks to fix liability on these Defendants.

The millowners are liable here, though they employed a competent engineer and contractor, and were not themselves guilty of any personal negligence. The principle, qui facit per alium facit per se, applies here, and the principal is liable for the negligence of his agent: *Paley* [28] ; Pickard v. Smith [29] .

Mr. *T. Jones* replied.

THE LORD CHANCELLOR (Lord Cairns)

My Lords, in this case the Plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The Defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the Plaintiff, although, in point of fact, some intervening land lay between the two. Underneath the close of land of the Defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the Plaintiff of his mine, ***338** he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the Defendants.

In that state of things the reservoir of the Defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the Defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed, and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the Defendants it passed on into the workings under the close of the Plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred, was argued, was of opinion that the Plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the Judges there unanimously arrived at the conclusion that there was a cause of action, and that the Plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might

in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained ***339*** that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the Defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of Smith v. Kenrick in the Court of Common Pleas [30] .

On the other hand if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. As the case of Smith v. Kenrick is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of Baird v. Williamson [31] , which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice *Blackburn* in his judgment, in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words:

"We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* ***340*** answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* , or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and

it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion, I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH

My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice *Blackburn* in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

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In considering whether a Defendant is liable to a Plaintiff for damage which the Plaintiff may have sustained, the question in general is not whether the Defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of Lambert v. Bessey , reported by Sir *Thomas Raymond* [32] . And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound sic uti suo ut non lædat alienum. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of Smith v. Kenrick [33] , and Baird v. Williamson [34] . In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The Defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the Plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the Defendant to protect the Plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water, in that case, was only left by the Defendant to flow in its natural course.

But in the later case of Baird v. Williamson the Defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the Plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without ***342** negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the Plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the Defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The Plaintiff had a right to work his coal through the lands of Mr. *Whitehead* , and up to the old workings. If water naturally rising in the Defendants' lana (we may treat the land as the land of the Defendants for the purpose of this case) had by percolation found its way down to the Plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the Plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in Smith v. Kenrick , the person working the mine, under the close in which the reservoir was made, had a right to win and carry away all the coal without leaving any wall or barrier against *Whitehead's* land. But that is not the real state of the case. The Defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the Plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the Defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the Defendant in Error.

Representation

Attorneys for Plaintiffs in Error: N. C. & C. Milne .

Attorneys for Defendant in Error: Norris & Allen .

Judgment of the Court of Exchequer Chamber affirmed. Lord's Journals, 17th July, 1868.

1. 3 H. & C. 774 .

2. 4 Ibid. 263 ; Law Rep. 1 Ex. 265 .

3. 12 M. & W. 324 .

4. 7 H. L. C. 349 .

5. 32 Barbour's Reports (New York). The head-note of the case is as follows:— “Individuals owning the bed of a stream, and each bank thereof, have the right to build a dam and embankment, and raise the water of the stream as high as they please, subject only to the restriction resting upon all, so to enjoy their own property as not to injure that of another person, with the qualifications and limitations incident to that right of property. “And if they, in the exercise of that right, build with due care an embankment to prevent the water, when raised by their dam above the natural banks of the stream, from overflowing the lands of adjacent owners, and in consequence of raising their dam the water finds its way through their own natural soil and below the surface thereof, by filtration, percolation, or otherwise, to the land of an adjacent proprietor, the owners of such dam and embankment are not, in the absence of any unskilfulness, negligence, or malice, liable to such adjacent proprietor for any damage he may sustain thereby; the injury being damnum absque injuriâ.”A party is liable for any defect in his artificial erections which might have been remedied by reasonable care and skill, but not for any defect in the natural banks of a stream. “Where persons have the right to use the waters of a stream for manufacturing purposes, the right to dam the water and detain it a reasonable time follows as a necessary incident to the right of user; and they cannot be compelled to make an artificial reservoir for that purpose. “The banks of the stream are theirs for that purpose; and so long as the water is only nominally detained for this lawful,

customary, and proper purpose, the adjacent landowners must submit to the indirect and consequential damages resulting to their lands from such use."

6. 7 C. B. 515 .
7. Bract. bk. 4, c. 37, fol. 221.
8. 6 Bing. N. C. 1 .
9. 1 Salk. 360; 2 Ld. Raym. 1089 .
10. 7 H. & N. 423; 1 H. & C. 544 .
11. 3 M. & W. 220 .
12. 31 L. J. (Ex.) 214; 7 H. & N. 1 .
13. 2 Man. & G. 575 .
14. 13 C. B. 182 .
15. 7 Q. B. 960 .
16. 6 Taunt. 29 .
17. 15 C. B. (N. S.) 376 .
18. 7 C. B. 515 .
19. 6 Taunt. 29 .
20. El. Bl. & El. 622; 9 H. L. C. 503 .
21. 4 B. & S. 229 .
22. 2 Ld. Raym. 1089 ; Salk. 360.
23. 4 B. & S. 149 .
24. 7 H. L. C. 600 .
25. 3 B. & S. 62 .
26. 4 B. & S. 609; 11 H. L. C. 642 .
27. Sir T. Raym. 421.
28. Pr. & Ag. 262.
29. 10 C. B. (N. S.) 470 .
30. 7 C. B. 515 .
31. 15 C. B.(N. S.) 317 .
32. Sir T. Raym. 421.
33. 7 C. B. 564 .
34. 15 C. B. (N. S.) 376 .

A Short Introduction to the Common Law

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1. Development of the English courts

The rediscovery of Roman law in the 11th century gave rise to a body of academic doctors in Italy who devoted themselves to commenting upon the Roman texts. These academics, who earned their name Glossators by writing their commentaries as marginal notes ('glosses'), were to lay the foundation for a legal revolution in continental Europe (Berman, 1983). The work on Roman law started by the Glossators was within a few centuries to dominate legal thinking on the Continent and as feudal law became Romanised 'the method, the terminology and even some of the substance of Roman law rubbed off on their *coutumiers*' (van Caenegem). Yet while 'the Glossators mainly busied themselves with the interpretation and systematic exposition of the Roman texts, they knew well enough that much of what they taught had no effective influence outside the doors of the lecture-room' (Jones, 1940, 14). The reason for this is that the living law was the feudal and customary law.

In Britain it was quite a different story in that feudalism provided the context for the development of a customary system that was to resist Roman law not just in substance but also in the methodology and mindset that accompanied the historical process of codification. Unlike the civil law, the tradition of the common law is not associated with a book (the *Corpus Iuris Civilis*). It is, instead, associated with a number of institutions which developed out of the historical facts of their time and which did not necessarily conform to any rational 'plan'. The institutions were functional and they have bequeathed a number of characteristics to the modern common law that are not to be found in the Roman thinking. Accordingly in order to understand the common law one must essentially understand the history of its institutions.

1.1 FEUDAL MODEL

The foundations of the common law undoubtedly reach back to before the Norman invasion of 1066. Nevertheless this event is a good starting point for the history of English law because the Normans created the context in which the main institutions of the common law were to develop

and to flourish (Baker, 2002, 12). Certainly the Normans retained not only the legal system that they found in their new country but also the existing administrative and feudal structure. Yet in extending feudalism to the whole of the country and in consolidating the means by which royal power could be asserted the Normans created the context for new developments.

The importance of the feudal structure was that it furnished a political and social context in which the legal concepts of the common law were to form. Indeed it must always be remembered that Roman law was not just a body of rules and legal institutions; it was also an ideological vision of government and society and thus one can talk of a Roman model (Ullmann, 1975, 46–47). The feudal model of government and society was quite different. It did not have at its foundation the two great Roman concepts of *imperium* (state power) and *dominium* (private ownership) and thus did not really adhere to a basic separation between the public and the private. Feudal power was based first on land and then on contract and thus intermixed the ideas of *imperium* and *dominium*. On conquering England, William I claimed the whole country as his and then set about granting large domains to his followers who would in turn bind themselves to him via the feudal contract. They were the tenants-in-chief. Certainly, from the 12th century onwards, nobody actually considered the king to be owner of the country as a matter of social and economic reality; but equally a feudal lord was not an owner of his domain in the Roman sense (Baker, 2002, 230). Each feudal lord would in turn grant parts of his domain to those who swore an oath of allegiance to him and thus governmental power could be said to be based on what was in reality a series of contracts (Ullmann, 1975, 147). Even today land has a special status in English law and so, for example, the word 'goods' does not include real property (see Chapter 6).

In this feudal model the administration of justice was, then, associated with feudal lordship and the Church. However it has to be remembered that the king was also a feudal lord – he was indeed the Lord Tenant in Chief – and as such he was not just integrated directly into the justice system but also entitled to have his own court, which could be used to control inferior tribunals, to assure the King's Peace and to protect his own interests. In addition the king could use his legislative power and his status as the fountain of justice to fashion new remedies, something that Henry II (1133–1189) did to great effect with respect to protecting real rights in land. As mentioned, these real rights were not really forms of ownership but 'seisin', which was closer to a form of possession (see 6.12). However these remedies were to give the emerging common law a very powerful institutional base that would act as one obstacle to the

importation of Roman law. The concepts associated with this land law are still at the basis of the modern English law of real property (see Chapter 6).

1.2 FRAGMENTATION OF THE *CURIA REGIS*: THREE COURTS OF COMMON LAW

William I did not arrive just with his army; he also had his King's Household consisting of his advisors and administrators of which he was the head. Gradually this household transformed itself into his Council or Court which became known as the *Curia Regis* and in which various specialist bodies, in particular law and finance, developed. Members of this Council would go on circuit around the country collecting taxes and judging crimes and gradually these specialists became a body of royal judges.

One section, Exchequer (named after its room in which there was a table covered with a cloth resembling a chess board pattern), dealt with finance and taxation and thus consisted of a body of accounting experts. However they found themselves having to judge legal matters arising out of financial issues and at the end of the 12th century a tradition had developed that these experts – the Barons of the Exchequer – would have a lawyer at their head. By the 16th century all the Barons had the status of judges. Yet even in the 12th century the Exchequer had a legal function and two centuries later this function had detached itself from the *Curia Regis*.

Another body of specialists were the advisors to the king. They were involved not just with administration and government but equally with petitions from subjects that affected the king's interests and they would often decide these matters in sessions with the monarch, seated on benches beside him. These became known as hearings in *Coram rege* – the king having a personal jurisdiction to decide cases – and over time the advisors distanced themselves more and more from the monarch, deciding cases in a court that became known as the Bench (*in banco residentes*). From as early as 1268 this court had its own Chief Justice and during the 14th century the Court of King's Bench became detached from the *Curia Regis*, holding sessions in which the king was no longer permitted to sit. Nevertheless, because of its closeness to the king and to government, this court had jurisdiction over matters that were primarily 'public' in their orientation, that is to say administrative law (not that this term existed until relatively recently) and criminal jurisdiction. In fact the boundary between civil and criminal law was not easily perceptible during the 13th and 14th centuries and as a result the judges were able to use the action of trespass – an action that in its origin was more criminal than civil – to extend their

jurisdiction into private law. With respect to 'administrative' law, this was not a matter of rules as such; the jurisdiction was rooted in a number of 'prerogative' remedies that were used by King's Bench to control the decisions of inferior tribunals, local authorities and even the other royal courts (see 3.10).

During the reign of Henry II it was normal for the judges to follow the king during his journeys to Bordeaux or to the royal forests. This situation evidently created much inconvenience for litigants and in the early 13th century the lords managed to impose on the then reigning king a 'Great Charter' (*Magna Carta* 1215) in which it was declared that 'common pleas' would be heard by a permanent group of judges in London. At first it was not possible to distinguish between the judges of King's Bench (*Coram rege*) and those hearing Common Pleas (*in banco*); but gradually two separate groups did emerge out of the *Curia Regis* with the result that from the 13th century onwards *Coram rege* became the Court of King's Bench while the judges *in banco* became a third court of common law, the Court of Common Pleas. Until the 16th century Common Pleas was the most important of the common law courts because, as its name suggests, it was dealing with the common litigation between subjects; it became, in other words, the court specialising in 'private' law matters and it increased its jurisdiction by taking cases away from the local courts. However, Common Pleas in turn saw its own jurisdiction reduced by King's Bench and Exchequer, which used legal fictions increasingly to draw ordinary litigation between subjects away from the other court.

Consequently up to the 17th century the common law was a matter of three royal courts competing for litigation. However, during this century the competition between the judges disappeared leaving three royal courts with more or less equivalent jurisdiction, although King's Bench retained its supervisory role while Exchequer continued to specialise in financial matters (Sutton, 1929, 36). These three royal courts lasted until 1875 and the case law that issued from them over the centuries became the 'common law'.

1.3 JURY

While it is perfectly reasonable to refer to these three institutions as courts of justice, they had, in comparison to courts within the civilian tradition, a number of special procedural characteristics of which two need to be mentioned in detail. The first was the jury, which consisted of a group of ordinary subjects drawn from the local community whose role at first was to familiarise the judge on circuit from London with the facts of a crime

(Spencer, 1998, 7–8). They were in effect a group of witnesses in a criminal law trial. Gradually, however, not only did their role change but the distinction between criminal and civil law became more marked and when there was a separation between the two types of trials the same procedure was transferred from criminal to civil procedure. Thus the jury became an institutional element in all common law cases. As for their role, the jury gradually evolved from being a group of witnesses to being a central part of the trial process itself. They became the judges of fact while the judge would (later) decide questions of law. This duality was to remain a central characteristic of the common law trial process until the end of the 19th century and even today the jury has not completely disappeared. It continues to play a central role in serious criminal trials and some civil cases (mainly defamation).

The effects of these late medieval developments were considerable, not only because the members of the jury were for the most part illiterate but also because they were ordinary people with their own livings to pursue. Accordingly cases had to be presented to these non-professionals in a way that they could understand and in a manner that would take days rather than months. Thus the common law 'trial' was oral and efficient time-wise, the idea of a case being based on a written set of documents being impossible. In addition the lawyers had to reduce a case to a series of questions that could be decided by the jury and there developed a set of rigid procedural rules to control this process. Indeed Bracton, a famous 13th-century legal writer, observed that litigation was like a game of chess (Baker, 2002, 77). The result of all this was that the common law largely consisted of knowledge of procedural formulae and so, in the 14th century, there was no body of 'English law' in the same way as there was a body of 'Roman law' (Milsom, 1981, 83). What a lawyer of this period had to know were the appropriate procedures for presenting a case.

1.4 JUDGE AND JURY

Up until the 16th century, then, the central institution was the jury. As for the judge, his role 'could be characterized as having as much in common with that of sports referees as with the proactive role of the modern English judiciary' (Baker, 2003, 49). In other words before the beginning of the 16th century no one looked to litigation as a means of refining the law; indeed 'reasoned final judgments were seldom called for' (Baker, 2003, 50; and see Baker, 2002, 79–80) and there was little separation, in terms of the verdict, between law and fact.

However, this situation was to change during the 16th century. There

was growing pressure on the judges to decide points of law, but if this was to happen such decisions had to be removed from the realm of the jury. Such removal became possible thanks to a procedure known as 'in banc' whereby judges in London could, after a jury verdict had been given, consider the matter as a question of law before entering final judgment in the case. At this secondary stage a defendant could apply for a motion on arrest of judgment and this would result in the judges considering the case as a question of law rather than fact and final judgment might be refused on legal grounds. Equally, where there was a verdict for the defendant, judgment would be entered for him unless the plaintiff could show cause as to why such judgment should not be entered. Other motions, such as one for a new trial, subsequently developed with the result that a clear distinction emerged between the role of the jury, as arbiter only of fact, and the role of the judge or judges in banc, as arbiters (and declarers) of law. Accordingly the motion for a new trial put the whole case before the court and resulted in the process whereby a final judicial decision became so important that a majority amongst the judges considering a verdict became the way of achieving it (Baker, 2003, 51). Majority decisions are still the means by which cases are decided on appeal (Kirby, 2007).

This procedure was still much in evidence in the 19th century. Take, for example, the famous contractual damages case of *Hadley v Baxendale* ((1854) 156 ER 145). The plaintiff (claimant) was the owner of a broken mill shaft who arranged for it to be sent speedily to the manufacturers by a firm of transporters (Pickfords). Pickfords delayed the delivery in breach of contract with the result that the mill had to shut down for lack of the shaft. The owners claimed not just ordinary damages (the value of the mill shaft) but compensation for the loss of their profits arising from the closure of the mill. At the trial, the jury awarded damages for the loss of profits but the defendant transporters successfully applied to the Court of Exchequer for a motion for a new trial. The court held that the loss of profit was not recoverable because it was not in the contemplation of the defendant that the mill would have to close if the shaft was delayed. The judgment delivered by the court – and in this case it was a single judgment of the court – remains an important declaration of the law concerning remoteness of damage in contract.

1.5 JUDGES AND JUDGMENT IN CONTEMPORARY ENGLISH LAW

With the disappearance of juries in the 20th century in most non-criminal cases (defamation and fraud are exceptions), the role of fact finding has

passed to the trial judge. This has resulted in a rather different situation with respect to the review of these findings of fact because of the duty on judges to give reasons for their decisions, for it 'is a function of due process, and therefore of justice' (*Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381). What is the extent of this duty? Much will depend on the subject matter. As Henry LJ went on to say:

> Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases (*Flannery*, at 382).

With regard to other questions of fact, and of course to questions of law, the duty to give reasons is based on the idea that without them it would be 'impossible to tell whether the judge has gone wrong on the law or the facts'. Thus 'the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself' (*Flannery*, at 381).

Yet, as Schiemann LJ pointed out, a judge's task is not an easy one. As he went on to say:

> One does often have to spend time absorbing arguments advanced by the parties which in the event turn out not to be central to the decision-making process. Moreover the experienced judge commonly has thoughts about avenues which it might be crucial to explore but which the parties have not themselves examined. It may be his duty to explore these privately in order to satisfy himself whether they are relevant. Having done the intellectual work there is an understandable temptation to which many of us occasionally succumb to record our thoughts for posterity in the judgment or to refrain from shortening a long first draft (*Customs and Excise Comrs v A* [2003] 2 WLR 210, 82).

Schiemann LJ continued:

> However, judges should bear in mind that the primary function of a first instance judgment is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. The longer a judgment is and the more issues with which it deals the greater the likelihood that: (i) the losing party, the Court of Appeal and any future readers of the judgment will not be able to identify the crucial matters which swayed the judge; (ii) the judgment will contain something with which the unsuccessful party can legitimately

> take issue and attempt to launch an appeal; (iii) citation of the judgment in future cases will lengthen the hearing of those future cases because time will be taken sorting out the precise status of the judicial observation in question; (iv) reading the judgment will occupy a considerable amount of the time of legal advisers to other parties in future cases who again will have to sort out the status of the judicial observation in question. All this adds to the cost of obtaining legal advice (para 82).

The disappearance of the jury has, in short, resulted in a significant procedural change of emphasis. Nevertheless it must not be forgotten that the 'role' of the jury has not vanished; it has simply passed to the trial judge.

1.6 WRIT SYSTEM (FORMS OF ACTION)

The second procedural characteristic was the system of writs. This was in its origin simply an administrative process through which a subject gained access to the royal courts and was necessary because these courts were at first exceptional jurisdictions, the administration of justice being the primary concern of the local feudal courts. The *Curia Regis*, within which the common law courts formed, was concerned at first only with the protection of royal and governmental interests, but gradually its jurisdiction was extended as it proved more popular than local justice. Thus the local courts found their jurisdiction being slowly removed in favour of the common law courts (Baker, 2002, 24). Nevertheless litigants never formally had the right to go to the royal courts: they needed a kind of 'ticket' to enter their case and this ticket was the writ which would be obtained from the Chancery section of the *Curia Regis* headed by the Lord Chancellor (Baker, 2002, 53–77).

The writs were a series of formulae that reflected the interests of the king or more generally the typical disputes of the time (the 'common pleas'). The writ of trespass, for example, was originally fashioned to deal with dispossession of land by force of arms (*vi et armis*) while the writ of debt was the means by which an unpaid supplier of goods or a service would obtain his money. Each writ, with its own formula, was based on a model factual situation and once defined became a sort of administrative and legal precedent (Baker, 2002, 55). At the beginning of the 13th century these 'precedents' were to be found in a large book entitled the *Register of Writs* but as the century progressed there was disquiet with its growth not just by the feudal lords, who saw their jurisdiction diminishing, but by the common law judges themselves (there were only 12) who feared being overwhelmed by litigation. As a result the *Register* became closed in that

no new writs were permitted, the only exception being the possibility of fashioning writs 'on the case', that is to say analogous to the writ of trespass (Milsom, 1981, 300–305). The consequences of this closure proved fundamental not just to procedure but to English legal thought itself. Access to the common law courts depended on an existing writ within which the litigant could categorise the facts of his case (*non potest quis sine brevi agere* declared a legal maxim of the time); consequently these formulas or 'precedents' came to define the objective law in that they effectively defined a person's 'rights' at law (Baker, 2002, 56). An absence of a suitable writ meant an absence of a legal remedy (*ubi remedium ibi ius*: where there is a remedy there is a right).

This system of writs, or 'forms of action', lasted until the 19th century and before their abolition in 1852 there were more than seventy (for the most important see, for example, Garde, 1841, 1–4, extracted in Samuel, 2007, 510–511). It is of course easy to criticise them as medieval and rigid, but they undoubtedly shaped the common law mentality. They kept legal thinking tied to categories of factual situations and this acted as an obstacle to the methods associated with the civilian jurists of the 16th and 17th centuries (on which see Stein, 1999, 79–82). In other words the system stood in stark contrast to the *mos geometricus* mentality which saw substantive law in terms of a 'logic of norms'; solutions and legal rights were according to this mentality a matter of deduction from a highly coherent model. The common lawyer, instead, used analogy: the facts of a dispute were simply compared to the models of factual situations to be found in the *Register of Writs*.

1.7 DEFECTS OF THE COMMON LAW SYSTEM

Despite the popularity of the royal courts, there were a number of serious defects with respect to the whole system. With one exception (order for the repossession of land), the common law courts could only grant monetary remedies, namely debt and damages. They could not order a party to do something or not to do something (other than to pay a debt or return land to its rightful possessor). The judges themselves were also very conservative and proved largely unwilling in the early centuries of the common law to adapt the law to new circumstances. In addition there were serious defects of procedure, especially with respect to the rigidity of the forms of action; if, for example, a claimant chose the wrong writ he risked seeing his whole case fail on the ground of want of form (for a 19th century example see *Jacobs v Seward* (1872) LR 5 HL 464). The procedure was equally rigid with respect to documents under seal: the common law judges refused to

look beyond the seal to see if there was fraud or duress. And of course the jury was hardly the best of institutions when it came to litigation based on documentary evidence. In fact once a jury had given its verdict it was very difficult to appeal against this decision, for there was no proper system of appeal courts over and above the three courts of common law. Added to all this, were the problems of delay and corruption.

1.8 COURT OF CHANCERY AND THE SYSTEM OF EQUITY

One possibility open to a disgruntled litigant in the 13th and 14th centuries was to petition the king directly since he remained the source (the 'fountain') of all justice. From the 14th century onwards the king would pass these petitions to his Lord Chancellor whose role was to be the 'keeper of the king's conscience', as well as being, of course, the head of the judicial section of the *Curia Regis*. In turn this high-ranking officer would often take advice from the royal judges before responding to a petition. This whole procedure attracted the name 'Equity'. However at the end of the 15th century the Lord Chancellor had started to decide these petitions in his own name using as a guide a mixture of his Christian discretion (since before the 16th century most Lord Chancellors were ecclesiastics), canon law and Roman law. Gradually the Lord Chancellor moved from being an individual taking decisions to a royal court dispensing justice in the name of the king. To the three common law courts was added a fourth court, the Court of Chancery, and the case law issuing from this court became known as equity.

At first the duality functioned, on the whole, in a co-operative fashion but in the 17th century a conflict developed, above all between the Lord Chief Justice Coke and the Lord Chancellor Lord Ellesmere (Lord Chancellor from 1596 to 1617). This was a serious crisis which was only settled when Lord Ellesmere convinced the king, James I, to intervene in favour of equity: when rules of common law and equity came into conflict those of equity would prevail (see now Senior Courts Act 1981, s 49). After the death of Ellesmere, his successors re-established cordial relations with the common law judges. Moreover, from the 17th century onwards, the Lord Chancellors progressively came to regard equity less as a multitude of decisions founded upon conscience and more a body of principles (van Caenegem, 1999). Yet these principles were never seen as being in opposition to those of the common law; the whole point of the Court of Chancery and its system of principles and remedies was to fill the gaps existing as a result of the defaults of the common law. In particular, of course, there

was in the common law courts the lack of non-monetary remedies together with the rigidity of the forms of action and the jury system.

The Court of Chancery accordingly used a quite different procedural model, one perhaps closer to the *ius commune* pattern to be found on the Continent (see Baker, 2003, 180–181 and 2.1). There were, then, no writs and no juries and it tackled the shortcomings of the common law through the development of a range of new remedies of which the most important was the injunction. This was a negative order made by the court against a party in person (*in personam*) not to do something and it could be employed to stop a litigant pursuing his rights at common law if such an act appeared to the Lord Chancellor as being an abuse of power or rights. In addition to the injunction, equity developed other non-monetary remedies such as specific performance of contracts, rescission of transactions and rectification of documents. In other words, the Court of Chancery developed remedies that could look behind documents and the like to see if there had been fraud, mistake, duress or undue influence (for a modern example see *Daventry DC v Daventry & District Housing Ltd* [2012] 1 WLR 1333).

In addition to these new remedies the Court of Chancery was able to fashion some new institutions (often indirectly through the use of injunctions) such as the trust. In the late Middle Ages an owner of land would frequently transfer it to another to be held 'on trust' for the benefit of a third person. The common law courts would look only at the form of the transfer and thus not recognise the 'trust' obligation attaching to the new owner. The Lord Chancellor took a quite different position on the basis of the King's Conscience and would force the new proprietor (the trustee) to respect his obligations towards the third party (the beneficiary). Gradually this position changed from being a matter of equitable remedies to one of property rights; the beneficiary acquired under a trust a real right in the trust property and there thus developed two forms of 'ownership', one at common law and one in equity.

1.9 COMMERCIAL LAW

The shortcomings of the common law might seem surprising in the context of the importance, today, of commerce to English law. The procedural rigidity and remedial limitations would hardly seem attractive to the merchants of the late Middle Ages. In fact, before the 18th century an important part of mercantile law was not to be found in the royal courts but in the Court of Admiralty and, before that, in the merchants' own courts.

The Court of Admiralty was partly the result of a jurisdictional

limitation that attached to a jury, which could not be convened with respect to a case that happened outside of England. This gap was at first filled by the *Curia Regis* and then by several specialised courts of which Admiralty was the most important. This was a court that formed around the Lord High Admiral who was the head of the navy and who had jurisdiction over piracy. Later this jurisdiction was extended to the law of the sea and then to commercial law in general, guided by judges trained in Roman and civil law. There were two reasons why Admiralty was able to capture this work from the old mercantile courts. First, it employed the fiction that any commercial case happened *super altum mare* and thus it simply pretended that the law of the sea and commercial law were one and the same. Secondly, to some extent, these two areas were one and the same since England was a sea-faring nation. Even today many commercial cases involve shipping and this was particularly true in the 18th and 19th centuries. However the success was not to last and from the 17th century Admiralty found itself gradually being relieved of its jurisdiction by the common law courts.

The common law courts were able to attract this commercial work because of several important developments. First, the law itself had matured at the level of theory; in particular a remedy based on the notion of trespass had been extended to cover damage caused by a person failing to do what he had promised. This new action of *assumpsit* in effect provided a compensation claim for a party who had been the victim of a breach of contract even although in the 17th century there was no theory of contract in the civilian sense of the term (see 7.2). Secondly, the Lord Chief Justice Coke had attacked the Court of Admiralty with Writs of Prohibition which had the effect of suppressing litigation in this court and attracting some of it to the common law courts. Thirdly, in the 18th century, Lord Mansfield, a common law judge, succeeded in adapting the procedures of the common law to the needs of the commercial classes with the result that commercial law got absorbed into the common law (or vice versa as some think).

All through the 19th century the common law courts built upon these developments and succeeded not just in fashioning a general law of contract but in developing specific areas of commercial law such as charterparty and insurance contracts. This is the reason why the common law is regarded by many as a commercial law (Moréteau, 2000, para 8). In 1875 the Court of Admiralty was absorbed into the Probate, Divorce and Admiralty Division of the High Court and in 1970, when this Division became the Family Division, Admiralty was absorbed into the Queen's Bench Division (Administration of Justice Act 1970, s 1). Thus Admiralty was finally merged with the common law at both the substantive and the

formal levels. However an Admiralty Court remains as a separate court within the Queen's Bench Division.

Nevertheless these 19th- and 20th-century developments did not result in a system that was perfectly suited to the needs of the commercial community. At the end of the 19th century a commercial court was constituted within the Queen's Bench Division of the High Court with the aim of speedily and efficiently dealing with commercial cases. But even this development seems not to have overcome problems of delay and expense with the result that, during the 20th century, arbitration was drawing commercial matters away from the courts (*Report of the Committee on Supreme Court Practice and Procedure*, Cmnd 8878, 1953, para 895). Today arbitration is not seen in a negative light and indeed has been given legislative support (Arbitration Act 1996). Moreover, the commercial court has embraced Alternative Dispute Resolution (ADR) procedures whereby parties are encouraged to resolve their dispute through mediation (see *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 and 1.13).

1.10 REFORM OF THE COMMON LAW IN THE 19TH CENTURY

Despite these important adaptations within the common law system, the beginning of the 19th century nevertheless saw England with a set of courts and procedures that were feudal and medieval in origin. In the age of science all this was to seem somewhat irrational and from a litigant's point of view it probably was. Why were there three courts of common law with equivalent jurisdiction? Why were there two systems of legal rules, law and equity? Why was there no proper appeal structure? Why was there so much emphasis on the form rather than the substance of a legal claim? In addition there were the scandals associated with delay in the Court of Chancery (see Dickens's *Bleak House*).

The 19th century was accordingly to become the age of reform. In 1830 a Court of Exchequer Chamber was established to act as a court of error, that is to say as a kind of appeal court; the new court consisted of judges from the common law courts other than the one from which the appeal came. This idea of error was the result of the old writ of error which had been one means of appeal within the common law system, along with the procedure for a motion for a new trial. A jury verdict could be overturned if an error was discovered in the legal record of the case. In fact the 1830 court was not the first Exchequer Chamber to have appeared: there had been three others over the centuries, though none had found long-term

success (see figure 1.1). In 1851 the legislature established a Court of Appeal in Chancery which was set up as a true appeal court – that is to say to rehear a case – rather than as a court of error (see figure 1.2). In addition to these institutional reforms, Parliament set about reforming the law of procedure. The forms of action were effectively abolished by the Common Law Procedure Act 1852 and some progress was made in fusing law and equity with respect to remedies and the ability of a single court to have recourse to both systems. In 1846 a system of local county courts was established. At first the jurisdiction of these new courts was restricted, but their increasing popularity encouraged the progressive extension of this jurisdiction with the result that today the county courts play a major role in the English civil law system. Another procedural change that was to have an important long-term effect was the power granted to a judge to dispense with a jury in civil claims; by the middle of the 20th century it had virtually disappeared from non-criminal cases, its role having been taken over by the trial judge (*Ward v James* [1966] 1 QB 273).

To a certain extent, then, the procedural and institutional mentality of the Court of Chancery was, thanks to these legislative reforms, imposing itself on the common law (Baker, 2002, 141–142). As for the Court of Chancery itself, there had been a number of important reforms since the beginning of the 19th century. The Lord Chancellor gradually decided fewer and fewer cases at first instance and in 1851 a Court of Appeal in Chancery was established. A few years later statute gave judges the power to award damages in lieu of an injunction or specific performance (Chancery Amendment Act 1858; see *Jaggard v Sawyer* [1995] 2 All ER 189). From then on it was possible to obtain damages (in equity) without having to go to another court if refused an equitable remedy.

1.11 JUDICATURE ACT 1875

However, the principal reform of the English legal system came in 1875 with the Judicature Acts 1873–75 (Supreme Court of Judicature Acts 1873 and 1875). These statutes swept away the old system of central courts and established a new model called the Supreme Court which operated at two levels. The first level was the High Court, which consisted of an amalgamation of the three old common law courts, the Court of Chancery, the Court of Admiralty and the ecclesiastical courts. The High Court was the court of first instance and had (after 1881) three divisions: the Queen's Bench Division (QBD), Chancery Division (ChD) and the Probate, Divorce and Admiralty Division (PDA), this last consisting of all those old courts that had largely dispensed Roman and civil law.

In 1970 this third Division was abolished and replaced by the Family Division (Administration of Justice Act 1970, s 1). Most cases were to be heard by a single judge who would decide (if there was no jury) both questions of fact and of law; however there were also Divisional Courts, often with two judges, of which the most important were those of the QBD, deciding questions of law arising from the magistrates' courts and deciding questions of administrative law.

The second level of the Supreme Court consisted of the Court of Appeal. This new appeal court took as its model not the old Court of Exchequer Chamber but the Court of Appeal in Chancery; it was therefore a genuine appeal court and not a court of error (Baker, 2002, 141–142). Normally a case would come before three judges and each had the right to issue his (or her) own judgment, although sometimes there would be a joint one issued as the judgment of the court (now quite frequent). This Court of Appeal was originally envisaged as being the first and final appeal; thus further appeal to the House of Lords (which had jurisdiction to hear appeals thanks to its old *Curia Regis* status) was to be abolished. However, between 1873 and 1875 there was a change of government with the result that a decision was made to retain the House of Lords as an appeal court. Consequently the old three-level structure (common law or Chancery court, appeal or error court and then the House of Lords) was ultimately retained, although statute ensured that the judicial section of the House of Lords was turned into a proper appeal body staffed by fully qualified Lords of Appeal (Appellate Jurisdiction Act 1876).

A much more recent development with respect to the House of Lords as an appeal body is in respect of its name. It has become the Supreme Court (thus necessitating a change with respect to the 1875 Supreme Court) and is housed in a building independent of the House of Lords itself (Constitutional Reform Act 2005). Mention must also be made of the Privy Council as an appeal court. This became independent of the *Curia Regis* in the 16th century with jurisdiction to decide appeals coming from overseas colonies and this was formalised by legislation during the 19th century (Judicial Committee Acts 1833 and 1844). It also heard appeals from the ecclesiastical courts and from the Court of Admiralty and is staffed by Lords of Appeal (now justices of the new Supreme Court).

1.12 DEVELOPMENT OF TRIBUNALS

In addition to the system of ordinary civil process courts (High Court and county court), the 20th century saw the development of a system of

tribunals. These tribunals were created by statute and largely dealt with disputes arising between citizen and various public authorities. Thus they resembled to some extent the administrative courts to be found in the civil law tradition. The development of these dispute resolution institutions outside the normal court system was not uncontroversial, but they had a number of advantages such as speed, expertise and less formality. They were also very diverse, not just in respect of their subject matter – taxation, social security, rent, licensing and so on – but also in their procedures. There were around 70 different tribunals. Some of these were like courts with court-like procedures, others were less formal; there were also differences with respect to the possibility of appeals (see *Report of the Committee on Tribunals and Inquiries*, Cmnd 218, 1957, paras 35–37). One major criticism that attached to this system of tribunals was that they were resourced and staffed by the public authority or department which administered the scheme and thus the tribunal appeared not to be sufficiently independent and neutral. Accordingly the system was reformed to some extent in 1958 and the great majority of tribunals were made subject both to an appeal route to the High Court and to control by judicial review proceedings (see 3.12) (Tribunals and Inquiries Act 1958).

The present century has seen further and major reform. The Tribunals, Courts and Enforcement Act 2007 has created a new unified structure of tribunals which, in its structural pattern, resembles in outline (or by analogy) the two-tier system of the old Supreme Court established by the Judicature Act 1873. There is a First-tier Tribunal which is divided into various chambers and an Upper Tribunal, also organised into chambers; both of these tiers are staffed by judges as well as by lay members, the Upper Tribunal actually consisting of High Court judges. However, as Lady Hale has pointed out, although the 'new structure may look neat . . . the diversity of jurisdictions accommodated means that it is not as neat as it looks' (*R (Cart) v Upper Tribunal* [2012] 1 AC 663, 23). For example, the Upper Tribunal is certainly an appeal court in the full sense of the term, but it is equally a court of first instance for some matters and it is not too clear why some of these matters should be assigned to this superior tier while others are not (Lady Hale, para 23).

It would appear, therefore, that there now are two parallel court systems in the UK rather than one court system and a mode of ADR via tribunals. As a result of the 2007 Act there exists something of a separate corps of judges under the responsibility of a Senior President (see Lady Hale, para 22) with the consequence that the idea of a unique common law court system covering both private and public law matters might have to be rethought. It could be that there really is now a 'system of specialised administrative courts' (Boyron, 2010, 126).

1.13 ALTERNATIVE DISPUTE RESOLUTION

It has already been noted that the tribunals are a form of ADR in that they represent an alternative to the ordinary courts. However, tribunals are not the only form of ADR; other forms are arbitration, mediation, negotiation and the ombudsman (or now ombud, ombudsperson). These alternative forms have become increasingly important since the Woolf Report (see 2.3), which felt that many disputes could be resolved through mediation (and see *Cowl v Plymouth CC* [2002] 1 WLR 803, 1–3), but there were important advances taking place before the reforms. Mediation has been developed in the Commercial Court (Commercial Court Practice Direction [1994] 1 All ER 34) and is seen as of particular value in family law disputes (Family Law Act 1996, s 8). There is even a mediation scheme attached to the Court of Appeal. One problem is whether this form of ADR should be compulsory; the Court of Appeal has indicated reluctance to penalise parties who refuse mediation since this could amount to interfering with the right of access to a court (*Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002) but the decision has attracted criticism. Whatever the position on costs, it is likely that mediation will become an increasingly important form of ADR.

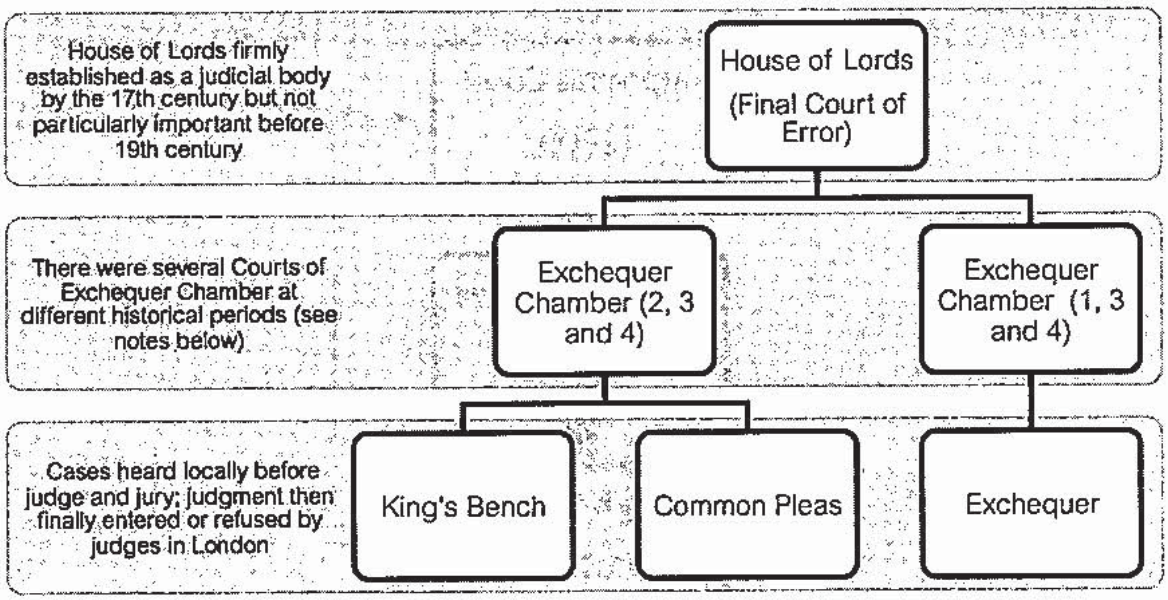
Mediation does have both a long history and a vital comparative dimension. In terms of history it is associated with particular communities such as those founded on religious beliefs, but more recently it has gained in importance in areas such as the professional, employment, landlord and tenant, and consumer environments. No doubt these community- and interest-based groups can provide a rich source for research. Equally some countries like China can offer much potential to legal anthropologists and comparatists given the country's long cultural tradition of mediation as a dispute resolution process (see Roberts & Palmer, 2005). There are however problems with processes such as mediation. Is it actually effective in terms of its take-up rate? The research so far is by no means conclusive. Indeed, there is even a powerful argument to be made against forced, or partially forced, settlements which might result from ADR (Fiss, 1984). There are other difficulties as well. Such methods often function in the 'shadow of the law' with the result that there is a permanent threat of 'juridification', especially as mediation is operating within an atomised ideology of rights (see 5.4–6 on Dworkin). Yet this juridification is itself weakened by the lack of any precedent system. Furthermore, the process can be manipulated by state power for reasons of economic efficiency and this may mean that it ends up operating as an adjunct to the ordinary court procedures (justice on the cheap). The historical and comparative possibilities can even have a negative effect in as much as there is a temptation

to introduce mediation procedures by way of transplantation from one society to another without proper consideration of cultural context. These are by no means fatal problems, but they do indicate that teaching and research, which perhaps is lacking at the moment in law schools because of the emphasis on positive law, needs to take ADR much more seriously.

Arbitration of course has a long history dating back to Roman law and in England it has now been put on a secure statutory basis (Arbitration Act 1996). This Act is said to represent a new philosophy in that recourse from arbitration decisions to the courts has become difficult, thus making arbitration more independent of the court system (*Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221). The advantages can be summarised under the 'four S's', namely saving, secrecy, specialisation and speed; but these aims and objectives are not always achieved. Some disputes can end up, for example, costing as much as litigation. The actual basis for arbitration is contract and many commercial and consumer contracts will contain arbitration clauses; the actual validity of these clauses is not, however, dependent upon the validity of the contract itself (Arbitration Act 1996, s 7). In many respects arbitration is like litigation and so arbitrators are under a duty to act fairly and impartially and to give reasons for their decisions; the remedies available are similar to those available in the ordinary courts. Nevertheless, despite these processes in some ways mirroring the ordinary court system, the great advantage of arbitration is that arbitrators can be specialists in the area in which the dispute has arisen. Ordinary judges are not likely to be experts in, say, the chocolate trade.

As for the ombudsmen schemes, these are now well established in both the public and the private sector since the creation of the Parliamentary Commissioner in 1967 to investigate claims of governmental maladministration (Parliamentary Commissioner Act 1967). Other ombudsmen have been established to investigate, for example, the health service and local government. In the private sector there are now ombudsmen covering a range of commercial and consumer activities, for example banking and insurance, pensions, telecommunications and estate agents. There are said to be three essential features that define an ombudsman: he or she is an independent and non-partisan officer who deals with specific complaints from the public and who has the power to investigate, criticise and publicise injustice and maladministration (Verkuil, 1975). One important feature that emerges from this definition is that the ombudsman, at least in the public sector, has no power to reverse an unjust decision and her decisions are not binding; the primary weapons are persuasion and publication. This can lead to serious difficulty when the government refuses to act on a report. Complaints to the Parliamentary Commissioner cannot

be made directly; they have to go first to the complainant's Member of Parliament (MP) who may or may not refer the matter to the ombudsman. In other words there is a filter device, which in turn means that the MP becomes part of the dispute resolution process. However, this filter device does not apply to the National Health Service or the Local Government Ombudsman, nor does it apply in the private sector schemes. The Law Commission has recommended a number of important reforms, including the abolition of the filter process and of the non-binding nature of the ombudsman's findings (Law Com: Public Service Ombudsmen, Law Com 329, 2011). In the private sector the powers of the ombudsman are stronger and so, for example, the financial services ombudsman can order a company to pay money and (or) put things right (Financial Services and Markets Act 2000, s 229). These schemes are a valuable alternative to litigation.



Notes:

1. Exchequer Chamber (1): This court of error was created in 1357 to hear error cases from the Court of Exchequer.
2. Exchequer Chamber (2): This court of error was created in 1585 to hear error cases from King's Bench. Error cases from Common Pleas were heard in King's Bench.
3. Exchequer Chamber (3): This was not really a court as such but an informal gathering of judges from the 15th to the 17th century who would discuss difficult cases.
4. Exchequer Chamber (4): In 1830 Parliament created a court of error to hear cases from all three common law courts. A further appeal could be taken to the House of Lords (see eg *Rylands v Fletcher* (1866) LR 1 Ex 265 (Ex); (1868) LR 3 HL 330 (HL).
5. By the 17th century the House of Lords had become established as a final court of error from the Courts of Exchequer Chamber.

Figure 1.1 Courts of Exchequer Chamber

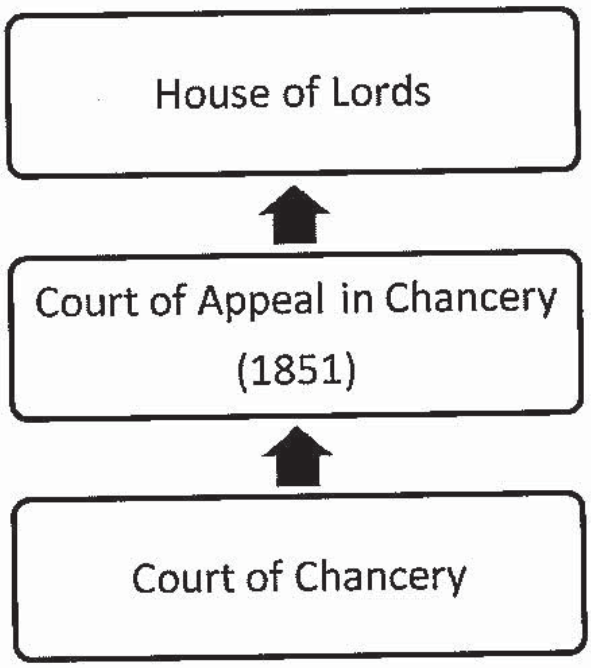
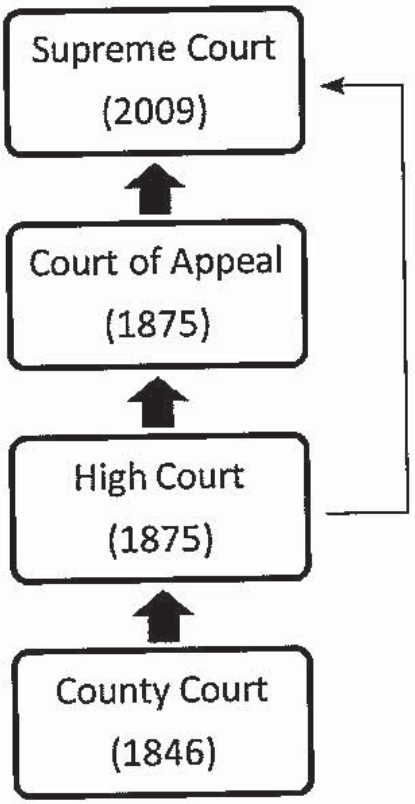


Figure 1.2 Equity court structure



Notes:
1. There is no automatic right to appeal to the Court of Appeal or the Supreme Court. Permission to appeal is required.
2. It is possible to appeal directly from the High Court or to the Supreme Court (leapfrogging procedure); but this is rarely used.

Figure 1.3 Contemporary court structure (non-criminal)

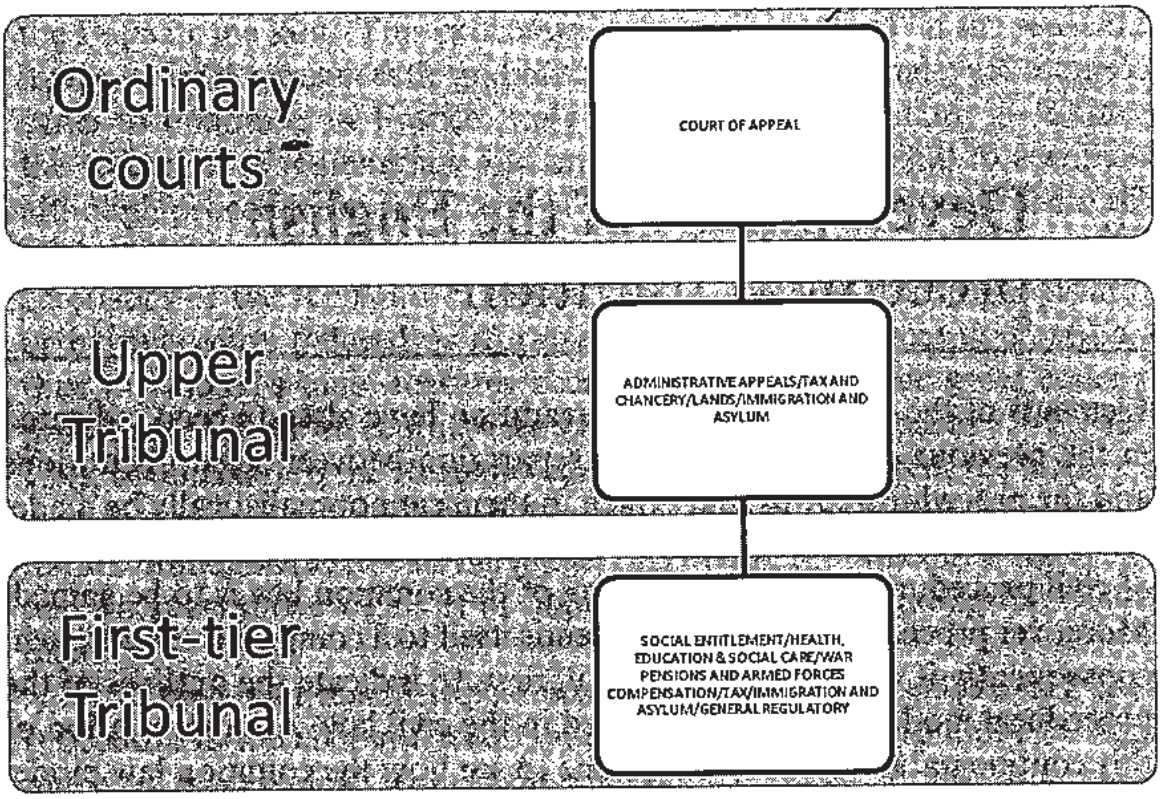


Figure 1.4 Tribunals

A Note on the History of Common Law and Equity

This note has been used in the Law Faculty at Victoria University for some years. It is thought that the original author was the late J.C. Thomas. There have been a number of revisions and additions since Mr Thomas's time, in particular by Professor D.W. McLauchlan

Introduction

Little is known of the laws operating in England prior to the Norman Conquest in 1066. It is, however, clear that there were local assemblies of free men called County or Hundred Courts that applied local custom. There were no general laws common to the whole of England and no overriding judicial authority for the whole of the country.

After the Norman Conquest, the County or Hundred Courts were gradually replaced by feudal courts set up by the feudal barons and overlords to decide disputes affecting their subjects. These feudal courts still applied predominantly local customary law.

Conflict between Local Courts and the King's Courts

At this time the King also exercised what was called "high justice". With the assistance of his officials and nobles, he would consider exceptional cases affecting the King's interest. The gathering of the King, his officials and nobles for the purposes of considering such disputes was called the Curia Regis (the Court of the King). Later, the King delegated this power to his officials. The Curia Regis was not an ordinary court open to all and sundry. It had to be careful not to appear to take cases away from the courts of the feudal barons. The King's Courts, therefore, were limited to dealing with cases concerning the King and not the private citizen. Thus, three courts were set up to deal with:

(a) the royal finances - the Court of Exchequer;
(b) the ownership and possession of land - the Court of Common Pleas;
(c) serious criminal matters affecting the peace of the kingdom - the Court of King's Bench.

There was, however, considerable pressure on the King's Courts to extend their jurisdiction to other matters and to assist private citizens. First, private citizens saw many advantages in having their cases

dealt with by the King's Courts, which had developed more efficient and rational procedures than the local courts. For example, the King's Courts used juries to resolve disputed issues of fact and they heard evidence given on oath. In the local courts there was still trial by battle or by ordeal. The King's Courts also had more effective means of enabling successful litigants to enforce judgments given in their favour. Secondly, the judges whom the King appointed to run his courts were anxious to increase the number of cases which they heard as that would also increase the fees that they received. Naturally, the feudal barons were opposed to the loss of revenue from their own courts that would result from the expansion of the King's Courts. The following is an example of the ways in which a litigant would try to get his case before the Royal Courts. A is owed money by B. He wants the King's Court to decide his claim against B. He goes to the Court of Exchequer and says "I know you only deal with cases affecting the King's revenue but, in fact, my case does affect the King's revenue because unless B pays me the money which he owes me I can't pay the King the money that I owe him". The royal judges were only too happy to act on this transparent fiction in order to collect the fees involved.

By the end of the 13th century, a compromise was reached. The Statute of Westminster II allowed the Royal Courts to retain the enlarged jurisdiction that they had already assumed but prohibited any further expansion by them.

The remedies provided by the Royal Courts had been embodied in documents called writs. These writs took different forms according to the type of case in which they were issued. The Statute of Westminster required the Royal Courts not to issue any new form of writ.

By prohibiting the creation of new forms of writs the Barons hoped they would prevent the Royal Courts from expanding their jurisdiction, that is, they would not be able to deal with cases of types that differed from those with which they had previously dealt.

Notwithstanding the Statute of Westminster, litigants still preferred to have their cases decided by the Royal Courts and the royal judges were still not averse to the additional income that they received from hearing more cases. What happened was that litigants attempted to fit the facts of their particular cases into the old forms so as to give the appearance

that the Royal Courts would not be expanding their jurisdiction if they were to hear that particular case. Accordingly, the first question that the Royal Courts had to decide when any case came before them was whether or not the form and procedure that the plaintiff had chosen was appropriate to the facts of the case. It was only if the case was essentially the same as cases with which the courts had previously dealt and could be brought within the existing forms that the courts had jurisdiction to decide the case.

In such a situation the judge's attention was directed not so much to substantive law (not so much as to the question of who was right and who was wrong) as to procedure. Concern with procedural questions continued to dominate English legal thinking down to the 19th century, when legislation was passed abolishing or simplifying the old forms of procedure.

The consequences of this preoccupation with procedure were:

(a) to prevent the adoption on a large scale of the concepts of Roman Law, as was done by Continental courts. It was impossible to apply these concepts within the rigid framework of English procedure;
(b) lawyers and judges tended to devote their attention to mastering complex procedural questions, which prevented their trying to develop comprehensive legal theories that would give a logical basis for deciding all disputes in a given field. The substantive law was enunciated by the judges almost as a brief afterthought tacked onto the decision on the procedural questions and they went no further than was necessary to dispose of the facts of the particular case before them;
(c) lawyers received their training not by the contemplation of theories of law but by practising the complex procedural devices that dominated all cases heard in the King's Courts.

However, notwithstanding the procedural difficulties, the litigant still preferred the King's Courts to the local courts and there was a gradual decline in the latter until they eventually suffered a total eclipse.

Development of Equity

The eclipse of the local courts had one very serious consequence. A litigant who could not fit his case

into the rigid forms and procedures of the King's Courts was, in effect, left without any redress. By the 14th century, however, litigants had developed a new practice to remedy the inability of the common law to adapt its procedures to meet new and different problems. The new practice was one which sprang naturally to the minds of people of that period. If the King's Courts would not provide a remedy why should not the litigant appeal directly to the person who was the fountain of all justice and grace, namely the King himself? If the King's Courts were not working properly why should not the King remedy the malfunctioning of his own courts?

It was natural that in considering petitions for him to exercise his charity and grace the King should seek guidance of the Lord Chancellor who was "the Keeper of the King's Conscience". By the 15th century, the whole function of dealing with these petitions was delegated by the King to the Chancellor and the Chancellor's officials.

At first the intervention by the King or his Chancellor was made as a special favour in special cases but gradually it became a regular practice for the Chancellor to give a remedy in almost any case where the common law procedures were inadequate or unsatisfactory. He justified his decision as made on the basis of the "equity of the case" and being unfettered by any rigid procedures there was an opportunity for the Chancellor and his officials to adopt a whole new system of law (such as Roman Law) to replace the common law, which had failed to develop to meet the needs of the changing society. The equity courts achieved such popularity at the expense of the common law courts that there was a real likelihood that the latter would, like the earlier local county courts, first decline into disuse and then be entirely superseded by the new courts.

This opportunity was however lost when, in the 16th and 17th centuries, an alliance between the common law courts, led by Chief Justice Coke, and Parliament forced the King and the Chancellor to make a compromise. This compromise, again, took the form of maintaining the status quo. The Chancellor could retain the jurisdiction which he had acquired by that time but he was not to make any new encroachment on the jurisdiction of the common law courts. Thus, there was established a dual system of courts, the common law courts applying the common law and the equity courts

applying the rules of equity which complemented and supplemented the common law.

The equity courts at first had no definite rules. They regarded themselves as merely applying moral sense or natural justice to the facts of a particular case. Judges, like other people, may differ in deciding whether or not good conscience requires a remedy to be given in any given case. Thus, some Chancellors would give a remedy in certain cases where others would not. This inconsistency led to the taunt that "Equity varies with the length of the Chancellor's foot". That is to say, whether or not something was equitable depended upon who was Chancellor at the time. Criticism of the arbitrariness of their decisions which was made during the conflict between Coke CJ and the Chancellor led the equity courts in the 16th and 17th centuries to seek greater consistency by following the decisions which they had previously made in similar cases. This meant that when a Chancellor had to decide a case he could not longer give a decision based solely on his own impression of what was fair. He had to look back to see if any other Chancellor had had to decide a similar case and then to follow any decision which had previously been given.

Thus, equity developed from being a general concept of natural justice or moral sense into a series of judge-made rules based on decided cases. Since that time, the courts have been less willing to question or examine established rules of common law under the guise of doing equity. The courts will not measure the established rules against a concept of natural justice and reject those that do not conform with that concept, and the possibility of the courts as distinct from Parliament making a wholesale revision of our system of law or of any particular field of law was lost back in the 17th Century. Equity like the common law will deal with new problems and situations by an extension or development of existing principles rather than by wholesale revision and replacement of established rules.

Fusion of Common Law and Equity

In the 19th century Parliament passed legislation, the Judicature Acts, which fused or combined the two systems so that all British courts were able to apply the rules of equity and the rules of common law. The old procedural duality was avoided and the rules and remedies of both common law and equity

could be applied by the same court in the same action.

There has been a similar fusion of common law and equity in New Zealand and our courts apply both equitable and common law rules.

Another important development in the 19th century was the introduction of legislation which transformed the rules of procedure which had previously dominated the common law courts. Litigants no longer had to attempt to force their cases into the forms and procedures which had been laid down in an earlier society, in different circumstances, to meet problems of a different kind. The courts, freed from the preoccupation with procedural matters, could concentrate on substantive law (ie on who was right and who was wrong). The development of a more coherent body of law was also facilitated by the growth of law reports, volumes which set out the decisions of the judges in particular cases and their reasons for reaching those decisions. Judges were thus able to consider the view of other judges in similar cases before giving their own decisions.

Further, by the late 19th and 20th centuries Parliament was far more ready to pass legislation which altered any rules of common law or equity which had proved to be unsatisfactory and also to pass legislation dealing with topics never really considered by the old courts.

Meaning of "Fusion"

Snell's *Principles of Equity* (28th ed) 17 states:

> It is sometimes said that the Judicature Acts fused law and equity. 'But it was not any fusion or anything of the kind; it was the vesting in one tribunal of the administration of Law and Equity in every cause, action or dispute which should come before that tribunal'. [*Salt v Cooper* (1880) 16 Ch.D 544, 549]. It is a fusion of administration rather than of principles. As has been well said [Ashburner's *Principles of Equity* (2nd ed 1933) 18], the two streams have met and now run in the same channel; but their waters do not mix.

The notion that law and equity retain their separate identity and that the effect of the Judicature Acts was only to enable all courts to administer legal

and equitable principles was strongly attacked by Lord Diplock in the House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904. His Lordship said (924-925):

> ... to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is, in my view, conducive to erroneous conclusions as to the ways in which the law of England has developed in the last hundred years.
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> Your Lordships have been referred to the vivid phrase traceable to the first edition of *Ashburner, Principles of Equity* where, in speaking in 1902 of the effect of the Supreme Court of Judicature Act he says (p 23) "the two streams of jurisdiction" (sc. law and equity) - "though they run in the same channel, run side by side and do not mingle their waters". My Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery (as well as those administered by courts of admiralty, probate and matrimonial causes), were fused. As at the confluence of the Rhône and Saône, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.

These observations give rise to a number of difficulties (see Baker, "The Future of Equity" (1977) 93 LQR 529) and so far have been largely ignored in subsequent cases. They have, however, received the endorsement of the New Zealand Court

of Appeal, particularly Cooke P, in a number of cases raising issues concerning remedies for breach of civil obligations. In *Day v Mead* [1987] 2 NZLR 443, 451 Cooke P said: "As Lord Diplock put it, law and equity have mingled now." See also *Elders Pastoral v BNZ* [1989] 2 NZLR 180, 186 and *Acquaculture Corporation v NZ Green Mussel Co* [1990] 3 NZLR 299, 301.

The precise meaning and implications of the substantive fusion of law and equity envisaged by the Court of Appeal are not made clear. It is undeniable that there are large areas of the law where common law and equity retain their separate spheres of operation and where there are important differences between legal rights and remedies and equitable rights and remedies. As pointed out by Hanbury and Maudsley, *Modern Equity* (13th ed 1989) 26 the most that can be said is that

> a century of fused jurisdiction has seen the two systems working more closely together; each changing and developing and improving from contact with the other; and each willing to accept new ideas and developments, regardless of their origin. They are coming closer together. But they are not yet fused.

The Court of Appeal's recent pronouncements are largely unreasoned assertions. Some of the issues remaining are quite complex. The judges talk about fusion of law and equity but the actual conclusions reached suggest that the fusion is an incomplete one - to some undefined extent law and equity do retain their separate identity.

J. Berryman et al, "Origins of Equity" *Remedies, Cases, and Materials* (1988) 517-519

As S F C Milsom points out (*Historical Foundations of the Common Law* (London: Butterworths, 1981)), the origins of "equity" are shrouded in mystery; and certainly the notion that equity was originally a substantive body of law, different from and more "just" than the common law, is something of a romantic fiction. Equity, like common law, had its origin in petitions addressed to the king, requesting the exercise of his prerogative powers to resolve some conflict or correct some abuse, inadequacy or injustice. By the fourteenth century, the administration of justice had largely been established through the formal institutions of common law. The three superior courts, King's Bench, Common Pleas and Exchequer, administered the law of the land. But the jurisdiction of these courts was neither exhaustive nor exclusive. The law remained grounded in the king's justice and the sovereign did not relinquish his ultimate authority to consider individual petitions and dispense justice (though the scope of this residual jurisdiction was to become a source of considerable political controversy). Thus, in addition to the three courts, citizens had the legal right to petition the king directly where it was alleged that justice could not be obtained in the common law courts.

The Chancery was not originally a "court". Rather it was a department of government that did the "paperwork" of the state. The Chancellor, historically a cleric, was the custodian of the royal seal used for the authentication of all government documents (including the common law writs), and was responsible for many of the internal affairs of the country. As petitions to the king became more numerous they were frequently referred to the Chancellor who, exercising delegated powers, gradually assumed a prominent role in the administration of royal justice. As the Chancellor's judicial role became better established, individuals alleging some defect or abuse in the common law courts would petition him directly for assistance. Such petitions might allege the dishonesty of local judicial officers or juries, the poverty of the petitioner or, more frequently with the increasing inflexibility of the common law writ system, some unfairness in the substantive or procedural law. Where satisfied of the justice of the petitioner's case, the Chancellor might issue a new common law

writ to direct the courts to provide some redress or , with increasing frequency, would issue an appropriate order directly to the offender to abide by the dictates of conscience.

The Chancellor's "conscience" often inclined in a direction opposite to the result reached by the common law. In fact, one of the earliest uses of the injunction was to restrain unfair proceedings in the common law courts. Of equal importance was the enforcement by the Chancellor of uses or trusts, which the common law refused to recognise. However, the Chancellor was not thought to be administering a separate system of rules, or overriding the common law, but instead was simply "perfecting" the administration of the king's justice. And while the orders of the Chancellor might, at times, run counter to the results reached in the common law courts these orders, directed only to the affected parties and not a matter of record, did not alter the general rules of common law. The explanation eventually adopted to explain the relationship between the common law and equity rested on the Aristotetian notion that equitable justice is a necessary correction of the defects of legal justice resulting from the universality of the latter. General rules will, on occasion, work injustice and it would be against conscience to allow this to occur. As Lord Ellesmere said in *Earl of Oxford's Case* (1615), 1 Rep. Ch. 1 at p 6: 21 E R 485 at p 486:

That men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppressions of what nature so ever they be, and to soften and mollify the extremity of the law.

Nevertheless, the relationship between law and equity did not remain a harmonious one. As J H Baker points out, "[t]he anomaly that a politician should hold the highest judicial office in the land was compounded by the undefined nature of the Chancellor's jurisdiction" (*An Introduction to English Legal History* (London: Butterworths, 2nd ed., 1979) at p 86). Perhaps not surprisingly, common law lawyers began to object to the apparently arbitrary nature of the Chancellor's jurisdiction and the relationship between the common law courts and the chancellor became increasingly uneasy. The mounting antagonism

(which may also have had something to do with the fact that judicial revenues depended upon the volume of litigation) eventually assumed the proportions of a constitutional crisis in 1616 in the form of a clash between the Chancellor, Lord Ellesmere, and the Chief Justice of the King's Bench, Sir Edward Coke. While Coke lost the battle, the stage was set for the formalization of the relationship between law and equity. Equity was said to be superior to common law, in that where the two conflicted equity would prevail, but subsequent Chancellors took greater care to define their jurisdiction and to introduce greater certainty and predictability into equity. The increasing appointment of common lawyers (particularly Lord Nottingham, 1673-1682) to the position of Chancellor further accelerated the trend to delineate the jurisdiction of Chancery by rules and principles and to rely on binding precedent. The familiarity with, and deference to, the common law by the Chancellors further cemented the principle that while equity is superior to common law, it is but corrective and supplementary. The reporting of the Chancellor's decisions also played a role in the transformation of equity from an expression of subjective conscience to a body of rules. By the time of the publication of *Blackstone's Commentaries* (1765 to 1769) equity, no less than common law, was considered to be a part of the positive substantive law of the land and capable of systematic exposition.

The reconciliation of law and equity was achieved at a price. As you will see, the "regularization" of equitable principles has arguably resulted in the same type of inflexibility in this area of law that equity was originally designed to remedy. At the very least, there remains a tension in equity between "conscience" and "rule" and the nature of equitable discretion is an important jurisprudential question (see, for example, R Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978) at pp 14-15).

Perhaps of greater historical importance, the growing number of Chancery petitions, the increasing formalization of equity, and the institutional and procedural limitations of Chancery procedure led eventually to the dismal situation described by Dickens in *Bleak House* (though this book was not published until some time after the darkest hours of Chancery). Under the tutelage of the unfortunate Lord Eldon (1801-1827), the

Chancery had become unworkable. A series of reforms beginning in the early nineteenth century allowed for the appointment of more judges to assist the belaboured Chancellor (until 1813 there had been only two judges in Chancery). Sweeping changes to Chancery procedure in the middle of the century widened the powers of the Chancery and streamlined its procedures. As we shall see, one of the most important of these reforms was *Lord Cairns' Act (Chancery Amendment Act, 1858,* 21 & 22 Vict., c.27*)* which gave the Chancery jurisdiction to award damages. Similarly, common law courts were given the power to take notice of certain equitable principles and to award equitable remedies. The increasing similarity of procedure in common law and equity and the overlapping powers of the two systems of courts paved the way finally for the reforms of the *Judicature Acts* in 1873 and 1875 whereby both systems of courts were abolished and the Supreme Court of Judicature was established having authority to administer both bodies of law.

Thomas v Winchester 6 N.Y. 397 (1852)

Court of Appeals of New York
July, 1852
Ruggles Ch. J, Gardiner J, Gridley J.

[arguments of counsel omitted]

RUGGLES, Ch. J. delivered the opinion of the court.

This is an action brought to recover damages from the defendant for negligently putting up, labeling and selling as and for the extract of dandelion, which is a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison; by means of which the plaintiff Mary Ann Thomas, to whom, being sick, a dose of dandelion was prescribed by a physician, and a portion of the contents of the jar, was administered as and for the extract of dandelion, was greatly injured, &c.

The facts proved were briefly these: Mrs. Thomas being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison county, where the plaintiffs reside.

A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects; such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilation of the pupils of the eyes, and derangement of mind. She recovered however, after some time, from its effects, although for a short time her life was thought to be in great danger. The medicine administered was belladonna, and not dandelion. The jar from which it was taken was labeled "1/2 lb. dandelion, prepared by A. Gilbert, No. 108, John-street, N. Y. Jar 8 oz." It was sold for and believed by Dr. Foord to be the extract of dandelion as labeled. Dr. Foord purchased the article as the extract of dandelion from Jas. S. Aspinwall, a druggist at New-York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John-street, New-York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the ***406** purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself and those containing extracts purchased by him from others, were labeled alike. Both were labeled like the jar in question, as "prepared by A. Gilbert." Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labeled in Gilbert's name because he had been previously engaged in the same business on his own account at No. 108 John-street, and probably because Gilbert's labels rendered the articles more salable. The extract contained in the jar sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell and taste; but may on careful examination be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester and used in his business with his knowledge and assent.

The defendants' counsel moved for a

nonsuit on the following grounds:

1. That the action could not be sustained, as the defendant was the remote vendor of the article in question: and there was no connection, transaction or privity between him and the plaintiffs, or either of them.

2. That this action sought to charge the defendant with the consequences of the negligence of Aspinwall and Foord.

3. That the plaintiffs were liable to, and chargeable with the negligence of Aspinwall and Ford, and therefore could not maintain this action.

4. That according to the testimony Foord was chargeable with negligence, and that the plaintiffs therefore could not sustain this suit against the defendant: if they could sustain a suit at all it would be against Foord only.

5. That this suit being brought for the benefit of the wife ***407** and alleging her as the meritorious cause of action, cannot be sustained.

6. That there was not sufficient evidence of negligence in the defendant to go to the jury.

The judge overruled the motion for a nonsuit, and the defendant's counsel excepted.

The judge among other things charged the jury, that if they should find from the evidence that either Aspinwall or Foord was guilty of negligence in vending as and for dandelion, the extract taken by Mrs. Thomas, or that the plaintiff Thomas, or those who administered it to Mrs. Thomas, were chargeable with negligence in administering it, the plaintiffs were not entitled to recover; but if they were free from negligence, and if the defendant Winchester was guilty of negligence in putting up and vending the extracts in question, the plaintiffs were entitled to recover, provided the extract administered to Mrs. Thomas was the same which was put up by the defendant and sold by him to Aspinwall and by Aspinwall to Foord. That if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injury and suffering of the wife, and not for loss of service, medical treatment or expense to the husband, and that the recovery should be confined to the actual damages suffered by the wife.

The action was properly brought in the name of the husband and wife for the personal injury and suffering of the wife; and the case was left to the jury with the proper directions on that point. (1 Chitty on Pleadings, 62, ed. of 1828.)

The case depends on the first point taken by the defendant on his motion for a nonsuit; and the question is, whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action cannot ***408** be maintained. If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully, arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such

negligence is not an act imminently dangerous to human life.

So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing; the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

This was the ground on which the case of Winterbottom v. Wright, (10 Mees. & Welsb. 109,) was decided. A. contracted with the postmaster general to provide a coach to convey the mail bags along a certain line of road, and B. and others, also contracted to horse the coach along the same line. B. and his co-contractors hired C., who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down; the plaintiff was thrown from his seat and lamed. It was held that C. could not maintain an action against A. for the injury thus sustained. The reason of the decision is best stated by Baron Rolfe. A.'s duty to keep the coach in good condition, was a duty to the postmaster general, with whom he made his contract, and not a duty to the driver employed by the owners of the horses.

But the case in hand stands on a different ground. The defendant***409** was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.

Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labeled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. (2 R. S. 662, § 19.) A chemist who negligently sells laudanum in a phial labeled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter. (Tessymond's case, 1 Lewin's Crown Cases, 169.) “So highly does the law value human life, that it admits of no justification wherever life has been lost and the carelessness or negligence of one person has contributed to the death of another. (Regina v. Swindall, 2 Car. & Kir. 232-3.) And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. (2 Car. & Kir. 368, 371.) Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the

defendant, to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate***410** vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart who leaves them unattended in the street is liable for any damage which may result from his negligence. (Lynch v. Nurdin, 1 Ad. & Ellis, N. S. 29; Illidge v. Goodwin, 5 Car. & Payne, 190.) The owner of a loaded gun who puts it into the hands of a child by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. (5 Maule & Sel. 198.) The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle, if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label.

In Longmeid v. Holliday, (6 Law and Eq. Rep. 562,) the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question***411** for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant; and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion; and to have been “prepared” by his agent Gilbert. The word ‘prepared’ on the label, must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon the faith of the defendant's label, would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion on that point. But it seems to me to be clear that the defendant cannot, in this case, set up as a defense, that Foord sold the contents of the jar as and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion; and that the defendant knew it

to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury the question in relation to the negligence of Foord and Aspinwall, cannot be complained of by the defendant.

GARDINER, J. concurred in affirming the judgment, on the ground that selling the belladonna without a label indicating that it was a poison, was declared a misdemeanor by statute; (2 R. S. 694, § 23;) but expressed no opinion upon the question whether, independent of the statute, the defendant would have been liable to these plaintiffs.

***412 GRIDLEY, J**. was not present when the cause was decided. All the other members of the court concurred in the opinion delivered by Ch. J. RUGGLES.

Judgment affirmed.

6 CASE LAW TECHNIQUE

"Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune led,
May beat a pathway out to wealth and fame."

—Tennyson, *Aylmer's Field.*

RATIO DECIDENDI

English courts are obliged to follow previous decisions of English courts[1] within more or less well-defined limits. This is called the doctrine of precedent.[2] The part of a case that is said to possess binding authority is the *ratio decidendi*, that is to say, the rule of law upon which the decision is founded. Finding the *ratio decidendi* of a case is an important part of the training of a lawyer. It is not a mechanical process but is an art gradually acquired through practice and study. One can, however, give a general description of the techniques involved.

What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. Obviously it does not require that all the facts should be the same. We know that in the flux of life all the facts of a case will never recur; but the legally material facts may recur and it is with these that the doctrine is concerned.

[1] But not the European Court of Human Rights. See below p.113.

[2] Or *stare decisis* (let decided things stand) as it is sometimes called. More detailed studies demonstrate that the picture presented here is, for reasons of space, necessarily somewhat simplistic. See L. Goldstein ed., *Precedent in Law* (1987); R. Cross and J.W. Harris, *Precedent in English Law* (4th edn, 1991); D.N. MacCormick and R.S. Summers, *Interpreting Precedent* (1997). An interesting and readable study is N. Duxbury, *The Nature and Authority of Precedent* (2008).

Although there is nothing like universal agreement on the point,[3] the *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon.[4] The same learned writer who advanced this definition went on to suggest a helpful formula. Suppose that in a certain case facts A, B and C exist; and suppose that the court finds that facts B and C are material and fact A immaterial, and then reaches conclusion X (for example, judgment for the claimant,[5] or judgment for the defendant). Then the doctrine of precedent enables us to say that in any future case in which facts B and C exist, or in which facts A and B and C exist, the conclusion must be X. If in a future case facts A, B, C and D exist, and fact D is held to be material, the first case will not be a direct authority, though it may be of value as an analogy.

What facts are legally material? That depends on the particular case, but take as an illustration a "running down" action, that is to say, an action for injuries sustained through the defendant's negligent driving of a vehicle. The fact that the claimant had red hair and freckles, that her name was Smith, and that the accident happened on a Friday are immaterial, for the rule of law upon which the decision proceeds will apply equally to persons who do not possess these characteristics and to accidents that happen on other days. On the other hand, the fact that the defendant drove negligently, and the fact that in consequence the claimant was injured, are material, and a decision in the claimant's favour on such facts will be an authority for the proposition that a person is liable for causing damage through the negligent driving of a vehicle.

The foregoing is a general explanation of the phrase "the *ratio decidendi* of a case". To get a clearer idea of the way in which a *ratio decidendi* is extracted, let us take a decided case and study it in detail. Set out below is the case of *Wilkinson v Downton*,[6] where the plaintiff was awarded damages by a jury for nervous shock, and the trial judge then

[3] The Court of Appeal has cited with approval a somewhat different formulation from that adopted here, that of Professor Cross in Cross and Harris, *Precedent in English Law* (4th edn, 1991), p.72: "The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him": *R. on the application of Al-Skeini v Secretary of State for Defence* [2005] EWCA Civ 1609; [2007] 1 Q.B. 140 at [145].

[4] A.L. Goodhart, "Determining the Ratio Decidendi of a Case" in *Essays in Jurisprudence and the Common Law* (1931), p.1.

[5] To remind—the "claimant" used to be known as the "plaintiff " and will be referred to as such in this chapter, where necessary for historical authenticity.

[6] [1897] 2 Q.B. 57.

heard argument on the question whether the verdict could be upheld in law. The first part of the judgment, which is all that needs be considered here, runs as follows.

> WRIGHT J.: In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.
>
> In addition to these matters of substance there is a small claim for 1s. 10d. for the cost of railway fares of persons sent by the plaintiff to Leytonstone in obedience to the pretended message. As to this 1s. 10d. expended in railway fares on the faith of the defendant's statement, I think the case is clearly within the decision in *Pasley v Freeman* (1798) 3 T.R. 51. The statement was a misrepresentation intended to be acted on to the damage of the plaintiff.
>
> The real question is as to the £100, the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damages caused by fraud, and therefore within the doctrine established by *Pasley v Freeman* and *Langridge v Levy* (1837) 2 M. & W. 519. I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no *injuria* of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful *injuria* is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.
>
> It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent

person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.

The reader will notice that the judge does not cite any authority for his decision that the £100 is recoverable. The only authorities he cites are authorities on which he says he prefers not to rely. The reason is that at the date when the case was decided there was no English authority on the general question whether it was a tort intentionally to inflict bodily harm on another. There was, indeed, the very ancient tort of battery, which is committed when D hits or stabs or shoots P. But Downton committed no battery upon Mrs Wilkinson; nor did he assault her by threatening a battery. Consequently, the case was one "of first impression", and the judge decided it merely on common-sense principles. It would be a grave reproach to a civilised system of law if it did not give a remedy on such facts.

Let us now see how the *ratio decidendi* is to be extracted. This is done by finding the material facts. The judge has already done much of the work for us, because he has omitted from his judgment many of the facts given in evidence that were obviously irrelevant to the legal issue, for example, the address at which the plaintiff lived. But the judgment mentions the address at which the husband was supposed to be lying, which also is clearly irrelevant. As a first step in boiling it down we may say that the essential facts, and the pith of the judgment, were as follows:

The defendant by way of what was meant to be a joke told the plaintiff that the latter's husband had been smashed up in an accident. The plaintiff, who had previously been of normal health, suffered a shock and serious illness. Wright J. held that the defendant was liable, not perhaps for the tort of deceit but because the defendant had wilfully done an act calculated to cause physical harm to the plaintiff, and had in fact caused such harm.

The above would represent the sort of note that an intelligent student would make of the case. How are we to frame the *ratio decidendi*? There are two main possibilities.

The first would be to take such of the detailed facts as may be deemed to be material, plus the decision on the facts. This would result in the following rule: that where the defendant has wilfully told the plaintiff a lie of a character that is likely (a clearer word than "calculated") to

frighten and so cause physical harm to the plaintiff, and it has in fact caused such harm, the defendant is liable, in the absence of some ground of justification.

This *ratio* omits to specify the particular lie told by the defendant, because this was immaterial. What mattered was not the particular lie as to the plaintiff's husband's alleged injury, but the more general fact of lying. The particular lie told by the defendant was material only in the sense that it was the sort of lie that was likely to frighten and cause physical harm to the plaintiff.

But, it may be objected, such a *ratio* would be too narrow, because the learned judge evidently intended to lay down a wider rule. He did not confine his judgment to lies, but spoke only of wilfully doing an act which is calculated to and does cause physical harm; and this gives us the true *ratio*. It was immaterial that the particular form of mischief perpetrated by the defendant took the form of a verbal lie; it might have been some other act likely to cause harm, and the legal outcome would have been the same. This, indeed, is common sense. A person with Downton's juvenile sense of humour who dresses up as a ghost, or who puts fireworks under somebody else's chair, would doubtless be placed in the same legal category as Downton if injury were to ensue.

Again, the judge did not speak of fright when he formulated the principle of his decision. He spoke of causing physical harm, which is much wider. On this principle, an outrageous *threat* causing suffering is a tort. In a subsequent case[7] which approved *Wilkinson v Downton*, the defendant threatened to arrest and prosecute the plaintiff, a foreign maidservant, if she did not give certain information; the defendant knew that any charge he brought against the young woman would be quite unfounded, and the young woman became ill with distress. It was held that she had a good cause of action. Another application of the principle occurs where the harm operates directly on the plaintiff's body, not indirectly through the mind—as where the defendant blackens a towel which the plaintiff is about to use, or secretly adds poison to the plaintiff's drink. Although these situations have not been the subject of reported decisions, there is no doubt that they would fall under the principle of *Wilkinson v Downton*.

[7] *Janvier v Sweeney* [1919] 2 K.B. 316.

The reader may now be feeling rather puzzled to the meaning of *ratio decidendi*. We started off with a possible narrow *ratio decidendi* of the case, incorporating the fact of lying and the fact of fright. Then we passed to a wider *ratio*, which evidently accords with common sense as well as with the language of the judgment, in which the facts of lying and fright have disappeared. How can this be reconciled with our definition of *ratio decidendi* as the material facts plus the decision thereon? Were not the lie and the fright material facts in *Wilkinson v Downton*? If there had been no lie and no fright, and no equivalent facts in their place, the plaintiff would not have won. What exactly do we mean by a "material fact"?

The answer is that we have not been using this expression in a consistent way, and it is necessary to restate the position in more exact language. What is really involved in finding the *ratio decidendi* of a case is a process of abstraction. Abstraction is the mental operation of picking out certain qualities and relations from the facts of experience. Imagine a baby in whose household there is a terrier called Caesar. The baby will probably learn to refer to the dog as "bow-wow", because "bow-wow" is easier to say than "Caesar". If the child sees another dog he will guess or be told that this other dog is to be called "bow-wow" as well. This is an example of one of the baby's earliest feats of abstraction. Abstraction comes through the perception of similarities between individual facts, and all language and all thinking depend upon it.

The next point to be noticed is that this process of abstraction may be carried to progressively higher flights. The individual dog Caesar is, at a low level of abstraction, a terrier; at a higher level he is a dog; higher still, a mammal and then an animal and a living thing. In the same way a man might say that he was born at the Fullerhope Maternity Hospital; in London; in England; in Europe. All these are "facts", but they are facts belonging to different levels of abstraction.

We are now in a better position to state the *ratio decidendi* of a case. The ascertainment of the *ratio decidendi* of a case depends upon a process of abstraction from the totality of facts that occurred in it. The higher the abstraction, the wider the *ratio decidendi*. Thus a rule that "it is a tort to tell a lie that is likely to and does cause fright and consequent physical harm" is a narrow rule, belonging to a low level of abstraction from the facts of the particular case in which it was laid down; leave out the reference to fright, and it becomes wider; replace "tell a lie" by "do any act with intent to affect the plaintiff in body or mind" and it becomes

wider still. It is the last rule that is the *ratio decidendi* of *Wilkinson v Downton*. We carry on the process of abstraction until all the particular facts have been eliminated except the fact of the doing of an act that is intended to affect the plaintiff adversely and is likely to cause physical harm, and the fact of the occurrence of such harm.

How do we know when to stop with our abstraction? The answer is: primarily by reading what the judge says in the judgment, but partly also by our knowledge of the law in general, and by our common sense and our feeling for what the law ought to be. It so happens that in the case we have been considering the learned judge formulates the rule fairly clearly, but sometimes the rule stated in the judgment incorporates facts which as a matter of common sense are not essential, and sometimes it goes to the opposite extreme of being too sweeping—as can be demonstrated either by the use of common sense or by referring to other decided cases. The finding of the *ratio decidendi* is not an automatic process; it calls for lawyerly skill and knowledge.

Distinguishing

Certain general truths implicit in the foregoing discussion may now be stated more explicitly.

In the first place, a case may have not one but several *rationes decidendi*, of ascending degrees of generality. We have seen two or three possible *rationes* in *Wilkinson v Downton*. The third was accepted not only because it was stated by the judge but also because it accorded with common sense and with other authorities. Sometimes a judge will lay down a rule that is narrower than is required by common sense, and a later court may then say that the rule ought to be read more widely, by abandoning some limitation unnecessarily expressed in it.

Indeed, one such unnecessary limitation can be found in the judgment in *Wilkinson v Downton*. The rule stated by Wright J. refers to a person who has "wilfully" done an act calculated to cause physical harm, and the primary meaning of a "wilful" act is one that is done with the intention of bringing about a particular consequence.[8] Downton did not, perhaps, intend to cause Mrs Wilkinson a serious illness, but he did intend to frighten her, and that was sufficient. But, as a matter of common

[8] "Wilful act", or "doing an act wilfully", is a telescoped expression. In a sense, every act is wilful, or it is not an act but merely a spasm. In legal discussions, the notion of wilfulness

sense, the rule should be extended also to one who is merely *reckless*[9] as to the harm in question (and the word "wilful" is, indeed, capable of extending to recklessness). If Downton had made the lying statement to Mrs Wilkinson in order to persuade her to accompany him for some secret end of his own, realising that the statement would be likely to frighten her but not desiring (and therefore not intending) the fright itself, his liability should be just the same as for a tort of intention. This was the essential position in the case of the foreign servant referred to before: what the defendant intended in that case was to put pressure upon the young woman to make her talk; he must have foreseen the possibility of causing her great distress, but his mind was directed towards making her do what he wanted, not towards distress. In analysis, the case is one of recklessness as to the plaintiff's fright, not one of intention as to the fright; but the legal liability should be, and is, the same.[10]

One may argue that there is another unnecessary limitation contained in the judgment in *Wilkinson v Downton*. The judge referred to the fact that the plaintiff had been in normal health, yet it is not only possible but probable that the decision would have been just the same even if her health had previously been poor—for the fact that the plaintiff is in poor

or intention usually refers to the *consequences* of conduct; it is the consequence that is intended, or wilfully brought about, not the movement of the defendant's body that constitutes the act. Where mere movement is referred to, "intention" connotes knowledge of the circumstances.

[9] In *Secretary of State for the Home Department v Wainwright* [2001] EWCA Civ 2081; [2002] Q.B. 1334, the Court of Appeal indicated that the tort was indeed capable of commission by a "reckless" actor. The court does not elaborate upon what is meant by "recklessness" in this context. The House of Lords [2003] UKHL 53; [2004] 2 A.C. 406 agreed with the Court of Appeal that no damages were recoverable, since the facts of the case did not support a conclusion that the defendants had indeed acted "without caring" whether or not harm was caused.

[10] A word may here be added upon the meaning of the word "calculated", which Wright J. used in his judgment. Judges are fond of this word, but it is an unfortunate expression because it suggests a meaning which it is not intended to convey. Originally, "calculated to" bore its literal meaning of "intended to", but in time it came to mean merely "likely to", and it is in this sense that Wright J. uses it. What the learned judge means is that the defendant intended to give the plaintiff a fright (this was the "wilful act"), and what he did was likely ("calculated") to cause the injury it did, even though the defendant did not intend to cause the full degree of the injury that occurred. The judge's decision would not apply (1) if the defendant merely acted carelessly in passing on information which was not true (for then there would be no "wilful act"), or (2) if, although the defendant intentionally told a lie and intended to cause the plaintiff some slight perturbation, a reasonable man would not have foreseen that the plaintiff would be seriously upset (for then the lie would not be "calculated" to cause physical harm).

health can be no excuse to a defendant who tells her a cruel lie that would be likely to cause her physical harm. The fact that the particular plaintiff had been in good health removed a complication that the judge might otherwise have had to consider, and for that reason the judge referred to it; but all the same a later court may, on mature consideration and when the question arises, decide that the limitation is unnecessary.

Conversely, it sometimes happens that a judge will lay down a rule that is unnecessarily wide for the decision of the case at hand; a later court may say that it is too wide, and needs to be cut down.

This point leads on to the second. The phrase "the *ratio decidendi* of a case" is slightly ambiguous. It may mean either (1) the rule that the judge who decided the case intended to lay down and apply to the facts, or (2) the rule that a later court concedes him to have had the power to lay down. The last sentence is rather clumsy, but what I mean is this. Courts do not accord to their predecessors an unlimited power of laying down wide rules. They are sometimes apt to say, in effect: "Oh yes, we know that in that case the learned judge purported to lay down such and such a rule; but that rule was unnecessarily wide for the decision of the case before him, because, you see, the rule makes no reference to fact A, which existed in the case, and which we regard as a material fact, and as a fact that ought to have been introduced into the *ratio decidendi*".[11] One circumstance that may induce a court to adopt this niggling attitude towards an earlier decision is the necessity of reconciling that decision with others. Or again, the court in the earlier case may have enunciated an unduly wide rule without considering all its possible consequences, some of which are unjust or inconvenient or otherwise objectionable. Yet another possibility is that the earlier decision is altogether unpalatable to the court in the later case, so that the latter court wishes to interpret it as narrowly as possible.

This process of cutting down the expressed *ratio decidendi* of a case is one kind of "distinguishing". It may be called "restrictive" distinguishing, to differentiate it from the other kind, genuine or non-restrictive distinguishing. Non-restrictive distinguishing occurs where a court accepts the expressed *ratio decidendi* of the earlier case, and does not

[11] A common form of statement is to say that the earlier judges "were speaking of, and their language must be understood by reference to, the particular facts which were brought before them in that case": 62 L.J.Ch. 126.

seek to curtail it, but finds that the case before it does not fall within this *ratio decidendi* because of some material difference of fact. Restrictive distinguishing cuts down the expressed *ratio decidendi* of the earlier case by treating as material to the earlier decision some fact, present in the earlier case, which the earlier court regarded as immaterial,[12] or by introducing a qualification (exception) into the rule stated by the earlier court.

Wilkinson v Downton has not been cut down, because the wide principle has commended itself to later judges.[13] If, however, a case ever arises in which Wright J.'s wide rule is thought to carry the law too far, the decision can be restrictively distinguished.

This matter of distinguishing has been stressed because it plays a most important part in legal argument. Suppose that you are conducting a case in court, and that the other side cites a case against you. You then have only two alternatives (that is, if you are not prepared to throw your hand in altogether). One is to submit that the case cited is wrongly decided, and so should not be followed. This is possible only if the case is not binding on the court. The other is to "distinguish" it, by suggesting that it contains or lacks some vital fact that is absent or present in your client's case. Sometimes you may have the sympathy of the judge in your effort to distinguish it, even though the distinction you suggest involves tampering with the expressed *ratio decidendi* of the precedent case and even though you have no authority for the suggested distinction. Your judge

[12] Dr Goodhart in the article cited above, p.96, fn.4, says that (1) it is for the judge who decides the case, and for him alone, to determine what facts are material, and the judge may express his decision that facts are immaterial merely by leaving them out of the rule of law that he propounds. But on the other hand (2) the *ratio decidendi* of a case is not necessarily the rule of law stated by the judge, because that may be too wide. It seems to me that these two statements are contradictory, and the truth I take to be that the second is right and the first wrong. The rule stated by the judge may be "too wide" in the view of the later court, and that means that the judge does not have an unlimited discretion to jettison fact as being immaterial. For Dr Goodhart's reply to a controversy on this question, see (1959) 22 M.L.R. 117.

[13] In *Khorasandjian v Bush* [1993] Q.B. 723, CA, an injunction was granted in reliance upon *Janvier v Sweeney* to prevent a person from making persistent harassing telephone calls, on the basis that it was feared that this might cause psychiatric injury. But in *Hunter v Canary Wharf* [1997] A.C. 655 the correctness of the decision was doubted by several members of the House of Lords, and the conduct complained of in that case is now the subject of legislation in the Protection from Harassment Act 1997. In *Wong v Parkside Health NHS Trust* [2001] ECWA Civ 1721, [2003] 3 All E.R. 932, the Court of Appeal confirmed that there was "nothing in *Hunter* that cast doubt upon . . . the principle in *Wilkinson v Downton*".

may be gravely dissatisfied with the case and yet, owing to our excessively strict doctrine of precedent, it may be impossible to overrule it. In such circumstances it is simply human nature to distinguish it if possible. The judge may, in extreme and unusual circumstances, be apt to seize on almost any factual difference between this previous case and the case at hand in order to arrive at a different decision.[14] Some precedents are continually left on the shelf in this way; as a wag observed, they become very "distinguished". The limit of the process is reached when a judge says that the precedent is an authority only "on its actual facts". For most practical purposes this is equivalent to announcing that it will never be followed. It is not suggested that this extreme form of distinguishing is a common occurrence, for generally judges defer to the decisions of their predecessors both in the letter and in the spirit, even though they dislike them. But restrictive distinguishing does happen, and the possibility of its happening makes it of great importance to the lawyer.

OBITER DICTUM

In contrast with the *ratio decidendi* is the *obiter dictum*. The latter is a mere saying "by the way", a chance remark, which is not binding upon future courts, though it may be respected according to the reputation of the judge, the eminence of the court, and the circumstances in which it came to be pronounced. An example would be a rule of law stated merely by way of analogy or illustration, or a suggested rule upon which the decision is not finally rested.[15] The reason for not regarding an *obiter*

[14] Perhaps Pollock C.B. had restrictive distinguishing in mind when, in a letter to his grandson, "F.P.", in 1868, he made the following remark: "Even Parke, Lord Wensleydale (the greatest legal pedant that I believe ever existed) did not always follow even the House of Lords; he did not overrule—oh no! but he did not *act upon* cases which were nonsense (as many are)". Hanworth's *Lord Chief Baron Pollock* (1929), p.198.

[15] An example of this latter is to be found in the decision of the House of Lords in *R. v Howe* [1987] A.C. 417, in which the House of Lords contemplated altering the law of duress in murder to the effect that it might be treated as reducing murder to manslaughter when successfully pleaded by the person acting under duress. One possible disadvantage of that course was the decision of the Court of Appeal (Criminal Division) in *R. v Richards* [1974] Q.B. 776 holding that a secondary party to a criminal offence could not be made liable for an offence greater than that committed by the principal. The House cast doubt on *Richards* in such a way as effectively to overrule it, even though the eventual decision was that duress could never be a defence to a charge of murder. On any view of precedent, therefore, the observations could not be said to be any more than *obiter*. But in *R. (Pretty) v DPP* [2001] UKHL 61; [2002] 1 A.C. 800, at [111] it was said that *Richards* had indeed been overruled.

dictum as binding is that it was probably made without a full consideration of the cases on the point, and that, if very broad in its terms, it was probably made without a full consideration of all the consequences that may follow from it; alternatively the judge may not have expressed a concluded opinion.

An example of an *obiter dictum* occurs in *Wilkinson v Downton* when the learned judge is considering the argument that the plaintiff is entitled to recover damages for the tort of deceit. At first sight this may seem a good argument, because the defendant could certainly be said in a popular sense to have deceived the plaintiff. But it is generally taken to be essential for the tort of deceit that the defendant should have intended the plaintiff to have acted on the statement, and that the plaintiff should have so acted to his detriment, for which detriment he now claims damages. Mrs Wilkinson recovered 1 shilling and 10 pence halfpenny as damages for deceit, because this was a sum of money that she had spent in reliance on the defendant's deceitful statement. But the fact that she became ill was not an act of reliance upon the statement. It was a spontaneous reaction to the statement. Consequently, the learned judge preferred not to rest his judgment upon this ground. He did not positively pronounce against it, but his words seem to indicate that he thought that as the law then stood, the claim could not properly be based on the tort of deceit. One may say, therefore, that there is a very tentative *dictum* against the plaintiff on this particular issue. But the point was not finally decided, and in any case was not made the ground of the decision, and so the observations made upon it were *obiter*.

There is another kind of *obiter dictum*, which perhaps is not, properly speaking, an *obiter dictum* at all, namely a *ratio decidendi* that in the view of a subsequent court is unnecessarily wide. It is not an *obiter dictum* in the primary meaning of that phrase, because it is constructed out of the facts of the case and the decision is rested upon it. But, as we have seen, later courts reserve the right to narrow it down, and in doing so they frequently attempt to justify themselves by declaring that the unnecessarily wide statement was *obiter*. The real justification for the practice of regarding what is really *ratio decidendi* as *obiter dictum*, that is to say for restrictive distinguishing, is the undesirability of hampering the growth of English law through the too extensive application of the doctrine of precedent. A court may restrictively distinguish its own decisions, or those of a court on the same level, but it will not generally

dare to do this with the decisions of courts superior to it in the hierarchy, particularly the House of Lords or the Supreme Court.

It is frequently said that a ruling based upon hypothetical facts is *obiter*. This is often true. Thus if the judge says: "I decide for the defendant; but if the facts had been properly pleaded I should have found for the claimant", the latter part of the statement is *obiter*. But there is at least one exception. In the past, when the defendant pleaded an "objection in point of law" (a "demurrer"), legal argument might take place on this before the trial, and for the purpose of the argument and the decision it was assumed that all the facts stated in the plaintiff's pleadings were true. A decision pronounced on such assumed facts is not an *obiter dictum*.

If a decision would otherwise be a binding authority, it does not lose that status merely because the point was not argued by counsel (this will be important only as a way of attacking a decision that is of merely persuasive authority). But what is called a decision *sub silentio* is not binding: a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that court.[16] This is so, at least, where the case is obvious, and where the precedent case is that of the same court. The Supreme Court would probably regard its own decision *sub silentio* as binding on the Court of Appeal.

HOW MUCH OF A CASE TO REMEMBER

A question that frequently vexes the beginner is: how many of the facts of a case should be remembered, for the purpose of learning the law and for the purpose of making a good showing in the exam? Ought the student to try to remember (1) all the facts stated in the report, or (2) a selection of those facts, or (3) only those facts that are incorporated in the statement of the *ratio decidendi*? Take again as an illustration the case of *Wilkinson v Downton*. The three possibilities just referred to are exemplified by (1) the passage from the judgment on pp.97–98, above, (2) the

[16] *R. v Brent Housing Board* [2001] Q.B. 955, applying *Barrs v Bethel* [1982] Ch. 294 and *Re Hetherington (dec'd)* [1990] Ch. 1.

first attempt at condensation on pp.98–99, and (3) the statement of the *ratio decidendi* on pp.100–101.

The answer to the question is that both (2) and (3) should be remembered. (1) is obviously ruled out; it would be a waste of effort to remember every minor circumstance that may be stated in the report, such as the fact that Mr Wilkinson was alleged to be lying at The Elms at Leytonstone. On the other hand, (3) is as obviously included, for it is the pith and marrow of the law. About the necessity for remembering (2) the reader may be inclined to be argumentative. It could be contended that the student is learning to be a lawyer, not a chronicler of tragedies, and that if the rules of law are remembered, there is no need to burden the memory with the facts of cases that as a matter of history gave rise to those rules.

There are two answers to this objection, the first of interest to exam candidates only, and the second of wider interest.

The first answer is that examiners are suspicious creatures, and in particular they are suspicious of "footnote" knowledge. Suppose that in the exam your only reference to *Wilkinson v Downton* is as follows: "A person is liable in tort if he causes physical injury by an act intended to affect the plaintiff adversely and likely to cause injury: *Wilkinson v Downton*". The rule is correct and the name of the case is correct; and you may in fact have satisfied yourself that the rule is deducible from the case; but the examiner will not know it. For all the examiner knows, you saw the rule in your textbook and the name of the case in a footnote. To dispel that suspicion, you must give some statement of the concrete facts.

The second answer is more important, but we need spend no further time over it because enough has really been said on it already. It is a mistake to suppose that every case has one and only one fixed and incontrovertible *ratio decidendi*. What exactly is the *ratio decidendi* of a case is often a matter for much argument. Also, the pick-lock art of distinguishing depends upon a critical examination of all the facts of the case that might by any possibility be regarded as material. If, therefore, there is any sort of doubt about the correctness of a decision, or about its limits, as many of the facts as can conceivably be looked upon as material should be remembered.

There are some cases, however, where nothing more than the simple *ratio decidendi* need be remembered, because apart from the facts stated in the *ratio decidendi* the case contains no facts except the trivialities of date, amount, etc. An illustration is *Byrne v Van Tienhoven*.[17] The facts of this case were as follows:

> October 1—The defendants in Cardiff by letter offered to sell to the plaintiffs 1,000 boxes of Hensol Tinplates.
> October 11—The plaintiffs received this letter. The plaintiffs wired to defendants "Accept thousand Hensols". But,
> October 8—The defendants posted a letter revoking their offer, ending "and we must consider our offer to be cancelled from this date".
> October 20—The plaintiffs received second letter.

It was held that there was a good contract and that the defendants' revocation of their offer was ineffective.

The reason why the above facts are set out in a case book is to show the student how the legal question as to revocation of offers is likely to arise in practice. By digesting the facts and seeing how the problem arises out of them, the student is preparing to answer exam problems and to deal with cases in legal practice. But this does not mean that the student is expected to memorise any of the particular facts of *Byrne v van Tienhoven*. All the facts of this case are immaterial except the fact that the offerors attempted to revoke their offer by a letter that did not arrive until after the offerees had accepted; and the *ratio decidendi* is that such a revocation is ineffective. If this is grasped, all the rest of the facts can be forgotten.

DIVERGENT OPINIONS

The establishment of the *ratio decidendi* is more complicated when different members of a composite court express different opinions. The problem is particularly acute for the decisions of the House of Lords and the Supreme Court, where the members not uncommonly express separate opinions, which may show great diversity. As a result, their Lordships not infrequently make the law more uncertain than it was before the appeal. Conscious of this difficulty the Court of Appeal (particularly the Criminal Division) tends to deliver one judgment as being the judgment of the court.

[17] (1880) 5 C.P.D. 344.

Where the opinions of different judges differ so greatly that there is no majority for any single view, all that can be done, to ascertain the *ratio decidendi*, is to add up the facts regarded as material by any group of judges whose votes constitute a majority, and to base the *ratio* on those facts. The result is to confine the *ratio* to its narrowest form. For example, if Justices L and M hold that the material facts are A and B while Justices N and O hold that they are A, B and C, and Justice P dissents, the *ratio decidendi* must require the presence of A, B and C. It seems, however, that the confusion of opinion may be such that there cannot be said to be a *ratio decidendi*. This is so where, of the three majority Justices, Justice L holds that the material facts are A and B, Justice M holds that they are A and C, and Justice N holds that they are A and D, while Justices O and P dissent. It would be wholly artificial to say that *the ratio* requires the presence of A, B, C and D, since this is not the view of any one of the Justices.[18]

Further complications can arise. The minority Justices, O and P, may agree with Justice L in thinking that if the facts were A and B the conclusion would be X, but they may hold that there is insufficient evidence that fact B existed, and for this reason conclude that the answer in this case is not X. So on the abstract point of law there is a majority of the Court (L, O and P) in favour of L's view. Yet, strictly speaking, the expressions of opinion by O and P are *obiter*. All that can be said is that the joint opinion of L, O and P will carry great weight with lower courts, even though it is not binding.

THE HIERARCHY OF AUTHORITY

More important than the name of the case is the rank of the court in which it was decided. To mention the court that decided a case is a mark of awareness of the doctrine of precedent, with its hierarchy of authority. The rule is that every court binds lower courts[19] and that some courts bind

[18] See Sir Rupert Cross in "The *Ratio Decidendi* and a Plurality of Speeches in the House of Lords" (1977) 93 L.Q. R. 378. He took the view that the opinion of a majority of the majority can be controlling, even though it is a minority of the whole House (see p.381); *sed quaere*.

[19] *Broome v Cassell & Co Ltd* [1972] A.C. 1027. But it seems that, exceptionally, the decision of the Crown Court in the exercise of its appellate jurisdiction will not be a binding precedent for magistrates' courts in other cases: see (1976) 140 J.P.N. 242. It has been argued by A.J. Ashworth [1980] Crim. L.R. 402 that the absence of any systematic reporting system for Crown Court decisions means that the ordinary rules of precedent are inapplicable to decisions of that court. Although it is not absolutely clear whether a ruling on a point of law made by a judge sitting in the Crown Court with a jury is binding on magistrates' courts (for example), the better view would therefore seem to be that it is of persuasive force only.

even themselves. Whether a court is "lower" depends not only on whether an appeal lies from it to the other court but, additionally, on whether the latter court is inherently higher in rank. Thus a Divisional Court of the High Court exercising its appellate jurisdiction from magistrates regards itself as bound by decisions of the Court of Appeal even though the further appeal in these cases goes not to the Court of Appeal but direct to the Supreme Court.[20] When the appellate court reverses or overrules a case in the court below, the case so reversed or overruled loses all authority on the particular point of law upon which it is reversed. *Reversal* is when the same case is decided the other way on appeal; *overruling* is when a case in a lower court is considered in a different case taken on appeal, and held to be wrongly decided.

Precedent in the House of Lords and Supreme Court

In 1966 the House of Lords declared (departing from its previous practice) that it would not be bound by its own decisions where too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.[21] Their Lordships are still disinclined to exercise their freedom to treat earlier authorities as being no more than persuasive, taking the view that the mere fact that a later panel believes an earlier decision to have been "wrong" is not an adequate reason to depart from that earlier decision. In *R. v Kansal (No.2)*,[22] for example, the House declined by a majority of four to one to depart from a case decided some six months previously, even though they thought, by a three to two majority, that the previous decision was wrong ("plainly erroneous" as Lord Lloyd put it).

[20] See Sir Rupert Cross, *Precedent in English Law* (4th edn, 1991), p.121.

[21] *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234. On the day after the declaration, Osbert Lancaster's cartoon in the *Daily Express* portrayed one Law Lord saying to another: "I say, Uptort, I can't get used to the fact that we can ever have been wrong".

[22] [2001] UKHL 62; [2002] 2 A.C. 69.

It is probably true to say that the grounds upon which the House of Lords (and now the Supreme Court)[23] will act are constantly under revision; the *Practice Statement* itself recognised "the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty in the criminal law". In *Kansal*, reference was made to the jurisprudence of the United States Supreme Court on the subject of departing from its own previous decisions. There it has been said that if the courts were to eye each issue afresh in every case, there was a danger that the judiciary will be seen as little different from the executive and the legislature, and this would be ultimately damaging to the rule of law. This possibility is even more acute in the House of Lords and Supreme Court, since appeal panels in the Supreme Court usually consist of a membership of five, whereas in the United States all members of the court sit in all cases. It would not be at all unlikely, therefore, that differences of view could arise from one case to the next merely because of a change in the composition of the court. Lord Hope in the minority in *Kansal* considered that not only was the previous decision wrong, but he took the view that the sooner error was expunged from the system the better.

The House does not need to refer to or rely upon the *Practice Statement* to depart from its previous decisions. A situation where the power might have been employed, but was not apparently considered by any of their Lordships, was in *Arthur J.S. Hall v Simons*,[24] where the House (consisting of a panel of seven) declined to follow *Rondel v Worsley*,[25] and held that advocates are no longer immune from suit for the negligent conduct of legal proceedings. This was done without reference to the *Practice Statement*, and the decision can be explained on the basis that the earlier decision was not wrong, but that the circumstances had changed since that decision to such an extent that it was no longer appropriate to follow it.

[23] In *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, [2011] 1 A.C. 355, the Supreme Court noted that it had "not thought it necessary to re-issue the Practice Statement as a fresh statement of practice in the Court's own name. This is because it has as much effect in that Court as it did before the Appellate Committee in the House of Lords" at [24], *per* Lord Hope.

[24] [2002] 1 A.C. 615.

[25] [1969] 1 A.C. 191.

A rare example of the use of the power is to be found in *Murphy v Brentwood DC*,[26] where the House (of seven members) overruled the decision in *Anns v Merton*.[27] The latter decision was much criticised both by commentators and by members of the House itself in a series of decisions which did not, however, find it necessary to overrule the decision. In *R. v National Insurance Commissioner, Ex p. Hudson*[28] their Lordships announced that they would not normally reconsider their own decisions on the construction of a statute. But in *Shivpuri*,[29] the House did precisely that, overruling its own decision in *Anderton v Ryan*[30] on the basis that the Law Commission Report preceding the Criminal Attempts Act 1981 had not been considered on the previous occasion. Similarly in the most celebrated recent use of the power in criminal cases is to be found in *G and R*,[31] in which the House overruled the decision in *Caldwell*[32] saying that the interpretation of the Criminal Damage Act 1971 there adopted had been shown to be a "misinterpretation". Their Lordships have proved to be less inhibited when sitting as the Privy Council, which is also not bound by its own previous decisions.[33]

Although the English courts will normally follow Strasbourg jurisprudence, the statutory obligation under the Human Rights Act 1998, s.2 is merely to take this "into account". The area is one of some political controversy, since the Human Rights Act is frequently criticised in the press as being the product of a European system that fails to appreciate the nuances of United Kingdom law. The Supreme Court has held that if a court is satisfied that the Strasbourg Court has misunderstood English law or procedure, it can prefer the national authorities, and must prefer a decision of the Supreme Court itself to a decision of the European Court.[34] Matters came to something of a head in *Al-Khawaja and Tahery v United Kingdom*,[35] where the Supreme Court had interpreted the relevant legislation in a manner that apparently conflicted with the Strasbourg

[26] [1991] 1 A.C. 398.

[27] [1978] A.C. 398.

[28] [1972] A.C. 944.

[29] [1987] A.C. 1.

[30] [1985] A.C. 560.

[31] [2003] UKHL 50; [2004] 1 A.C. 1034.

[32] [1982] A.C. 341.

[33] See *Lewis v Att.-Gen. of Jamaica* [2001] 2 A.C. 50.

[34] See *R v Horncastle* [2010] UKSC 14, [2010] A.C. 373.

[35] 26766/05, (2012) 54 E.H.R.R. 107.

jurisprudence. The Grand Chamber of the European Court of Human Rights held that in one of the two cases before it, there had been a violation of the defendant's rights, but it modified its position as to the scope of the applicable law as a result of the views expressed by the Supreme Court in *Hornccastle*,[36] making the point that its jurisdiction was a supervisory one, the application of national laws being a matter for the local jurisdiction.[37]

Court of Appeal

The Court of Appeal generally binds itself, both on the civil and on the criminal sides. There has been a steady stream of criticism by writers of this "autolimitation" of the court, at any rate in civil cases, for when a decision of the Court of Appeal is plainly wrong, it seems absurd that the parties should be put to the expense of a further appeal to a superior court in order to get it set aside.[38] When an appellant perceives that there is no chance of success in the Court of Appeal because a precedent stands in the way, it will save money if leave can be obtained to use the "leapfrogging" procedure referred to earlier, and go direct to the Supreme Court.

In certain exceptional cases it is recognised that the Court of Appeal can refuse to follow one of its own previous decisions.[39] Although the precise scope of the exceptions is not fully agreed, it is generally thought that they are mainly as follows.

(1) Where, by inadvertence or otherwise, the court arrives at inconsistent decisions, a later court must necessarily choose between them. It is not bound to follow either the earlier or the later.

[36] The position has been summarised in *R v Riat* [2012] EWCA Crim 1509, [2013] 1 Cr. App R. 2 which lays the particular issues to rest for the time being. But it may be expected that there will be disagreements between the two jurisdictions in the future as to the appropriate application of the relevant law.

[37] See generally M. Amos, "The Dialogue between United Kingdom courts and the European Court of Human Rights" (2012) I.C.L.Q. 557.

[38] The arguments for the autolimitation rule are ably demolished by C. Rickett, "Precedent in the Court of Appeal" (1980) 43 M.L.R. 136.

[39] *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718. Applied most recently in *Patel v Secretary of State for the Home Department* [2012] EWCA Civ 741.

(2) The court is bound to refuse to follow its earlier decision that has been overruled by the House of Lords or Supreme Court, or that cannot stand with a later decision of the House or Court (i.e. has been impliedly overruled).

(3) It need not follow its own decision given *per incuriam* (by oversight), as where a relevant statute was not considered, or was misconstrued because the court overlooked part of its provisions or arrived at a conclusion plainly contrary to the intention of the statute as a whole. In other words it must be clear that the earlier decision was mistaken and wrong—it is not enough merely that the later court would have decided the matter differently.[40] Presumably another example would be where a relevant decision of the Supreme Court or House of Lords was not considered.[41]

(4) It is also arguable that a special rule applies to the Criminal Division of the Court of Appeal. The court (in practice sitting as a "full court" of five judges instead of the usual three) can refuse to follow and in effect overrule its own prior decision rendered against the defendant in the precedent case (or the similar decision of the older courts that this court has superseded).[42] In practice, however, it almost never does so. The court is supposed to be bound by its own decisions rendered in favour of the defendant on a point of substantive law.

Involvement with the European jurisprudence has added a fifth, which is that

(5) Where the Court of Appeal considers that one of its own decisions is inconsistent with a subsequent decision of the European

[40] See Lord Donaldson M.R. in *Duke v Reliance Systems Ltd* [1988] 1 Q.B. 108 at 113.

[41] *Dixon v BBC* [1979] Q.B. 546. See generally on *per incuriam*, P. Wesley-Smith, "The Per Incuriam Doctrine" (1980) 15 J.S.P.T.L 58.

[42] *R. v Gould* [1968] 2 Q.B. 65. See G. Zellick, "Precedent in the Court of Appeal Criminal Division" [1974] Crim.L.R. 222, and R. Pattenden, "The Power of the Criminal Division of the Court of Appeal to Depart from Its Own Precedents" [1984] Crim. L.R. 592. In *R. v Spencer* [1985] Q.B. 771, the Criminal Division took the view that there was no difference between itself and the Civil Division, except that when the liberty of the subject was involved, it might decline to follow one of its own decisions.

Court of Human Rights, it is free (but not obliged) to depart from that decision.[43]

In addition to these four main exceptions, the court has shown a disposition to add to them whenever it feels a strong need to throw off the authority of its own precedent. So the court has held that it need not follow its own decision when it was inconsistent with a later pronouncement of the Privy Council,[44] or when it was the decision of a court of two relating to an interlocutory matter (a point of procedure arising before trial).[45] These pronouncements were not the result of any logical compulsion; they were merely ways of getting rid of particular precedents that now irked the court.

For several years Lord Denning M.R. (who was Master of the Rolls from 1962 until 1982) spoke in the Court of Appeal (Civil Division) in favour of a general freedom from the court's own past decisions when they subsequently appeared to be clearly wrong. These expressions of opinion culminated in *Davis v Johnson*,[46] where the court had to consider two of its own previous decisions restrictively interpreting a recent statute passed for the purpose of protecting a woman who was attacked by the man with whom she was living, whether or not she was married to him. The restrictive interpretations had been severely criticised in the press, and the Court of Appeal, sitting as a court of five, was evidently anxious to disembarrass itself of them. A bare majority of the court decided that it was free to do so. Lord Denning gave his accustomed reason that the court was not bound by its own decisions. Sir George Baker, President of the Family Division, concurred in the result but assigned a narrower reason:

[43] *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] UKHL 63; [2009] 1 A.C. 311.

[44] Sir Rupert Cross, *Precedent in English Law* (4th edn, 1991), p.102, fn.2. Indeed in *James* [2006] EWCA Crim 14, [2006] Q.B. 558 the five judges of the Court of Appeal declined to follow a decision of the House of Lords in *Smith (Morgan)* [2001] 1 A.C. 146 in favour of a decision of the Privy Council in *Att.-Gen. for Jersey v Holley* [2005] UKPC 23; [2005] 2 A.C. 580, on the grounds that in that case nine current members of the House of Lords had agreed that their decision in the Privy Council case clarified definitively the state of English law on the particular issue in question.

[45] *Boys v Chaplin* [1968] 2 Q.B. 1.

[46] [1979] A.C. 264.

"The court is not bound to follow a previous decision of its own if satisfied that that decision was clearly wrong and cannot stand in the face of the will and intention of Parliament expressed in simple language in a recent statute passed to remedy a serious mischief or abuse, and further adherence to the previous decision must lead to injustice in the particular case and unduly restrict the proper development of the law with injustice to others."

Judges who make up exceptions in this way are in effect throwing off the compulsive force of precedent, and it would be more convenient to say so. In form, however, the decision of the Court of Appeal merely adds one more exception to the general rule, though there was no agreement on its wording. On further appeal, all the Law Lords expressed the decided opinion that the Court of Appeal was (exceptions apart) bound by its own decisions. The practical effect of denying the Court of Appeal the power to correct its own errors is to force a further appeal to the Supreme Court, with its attendant delay and expense.

When it appears that counsel may wish to ask the Court of Appeal not to follow its own previous decision on one of these grounds, the court may be arranged to sit with five or more members (the so-called "full court") instead of the usual three,[47] though it must be said that this practice is extremely rare.

The exceptional rules freeing the Court of Appeal from the authority of its own previous decisions do not operate to free it from the authority of the House of Lords or the Supreme Court. Their Lordships (members of the Supreme Court) are likely to take it amiss if the Court of Appeal announces that a decision of the higher court was *per incuriam*. On one occasion when the Court of Appeal did this and a further appeal was taken to the House of Lords, their Lordships expressed strong disapproval. They regarded the action of the lower court, in the words of Lord Denning (speaking subsequently in the Court of Appeal), "as a piece of *lèse-majesté*. The House of Lords never does anything *per*

[47] But this is not essential. For example, *R. v Gould* [1968] 2 Q.B. 65 was decided by a court of three, which declined to follow an earlier decision of the Court of Criminal Appeal rendered against the defendant. In *Simpson* [2003] EWCA Crim 1499; [2004] Q.B. 118, the Court of Appeal said that the constitution of the court was relevant to the exercise of the discretion of the court not to follow an earlier decision.

incuriam."[48] For a time thereafter, the position was that if the House decided a case in ignorance of a previous decision of its own going the other way, the Court of Appeal would nevertheless regard itself as bound to follow the later of the two decisions.[49] So the law will remain uncertain until a litigant who has ample private means or who can call on the legal aid fund takes the point to the Supreme Court for reconsideration.

Attitudes may have softened subsequently; in *I.M. Properties v Cape & Dalgleish*,[50] the Court of Appeal refused to follow the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*[51] on the grounds that an earlier and contradictory decision of the House[52] had not been considered and was therefore on the central point *per incuriam*. On this occasion, not only did the House not take exception—it refused leave to appeal. Some years after this, it explicitly decided not to follow the earlier decision.[53] It appears, therefore, that when there are conflicting decisions of the House of Lords or the Supreme Court, and the later judgment has been delivered without any reference to the former, the Court of Appeal is at liberty to say that it prefers the earlier reasoning.

Divisional Court

Turning to the Divisional Court; its decisions are binding precedents for magistrates' courts in other cases. The Divisional Court used formerly to be regarded as binding itself.[54] In *R. v Greater Manchester Coroner, Ex p. Tal*,[55] however, it was decided that (as is the case with the High Court) it was not bound, but would follow the decision of another judge unless convinced that this was wrong, except that it will presumably exercise the same freedom in criminal cases as the Court of Appeal. Presumably the Divisional Court binds judges and recorders when the latter hear appeals from magistrates' courts, because the Divisional Court is superior in the

[48] *Fellowes & Son v Fisher* [1976] Q.B. 132 E.

[49] *Fellowes & Son v Fisher* [1976] Q.B. 132 E; *Miliangos v Frank (Textiles) Ltd* [1976] A.C. 443 at 476–479. See also *Moodie v Inland Revenue Commissioners* [1993] 1 W.L.R. 266.

[50] [1999] Q.B. 297.

[51] [1996] A.C. 669.

[52] *President of India v La Pintada Compania Navigacion SA* [1985] A.C. 104.

[53] *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 A.C. 561.

[54] *Huddersfield Police Authority v Watson* [1947] K.B. 842.

[55] [1985] Q.B. 67.

hierarchy—as was said before, a further appeal can be brought from the Crown Court to the Divisional Court.

However, the Divisional Court does not bind Crown Court judges who try cases with juries.[56] The Crown Court is a branch of the Senior Court having equal status with the High Court,[57] and therefore with a Divisional Court of the High Court. It makes no difference that only one judge sits in the Crown Court while two or more sit in the Divisional Court.[58]

Single judges of the High Court trying civil cases bind inferior courts (county courts, and magistrates' courts in their civil jurisdiction), but they do not absolutely bind other High Court judges.[59] One such judge may refuse to follow another judge, and the result will be a conflict of authority that will one day have to be settled by the Court of Appeal. In other words, a High Court judge cannot overrule a judicial colleague, but can only "disapprove" the decision and "not follow" it. Refusal to follow is, however, rare.

Decisions of courts inferior to the High Court do not bind anybody, not even themselves. In legal theory decisions of the Judicial Committee of the Privy Council do not bind English courts, nor even the Judicial Committee itself. But they have great "persuasive" authority.[60]

My suggestion is that the student should try to remember when a case belongs to the Supreme Court, the House of Lords, the Court of Appeal (or in very rare cases its predecessors the Court of Exchequer Chamber, the Court of Appeal in Chancery, the Court for Crown Cases Reserved, and the Court of Criminal Appeal), or the Privy Council. Since the student cannot be expected to remember everything, it is usually permissible to forget the exact court that decided cases of authority inferior to these. Nothing is gained by trying to distinguish between the three common law courts (King's Bench, Common Pleas, Exchequer) before

[56] *R. v Colyer* [1974] Crim.L.R. 243.

[57] Supreme Court Act 1981, s.1. Until 2009, the higher courts were known collectively as members of the Supreme Court, but with the creation of a new Supreme Court, a change of nomenclature was required, and the expression "senior court" was chosen in the Constitutional Reform Act 2005.

[58] For other problems relating to the Crown Court, see A.J. Ashworth [1980] Crim. L.R. 402.

[59] Including Deputy High Court judges: *Howard de Walden Estates v Aggio* [2008] Ch 26.

[60] The Privy Council is not itself bound by English cases, and it has made it clear that the jurisdictions from which it hears appeals are free to develop the common law along different lines from English law; see *Invercargill City Council v Hamlin* [1996] A.C. 624.

1875, or the various branches of the High Court today. Also, it should be noted that a particular decision was simply that of a judge given by way of direction to a jury. Such decisions are of inferior authority, largely because in a jury trial questions of law are unlikely to have been fully debated. It is very rare to report these directions to a jury, though, as Pollock says, "many of the older ones have become good authority by subsequent approval, and some of them are the only definite reported authority for points of law now received as not only settled but elementary".[61] It may be added that directions to a jury have been more important in criminal than in civil law, because there used to be no appeal from a jury verdict of not guilty, and thus if on a particular point of law judges were in the habit of directing the jury in the defendant's favour the appeal court may have had no opportunity to pronounce upon it. Since 1972 the Attorney-General may refer an acquittal for the opinion of the appellate courts to clarify the law which is regarded as unsatisfactory, but this does not affect the particular defendant.[62]

A word may be said about international law. In studying this subject the student will be expected to know the more important decisions of international and municipal (i.e. national) tribunals. Always distinguish between the two, for the pronouncement of an international court is generally more authoritative for other international tribunals on a matter of international law than that of a merely national body. (But the decision of a municipal court may be more authoritative for other courts of the same state).

CIRCUMSTANCES AFFECTING THE WEIGHT OF A DECISION

The good lawyer will often make a mental note of some circumstances that go to increase or diminish the authority of a case.

Among the circumstances adding to its authority are: the eminence of the particular judge or judges who decided it; the large number of judges who took part in it; and the fact that the judgment was a "reserved" one, i.e. not delivered on the spur of the moment. (This last is indicated in the report, at the end of the arguments of counsel, by the letters C.A.V., or

[61] *First Book of Jurisprudence* (6th edn, 1929), p.348. The old *nisi prius* cases are reprinted in Vols 170–176 of the *English Reports*.

[62] Criminal Justice Act 1972, s.36.

words *Curia advisari vult*.—the court wishes to be advised.) Naturally, a case is reinforced if it has been frequently followed, or has created expectations in commercial or proprietary matters. Some say that any decision of long standing is unlikely to be disturbed[63]; on the other hand, it may be hard to persuade a court to depart from its own precedent established only a few years before, for that would look like vacillation.[64] So this can be "Catch 22" for a party seeking to challenge a decision.

Among the circumstances detracting from the authority of a case are: the presence of strong dissenting judgments; the fact that the majority do not agree in their reasoning but only in the result; the failure of counsel to cite an inconsistent case in argument; the disapproval of the profession including academic writings; and the fact that the case was taken on appeal and that the appeal went off on another point.

These circumstances have no importance if the case is absolutely binding on the court before which it is cited and if it is incapable of being distinguished. But they are of great importance if the case is not absolutely binding, or if on the facts of the later case it is capable of being distinguished or extended at the pleasure of the court.

JUDICIAL LAW-MAKING

Rules of precedent instruct judges that they are or are not bound to decide the case before them in a particular way. The rules do not tell the judge what principles to act upon when the situation is unconstrained by authority, for example when faced by a precedent in a lower court which is not binding. The judge then has to choose between notions of justice, convenience, public policy, morality, analogy, and so on, perhaps taking into account the opinions of other judges (in American, Canadian, Australian and Scottish cases, for instance) or of writers. The various considerations may not point in the same direction, but conflict with each other.

Judges do not generally dwell upon the fact that they make law; but they no longer hide behind the "fairy tale" (as Lord Reid once termed it) that the common law is a miraculous something existing from eternity

[63] *per* Lord Simon in *Farrell v Alexander* [1977] A.C. 59 at 90G.

[64] cf. *DPP v Nock* [1978] A.C. 979 at 997E. This was the problem for the appellant in *Kansal*, discussed at p.111 above.

and not made by anyone. They would much prefer to put it in terms of the so-called "declaratory theory" which recognises that it may be necessary for the law to change. As Lord Hobhouse put it[65]:

> "The common law develops as circumstances change and the balance of legal, social, and economic needs changes. New concepts come into play; new statutes influence the non-statutory law. The strength of the common law is its ability to develop and evolve. All this carries with it the inevitable need to recognise that decisions may change. What was previously thought to be the law is open to challenge and review; if the challenge is successful, a new statement of the law will take the place of the old statement."

With increasing frequency, judges do consider (and are constrained by) such matters as the rights articulated in the Human Rights Act 1998 or the ideals to be found in international conventions and treaties. One consequence is that the modern judges more readily consider the principles on which they should act in deciding whether or not to introduce a change. But there are clearly permissible limits to their law-making powers—at the end of the day, they are judges and not legislators. In the criminal law sphere, for example, the House of Lords has offered the following guidance to the judges[66]:

> "(1) if the solution is doubtful, the judges should beware of imposing their own remedy; (2) caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated while leaving the difficulty untouched; (3) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems; (4) fundamental legal doctrines should not lightly be set aside; (5) judges should not make change unless they can achieve finality and certainty."

One generalisation can be made. The judge has to balance two opposing needs in the law: the need for stability and certainty and the need for change. It would obviously be going too far to say that a judge can scrap

[65] *R. v Governor of Brockhill Prison, Ex p. Evans (No.2)* [2001] 2 A.C. 19 at 48.
[66] *C v DPP* [1996] 1 A.C. 1 at 28.

or alter any established rule whenever the rule appears objectionable. The judge, even when free from binding authority, must take account of people's understanding of what the law is—as when they make contracts, or insure against liability. But not all judicial legislation defeats expectations. For example, a judgment restricting the area of liability does not do so (except to the extent that it defeats the claimant/prosecutor's expectation of succeeding in the particular proceedings). Again, the law of procedure and evidence does not create expectations in the ordinary citizen, and the judges are for this reason more prepared to exercise their creative powers more readily in this sphere.

Lawyers are rather prone to assume that what has been decided cannot be upset. It often happens that a plainly wrong decision is given at first instance or even by the Court of Appeal, which is followed unquestioningly for many years because counsel do not advise their clients to take the point further on appeal. When, eventually, some counsel is found who has the courage and acumen to take the point, the precedent is reversed. As the House of Lords has decided that it can question its own previous decisions, there is hardly any decided point that cannot be reopened if the arguments against it are strong enough.[67]

FURTHER READING

On precedent and the judicial function, Michael Zander's *The Law-Making Process* (6th edn, 2004), Chapters 4, 6 and 7 may be warmly recommended. See also Manchester, Salter, *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation* (4th edn, 2011) and J.A. Holland and J.S. Webb, *Learning Legal Rules* (7th edn, 2010).

[67] e.g. *R. v Gould* [1968] 2 Q.B. 65. In *R. v Taylor* [1950] 2 K.B. 368 counsel had allowed his client to plead guilty on the strength of a decision in an earlier case notwithstanding that it was plainly erroneous. An appeal was taken against the sentence only, but, on being informed of the facts and of the earlier decision, the Court of Criminal Appeal was so surprised that it allowed the appeal to be converted into an appeal against conviction; it then allowed the appeal and overruled the precedent.