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Special Issue

135 YEARS OF THE LAW REPORTS AND THE WEEKLY LAW REPORTS

Edited by ROBERT WILLIAMS Barrister and PAUL MAGRATH Barrister

- **R v Dudley and Stephens (1884) 14 QBD 273 DC**
- **Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 CA**
- **Donoghue v Stevenson [1932] AC 562 HL(Sc)**
- **Woolmington v DPP [1935] AC 462 HL(E)**
- **Young v Bristol Aeroplane Co Ltd [1944] KB 718 CA**
- **Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130**
- **Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 CA**
- **Incorporated Council of Law Reporting for England and Wales v Attorney-General [1972] Ch 73 CA**
- **American Cyanamid Co v Ethicon Ltd [1975] AC 396 HL(E)**
- **Van Duyn v Home Office [1975] Ch 358 ECJ**
- **Practice Direction (Judgments: Form and Citation) [2001] 1 WLR 194 Sup Ct**

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THE INCORPORATED COUNCIL OF LAW REPORTING

FOR ENGLAND & WALES

THE LAW REPORTS
and
THE WEEKLY LAW REPORTS

Special Issue

(Fourth Reprint)

Edited by **Robert Williams**, *Barrister* and **Paul Magrath**, *Barrister*

Produced by **Paul Magrath**, *Barrister* and **Nicholas Mercer**, *Barrister*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

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FOREWORD

by Robert Williams

Law reporting, as applied to the writing of a headnote, is a skill which is not easily learnt. It is partly academic–defining the concept of ratio decidendi and applying it to particular cases is the fundamental task of every student of jurisprudence–partly journalistic, particularly in relation to the summary reports which are now demanded within hours of the delivery of a judgment, and, above all, practical–law reporters are providing the raw material to facilitate the application of law to real situations and real people in everyday life.

This selection, which comprises cases which have acquired a certain venerability over the years, may, perhaps, be viewed as a tribute to the law reporters and editors of preceding generations who have worked for the Incorporated Council, whose example inspires us today and whose mantle we wear with pride. I hope it will also serve to draw attention to the current reports, where the same qualities of dedication, skill and accuracy can still be discerned week by week.

I am immensely grateful to the reporters and editorial staff, whose skill and hard work enables us to provide our subscribers with a comprehensive selection of reports as quickly as is consistent with maintaining a high standard of accuracy, and to all those who contribute to the publication and distribution of the Law Reports, Weekly Law Reports and Industrial Cases Reports. Particular thanks are due to Paul Magrath and Mary Fraser (with assistance from Nicholas Mercer) for their part in compiling this souvenir volume.

INTRODUCTION

The Incorporated Council's 135 Years of Law Reporting for England and Wales

by Paul Magrath

This collection of ten landmark cases was first published to mark the relaunch in 2001 of the Law Reports and Weekly Law Reports in a new format for the 21st century, and to celebrate the achievements of the Incorporated Council for Law Reporting for England and Wales since its inception, nearly 136 years before, in the 19th. They were chosen from a long list of almost 50 cases nominated by the Council's own reporters. Naturally, it was impossible to include in a single issue more than a limited selection of the most popular ones, let alone to do justice to the range of subject matter and courts covered by the Council's publications in the course of its history. But we hoped to reflect in the final choice some idea both of the continuing relevance of certain older cases and of the consistency of our approach over the preceding 135 years.

The publication of this special issue also offered an opportunity to stand back a little and reflect on the reasons why the Council was set up in the first place, to see how conditions in which it operates have changed, and to consider whether and to what extent it still fulfills its original purposes.

History

Law reporting has a venerable but occasionally chequered history. No one now would seriously dispute the need for accurate and reliable reports of legal proceedings, published promptly and at a price affordable to both students and professionals. Yet the fulfilment of such aims was, until 1865, achieved in a somewhat piecemeal, even haphazard, fashion.

Regular reporting began with the Year Books, transcribed from the Plea Rolls begun in 1189. The Year Books contained notes of cases written up in Anglo-Norman by apprentices to the law. Early commentators on the law produced authority for their propositions which was often decidedly hearsay or anecdotal. But by the 16th century individual reporters were publishing volumes or series of case reports under their own names. Often there were two of them, sounding a bit like comedy duos: Adolphus & Ellis, Meeson & Welsby, Flanagan & Kelly. There was a series called Dickens' Reports, but they have nothing to do with the novelist, although he did do news reporting from the courts and of course from Parliament, where he was renowned for the speed of his shorthand. Dickens the law reporter published two volumes covering from 1559 to 1792: it's unlikely he was in court for all of these cases.

These various freelance productions are now collectively known as the Nominate Reports. Many are still cited and referred to today but the problem was that they varied enormously in coverage, accuracy and reliability. Occasionally cases reported in more than one series even appear with different holdings.

Certain reporters were the subject of astringent comments from the Bench. It was said of Espinasse, whose six volumes cover from 1793 to 1807,

that he was deaf and that he "heard one half of a case and reported the other." Lord Denman C.J. in *Small v. Nairne* (1849) 13 Q.B. 840, 844 was

> "tempted to remark for the benefit of the profession that Espinasse's Reports, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt and hesitation . . ."

In the Modern Reports, covering 1669 to 1732, Pollock C.B. declared, "You will find authority . . . for many propositions that are not law." One report in volume 8 was described by Lord Kenyon C.J. as "totally mistaken there, as indeed are nine cases out of ten in that book." Lord Mansfield absolutely forbade the citing of Barnardiston's Reports in Chancery (1726–35),

> "for it would only be misleading students, to put them upon reading it. He said, it was marvellous however, to such as knew the serjeant in his manner of taking notes, that he should so often stumble upon what was right: but yet, that there was not one case in his book, which was so throughout."

Of the same reporter's King's Bench Reports (1726–35), Lord Lyndhurst once exclaimed:

> "I fear that is a book of no great authority; I recollect, in my younger days, it was said of Barnardiston, that he was accustomed to slumber over his notebook, and the wags in the rear took the opportunity of scribbling nonsense in it."

(See also the remarks about Kelynge's reports on criminal cases in Lord Sankey L.C.'s speech in *Woolmington v. D.P.P.* [1953] A.C. 462, 479 included herein.)

It was, therefore, as much to ensure standards of accuracy, as uniformity of appearance and breadth of coverage, that the Council ultimately replaced all these freelance series with its own, judicially approved, reports.

Establishment of the Council

In 1849 a report of the Law Amendment Society complained that although the decisions of the courts and tribunals were "the formal constituents of the common law," they were in no respect officially promulgated. The report observed that: "It has long been considered a practicable scheme for any barrister and bookseller who unite together with a view to notoriety or profit, to add to the existing list of law reports." The result was that "even if all the reports which are published were correct and given by competent persons, they are now so numerous that they cannot be known to one tithe of the practitioners of the law. They are beyond the reach not only of the public, but of the great body of the profession."

By 1863 it was apparent that there was widespread dissatisfaction with the system. W. T. S. Daniel Q.C., in a letter to the Solicitor-General, Sir Roundell Palmer, said that there were no fewer than 16 series of authorised reports. He complained of their "enormous expense, prolixity, delay and irregularity in publication," and of their "imperfection as a record, for want of continuity." The publication of five further series of reports did little to alleviate the problem. The letter was accompanied by a *Paper on Legal Reports* written by Nathaniel Lindley Q.C. (who went on to become

Master of the Rolls and a Law Lord) in which he set out what in his view were the objects of a law report and the criteria for selection of cases.

Lindley was as insistent on what should *not* be included—"cases which pass without discussion or consideration, and which are valueless as precedents" or "which are substantially repetitions of what is reported already"—as he was on what should. In the latter class he put:

> "1. All cases which introduce, or appear to introduce, a new principle or a new rule.
> "2. All cases which materially modify an existing principle or rule.
> "3. All cases which settle, or materially tend to settle, a question upon which the law is doubtful.
> "4. All cases which for any reason are peculiarly instructive."

The result of all this lobbying was the adoption, at a general meeting of the Bar held at Lincoln's Inn on 28 November 1864, of a scheme to publish the decisions of the superior courts of law and equity under the management of a Council composed of members of the Inns of Court and of the Incorporated Law Society. Not everyone supported the scheme. According to the Council's first annual report, the sheer novelty of the idea of publishing law reports "solely in the interest of the profession and the public" was "with some, an objection which impeded all consideration of its merits; others disbelieved that such a work could be undertaken without a latent expectation of private gain," and so forth. Among the nay-sayers was Gray's Inn, which "for reasons of prudence and delicacy, at first declined co-operation." However, they soon saw the light and "signified their adhesion to the scheme" by appointing, like the other Inns, representatives to the Council.

The Council of Law Reporting was duly constituted in 1865, with Sir Fitzroy Kelly Q.C. as chairman (succeeded the following year by Sir Roundell Palmer, now Attorney-General) and W.T.S. Daniel Q.C. as Vice-Chairman. In 1867 the Council was incorporated as a company limited by guarantee. All the reporters engaged in the existing series of authorised reports were offered appointments under the new scheme. Only three refused.

The Council's first law reports were published in November 1865. They were divided into 11 different series covering the then myriad divisions of the courts. A decade later these were reduced to six series, following the consolidation and reorganisation of the courts of law and equity effected by the Judicature Acts 1873–75. In 1891 the Council introduced the simplified arrangement of dated annual volumes in four series which still exists today, comprising Appeal Cases (covering the House of Lords and Privy Council) and separate volumes for the Chancery, Queen's Bench and Family (formerly the Probate, Divorce and Admiralty—also known as "Will, Wives and Wrecks") Divisions of the Supreme Court.

In 1866 the Council also began publishing the Weekly Notes, covering additional cases of interest which did not merit a full law report. As well as case summaries, it contained legal lists and notices, exam results, and advertisements (e.g. for Dickens's novels). It was superseded in 1953 by the Weekly Law Reports, which aimed to make full-length reports available more quickly than the Law Reports and to cover additional cases.

The present day

The criteria for reporting, as explained in Lindley's paper, have essentially remained the same ever since. Though they might be more

succinctly put, they have if anything an added relevance in the present day, when the Internet and electronic media have made possible a huge increase in the speed and variety of law reporting. Once again, the student and practitioner are beset by a bewildering array of competing publications. It was precisely to avoid the chaos created by myriad rival reports of variable quality, and to ensure that only those cases which introduced, modified or clarified the law should be reported, that the Council was set up.

At a conference on Law Reporting, Legal Information and Electronic Media in the New Millennium hosted by the law faculty at Cambridge University in March 2000, Lord Bingham of Cornhill, Lord Chief Justice "broadly welcomed" the increase in available information. If justice was to be administered in public, he said, its end product should be in the public domain. It was a denial of justice if knowledge was confined to an inner circle of high priests who alone had access to its mysteries. But there was a danger of swamping the courts if counsel did not exercise restraint.

Echoing those sentiments Buxton L.J., a member of the Council (which sponsored the conference), pointed out that few Court of Appeal decisions merited reporting since most turned on existing principles and merely illustrated their application. But for the few judgments which were genuinely reportable, the "added value" of edited, annotated reports, especially those including notes of argument (often very illuminating in identifying the issues), must not be overlooked.

The almost universal view among judges in England is that too much, rather than too little, is reported. The Council sets out, as it always has done, to publish only those cases that really matter. This means in practice that out of around 5,000 decisions capable of being binding precedents per year (the figure has been put as high as 8,000) the Council selects some 350 cases per year for the Weekly Law Reports. Of these, about 150 will subsequently be published in one of the four divisions of the Law Reports.

A problem frequently cited by practitioners is that of delay. One of Lindley's desiderata was that law reports "should be published as speedily as is consistent with a conscientious discharge of the reporter's duties." He might have added that since it is necessary to work from (and therefore to wait for) an authorised transcript of the judgment, and since the process of reporting involves a good deal of editorial work by several hands, including the checking of all facts, quotations and references, and the reading of proofs by several eyes (including the judge's), and the whole process must be fitted into a weekly or monthly schedule of printing and distribution with its inevitable backlogs and bottlenecks, some delays are inevitable. The speedy availability of "raw law" in the form of uncorrected judgment handouts, Internet databases, overnight reports such as the Council's own Daily Law Notes (at www.lawreports.co.uk) and newspaper reports such as those which the Council's reporters contribute to The Times (which has published law reports since its inception, as the Universal Daily Register, in 1785) only serves to heighten the time-lag before the "added value" of an edited, annotated law report appears. Thankfully, the Council has been able to exploit some of the benefits of new technology and electronic media to achieve a substantial decrease in reporting times over the last year; and, moreover, to provide (by licensed intermediary) a database of past reports with all the advantages of electronic search and instant access.

The Council thus finds itself at the start of a new millennium equipped with the tools of the future while providing, still, the high quality product

of the past; and as innovative in its current operation as it was in its original establishment, 135 years ago. Lord Lindley M.R., in whatever Higher Court he now finds himself, must surely be looking on with quiet satisfaction. We hope he would also enjoy the present volume as a fitting way of celebrating the Council's achievements.

The cases

Regina v. Dudley and Stephens (1884) 14 Q.B.D. 273, D.C.

The earliest of the cases chosen for this special issue is also perhaps the one most likely to appeal to a lay person as being an interesting legal dilemma. Not surprisingly, it was a cause célèbre in its day and has subsequently proved a suitable case for both book and film treatment. Some shipwrecked sailors, starving, decide to draw lots to determine which of them should be sacrificed to save the rest. In the end, even the semblance of democracy is forgotten as they fall upon the weakest of their number, a cabin boy, whom they kill and devour in the hope (justified in fact) of keeping themselves alive for just long enough to be saved. On a charge of murder, could they plead a defence of necessity? The law said, resoundingly, no. An interesting exercise might be to compare and contrast this situation with, say, the destruction of one of conjoined twins in order to save the life of the other (or, by the same token, of human life in foetal or even embryonic form in the hope of ameliorating the existence of adults suffering from or at risk of non-fatal afflictions) which may be thought to fall into the same category, though that is not the law as it stands: see *In re A. (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 and *C. v. S.* [1988] Q.B. 135.

On a lighter note, the case offers an example of the kind of anecdotal, hearsay (or seewrite) evidence which in days of yore passed for authoritative precedent: see the reference in the Attorney-General's argument to "the case cited by Puffendorf" which turned out to be mentioned in a work by Tulpius, a 17th century Dutch writer, entitled Observationum Medicarum and "not a judicial decision." Great chunks of untranslated Latin are also a thing of the past, though their appeal will linger for those recusants among us for whom meaning is secondary to hallowed mystery. (If for them "mental element" refers to the unruly part of a football crowd, no doubt for others "mens rea" sounds more like builders' cleavage.) Prima facie, those Latin phrases which are regularly used among lawyers may be considered part of the English language; ipso facto, they need not be outlawed by the new, user-friendly regime introduced by the Civil Procedure Rules 1998.

Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q.B. 256, C.A.

Next in time, we have a case the facts of which are reminiscent of snake oil salesmanship in its wild western prime. These days the Carbolic Smoke Ball Company would be being sued (in a billion-dollar class action) for failing to include a health warning on the packet; but in those days the issue was one of the manufacturer not coughing up enough rather than the consumer doing so too much. If Hawkins J. at first instance knew that what he was really dealing with was a case about the formation of a contract, the law reporter in drafting the catchwords seems to have thought it was principally about gaming and whether the advertisement was some kind of bet: see [1892] 2 Q.B. 484. Although Hawkins J. did deal with the gaming and insurance issues raised by counsel, his decision, as

affirmed by the Court of Appeal, rests on a question of contract, as the catchwords to the latter report (reproduced here) make clear. Indeed, the judgment of Lindley L.J. (the very same) more or less dismisses the gaming and insurance aspects of the case as hopeless (counsel no doubt making the best of the bad hand dealt to him) before rather drily scorning the idea that the advertisement for the eponymous fumigaceous remedy might have been a mere "puff."

Donoghue v. Stephenson [1932] A.C. 562, H.L.(Sc.)

The case about the contaminated ginger beer has lodged itself in the mind of every generation of law students like a snail in the depths of an unguarded bottle. To the modern reader, accustomed to the notion of consumer rights and the blame-and-shame culture, the idea that a negligent manufacturer might not be liable to an injured end-user seems almost outlandish; yet two of the five Law Lords dissented from the judgment of the House. In view of the length of the original report we have taken the exceptional step of cutting the two dissenting speeches and the two other speeches which essentially concurred with that of Lord Atkin. It was Lord Atkin who was responsible for the oft-quoted definition of legal neighbourliness and his speech is worth reading in full, not least because he wrote so well. He may have thought he was merely tidying up a principle already enunciated by Lord Esher (as Sir Baliol Brett M.R.) in *Heaven v. Pender* (1883) 11 Q.B.D. 503. Yet it turns out he was more or less inventing the modern law of negligence.

For some idea of the mindset of the opposition it is still worth going back to the original and reading the dissenting speech of Lord Buckmaster: he appears like some over-tweeded rambler struggling to release himself from the gorse-like thickets of common law precedent at the foot of the hill, while Lord Atkin climbs ahead towards that eminence from which a clear view of the justice of the case (and others like it) may be enjoyed.

Woolmington v. Director of Public Prosecutions [1935] A.C. 462, H.L.(E.)

At a time when the "golden thread" running through the web of English criminal law—that it is for the prosecution to prove the defendant's guilt and not for the defendant to establish his own innocence—seems to be being whittled away in the name of public order, the prevention of football hooliganism, terrorism, fraud, drug trafficking, paedophilia etc., it is useful and instructive to read the whole of the original text of Viscount Sankey L.C.'s judgment from which it was drawn. The golden thread, much beloved of Rumpole of the Bailey and other stout defenders of the virtues of liberty and good old fashioned common sense, reappears in harmonised form in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as now scheduled to the Human Rights Act 1998. But the Convention and the "Strasbourg jurisprudence" that has mushroomed from its moist undersoil may in the end permit a level of whittling down not matched even by those statutory exceptions enacted within this jurisdiction: see, for example, *Reg. v. Lambert* [2001] 2 W.L.R. 212, 217 at paras. 8 et seq.

Whether a properly directed jury would have convicted Woolmington today is another matter. The use by a rural type of a shotgun to frighten someone is apparently not unusual. Woolmington said (and it is not for us to judge the logic of his tactics) that he wanted to frighten his wife into returning to the matrimonial home. In a more contemporary case, the plan

was to frighten a burglar into *not* returning to the defendant's home: see *Reg. v. Martin* (unreported—except of course, massively, in the media).

Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718, C.A.

In our next case, Lord Greene M.R. found it "surprising that so fundamental a matter should at this date still remain in doubt". The matter was whether and to what extent the Court of Appeal was bound by its own previous decisions. The judgment, a key text in any study of the English legal system, is a law reporter's dream because Lord Greene basically sets out the headnote at the end. Of course, if all judges produced a succinct precis of their holdings in the course of their judgments, there would be little need for law reporters to exercise their often considerable skills in distilling, from a lengthy transcript, the proposition of law which justifies reporting the case. This is the high point of their art.

According to reporters' lore, a good way to decide whether a case is reportable is to see whether one can write a holding: if not, or not easily without stating the obvious, the chances are that the case is unreportable. But the best way of deciding the question is to sit and listen to it. Indeed, as a law reporter one is often a sort of spectator in the theatre of legal history—or perhaps even a reviewer at the first night of a new drama. Instead of the making of thespian reputations one is occasionally privileged to witness at first hand a landmark decision such as one of these included here.

Central London Property Trust Ltd. v. High Trees House Ltd. [1947] K.B. 130, Denning J.

Yet all too often the really important cases do not appear as such until some time later when their effect, like a pebble thrown into a lake, has rippled out from the still point of impact to rock even the largest vessels at the perimeter. An example of such a "sleeper" might be the *High Trees* case, in which Denning J. (as he then, but not for very long, was) single-handedly created from the long-mixed genetic pools of equity and the common law a new hybrid of promissory estoppel.

Associated Provincial Pictures Houses Ltd. v. Wednesbury Corpn. [1948] 1 K.B. 223, C.A.

This is another sleeper or depth-charge. The expression "*Wednesbury* unreasonable" has been so commonly used as to require no explanation among anyone with the least experience of administrative law; but to the layman encountering the expression unanchored to its full case reference (which most law reporters have by heart, a sort of mental macro) it is one of those phrases, like "*Mareva* injunction" or "*Calderbank* letter", which seem to reinforce the idea of the law as a jungle of jargon. The problem is that there is no simple way of replacing them with the same precision in anything like the same concision. A *Mareva* injunction may now be called a freezing order (for a full discussion of its origins and effects see *Z. Ltd. v. A.-Z. and AA.-LL.* [1982] Q.B. 558); and a *Calderbank* letter may be described as a pretrial offer without prejudice but reserving the right to refer to the offer on the issue of costs: see *Calderbank v. Calderbank* [1976] Fam 93. Yet the threefold definition of *Wednesbury* unreasonableness to be derived from Lord Greene M.R.'s judgment—taking into account what one should not, failing to take into account what one should, or just plain irrationality—cannot be more succinctly termed. What else could one call

it? Unlawful unreasonableness? Judicially reviewable unreasonableness? In the end, the useful word is the one that has stuck, and here is the case for which it was named.

To deny children the pleasures of the cinema on Sundays may no longer seem like an issue worth going down in legal history for, but no doubt the borough councillors of Wednesbury had their reasons and as always it is the principle of the thing. The huge increase over the last 20 years in the categories of administrative decision-making that have been found to be susceptible to judicial review means that from this tiny forensic acorn, planted over half a century ago, a sturdy oak has grown.

Incorporated Council of Law Reporting for England and Wales v. Attorney General [1972] Ch. 73, C.A.

Not surprisingly, the Council's own occasional involvement in litigation has been reported in its publications. In all three cases there were tax implications. In 1888 it had a spat with the taxman over whether it was bound to deliver an account of its property under section 15 of the Customs and Inland Revenue Act 1885. The Divisional Court of the Queen's Bench Division held that the Council, as an association established for a trade or business within the meaning of section 11(5), was exempted from the duty imposed by that section: see *In re Duty on the Estate of the Incorporated Council of Law Reporting for England and Wales* (1888) 22 Q.B.D. 279. The Council had another spat with the taxman in 1913, when it resisted attempts by the Revenue to levy income tax in respect of a gratuity of £1,500 paid to a reporter on his retirement. Scrutton J., sitting in the King's Bench Division, ruled that the question whether the payment constituted an expense deductible from the Council's profits, thus reducing them for income tax purposes, or was an application of part of the Council's profits after they had been earned, as the inspector contended, was a question of fact for the Commissioners. Since there was evidence on which they could find that the sum was a deductible expense, he declined to interfere with their decision to that effect: see *Smith v. Incorporated Council of Law Reporting for England and Wales* [1914] 3 K.B. 674.

The third appearance by the Council in its own law reports is the one included here. Once again, the issue had tax implications. This time it involved a dispute with the Charity Commissioners over the Council's charitable status. The Court of Appeal affirmed (on slightly different grounds) the decision of Foster J. [1971] Ch. 626 that the Council had been established for exclusively charitable purposes, namely "to further the development and administration of the law and to make it known or accessible to all members of the community". It was undoubtedly, in Russell L.J.'s view, [1972] Ch. 73, 85,

> "beneficial to the community that reliable reports of judicial decisions of importance in the applicability of the law to varying but probably recurrent circumstances, or demonstrating development in the law, should be published; and all the more so if the publication be supervised by those who by training are best qualified to present the essence of a decision correctly and to distinguish the ephemeral from the significant."

By a majority (Russell L.J. dissenting on this issue) their Lordships also held that the Council's purposes were charitable "as being for the

advancement of education". We hope our student subscribers agree, and have included the case in this volume as an important example of a dispute over charitable status and the application of the Statute of Elizabeth I.

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396, H.L.(E.)

One may appreciate the significance of this next case without ever knowing or wanting to find out what a polyhydroxyacetic ester might be. To the parties, it was a dispute over patent infringement; but to the rest of us it was about interlocutory injunctions and established an approach to their grant or refusal which has had far-reaching implications. As with "*Wednesbury* unreasonableness," there is no simple way of expressing the three-stage *Cyanamid* test other than to call it just that. It is not enough to refer to the "balance of convenience" because that is only the final stage. Accordingly, "the *Cyanamid* test" is another of those phrases which, to the mystification of the lay person, has passed into legal jargon.

Van Duyn v. Home Office [1975] Ch. 358, E.C.J.

As the opinion of the Advocate General notes, our final choice is a landmark case because it was the first time that a court of the United Kingdom (which had only recently joined the E.E.C.) made a reference to the Court of Justice of the European Communities in Luxembourg under article 177 of the Treaty of Rome (now article 234 E.C.). It concerns a principle, the free movement of workers, which lies at the very heart of what might rather romantically be termed the European dream. Whether one's sympathies are unionist, federalist or Eurosceptic, one cannot gainsay the significance of the principle that, if economic borders are to be ignored, they should be ignored across the board. That said, the principle was made subject, in the case of the free movement of workers, to the conduct of the individual concerned. But to what extent does membership of an organisation—in this case the "Church" of Scientology, disdainfully referred to by a government minister as a "pseudo-philosophical cult"—which is not itself illegal in the excluding member state, constitute personal conduct? The reference, which sought a preliminary ruling on the interpretation of article 48 of the Treaty and article 3 of Directive 64/221/E.E.C., was made by Sir John Pennycuick V.-C. [1974] 1 W.L.R. 1107 in an action brought against the Home Office by Miss van Duyn, a Dutch national, following a refusal to allow her to enter the United Kingdom in order to take up a post with the church.

Other cases

Those, then, are the 10 cases we have chosen. Among those we would like to have included but were unable to find space for, the most voted-for was the House of Lords' decision in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, closely followed by *Pepper v. Hart* [1993] A.C. 593. Their Lordships' decisions in *Liversidge v. Anderson* [1942] A.C. 206 and *Reg. v. Secretary of State for Transport, Ex p. Factortame* [1990] 2 A.C. 85 were not far behind. The decisions of the Privy Council in the two *Wagon Mound* cases, *Overseas Tankships (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound (No. 1))* [1961] A.C. 388, and *Overseas Tankships (U.K.) Ltd. v. Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [1967] 1 A.C. 617, were also very popular, with *W.T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300 not far behind.

Finally, the inimitable style of Lord Denning M.R. received a number of these-you-have-loved nominations, including *Beswick v. Beswick* [1966] Ch. 538 ("Old Peter Beswick was a coal merchant"), *Hinz v. Berry* [1970] 2 Q.B. 40 ("It was bluebell time in Kent") and *Reg. v. Barnsley M.B.C., Ex p. Hook* [1976] 1 W.L.R. 1052 ("To some this may appear to be a small matter, but to Mr. Harry Hook it is very important.") These are colourful and interesting cases, but none of them quite matches the significance of the *High Trees* case which is here.

Practice Direction (Judgments: Form and Citation) [2001] 1 W.L.R. 194, Sup. Ct.

The omissions are a pity, and no doubt readers will mourn the absence of their own particular favourites. But we hope there is enough here to justify our claim to have been, as an association, a particularly diligent reviewer in the theatre of legal history. That our coverage is not only appreciated but required reading is emphasised by paragraph 3.1 of the current practice direction on citation of judgments in the Supreme Court. Although it basically reiterates what was said in *Practice Direction (Court of Appeal: Citation of Authority)* [1995] 1 W.L.R. 1096 and *Practice Statement (Supreme Court: Judgments)* [1998] 1 W.L.R. 825, para. 8, we include it here as a reminder to the profession as a whole, and in particular to all advocates, of the courts' preferences for citations from the Law Reports.

Acknowledgements

In its first annual report, dated 17 June 1867, the Council expressed "much satisfaction in being able to state that their proceedings hitherto have been attended with success greatly beyond what was anticipated at the outset." In other words, they'd had a good year. Well, we'd like to say we've had a good 135-odd years now.

The report pays tribute to three groups. First, to the reporters, editors and other staff who helped to make it all happen: the same compliment must surely be owed to all the present occupiers of those positions, whose names are listed in the opening pages of this volume.

Second, the report pays tribute to the legal profession and all those who, through their subscriptions, helped to support the new venture. Hear, hear: they're supporting us still, and without them, of course, we'd be nothing. (We hope they enjoy this bonus bedside reading.)

Finally, the report pays tribute to the Council's then printers, Messsrs. Clowes, who had "done their part in producing a work which, as regards paper, type, printing, style and general regularity of publication and distribution, is almost all that could be desired . . ." That sentiment, also, must be echoed in relation to our current typesetters and printers, respectively CPI Tradespools and CPI Antony Rowe of Chippenham, Wiltshire, with particular thanks to both for their assistance in the preparation of this extraordinary issue.

Megarry House, 1 September 2001.

Postscript

To the history of the Law Reports outlined above must now be added a new chapter. The electronic advances which have made the 21st century so different from the 19th, when we began, have not only made possible the release of electronic versions of the reports throughout the virtual world, but also enabled (as of 2003) the simultaneous printing of the written edition in such far-flung parts of the geographical world as Delhi (for India, Pakistan, Sri Lanka and Bangladesh) and Beijing (for all of China apart from Hong Kong). It is hoped that other jurisdictions will also soon be able to benefit from local printings of what, it must be stressed, is the same authoritative edition as that produced in England. As for the electronic version, through our continued relationship with Justis we offer subscribers the Law Reports, Weekly Law Reports and Industrial Cases Reports on both CD Rom and the Internet (www.justis.com), while the Law Reports are additionally available on the Internet via both Lexis and Westlaw. Indeed, it is now fair to say that our principal method of distribution is via the electronic media.

The response to the original printing of this Special Issue has been so much more enthusiastic than, in our modest vanity, we had hoped, as to require not just one but now, barely two years later, yet another reprinting. Letters, tributes and requests for more copies have come from judges, academics, practitioners and students, all betraying not just an abiding interest in the source material of English law but also a gratifying curiosity in the nuts and bolts of law reporting. Responses have come from as far afield as Murmansk, Addis Ababa and Wellington, New Zealand. The Special Issue has proved invaluable both as a publicity tool at trade fairs and professional conferences and as a sort of calling card (it was largely instrumental in securing the contract for the Chinese edition), and continues to represent, to the 100-plus countries in which our publications are distributed, the essence of what we are about.

Suggestions of cases we ought to have included were, naturally, plentiful; but no one argued convincingly that any of those included ought not to have been. Keep the suggestions coming: a further volume is not off the cards. In the meantime, the legal history that is made every day in the law courts continues to be distilled, speedily, accurately and enduringly, to the ever-growing number of our loyal subscribers. To them we dedicate this further, demand-led printing.

Megarry House, 16 October 2003.

Second Postscript

Another new chapter in the history of the ICLR was added with the launch, in January 2007, of the Business Law Reports. Although the Council's reporters have always contributed on a freelance basis to specialist series produced by other publishers, such as the Road Traffic Reports, till now the only specialist series produced in-house was the Industrial Cases Reports, which cover employment law and (in its former incarnation, RPC) restrictive practices cases. The ICR has always set the benchmark for reporting those cases on employment, discrimination, competition and health and safety which really matter to employers and unions and their respective advisers. Now, it was felt, there was a place for a series that would cover the important cases on company, commercial and intellectual property law that would be of interest to businesses generally

and those advising them, and to teachers and students of business, management and accountancy courses. Though the market abounds with specialist series, many of them (as their titles indicate) are narrowly targeted at specific areas of law, such as company law, insurance or patents. We felt there was a need for a broadly specialist series which would target, not a narrow academic specialism, but a particular kind of client and the practitioners who need to advise them on all the different aspects of law that might affect their business.

The series was launched, appropriately enough, at Tallow Chandlers' Hall, one of the beautiful old livery halls in the City which symbolise London's long history as a global commercial centre. Proposing a toast to the new publication, Lord Bingham of Cornhill, the senior Law Lord, declared: "I think it has the potential of making a real contribution to the effective and fruitful conduct of business and finance and commerce in this country and the City of London in particular." (For further details, see our website: www.lawreports.co.uk.)

The potential which Lord Bingham identified in January is already showing signs of being more than amply realised. At the time of writing, I can report that the Business Law Reports is doing good business. Subscriptions have been doubling month on month since the launch and receipts are now more than covering marginal production costs. Interest in the new series has been exceptional for a specialised publication. It has also been global: the online version has been accessed from jurisdictions as far flung as Hong Kong, New Zealand and the Virgin Islands. In short, we can fairly be said (in business management speak) to have "hit the ground running".

These developments anticipate a major reorganisation of the law courts. The question of the replacement of the Appellate Committee of the House of Lords with a Supreme Court is no longer one of "whether" or "where" but only one of "when": the plan at the time of writing is that it will be located in the Middlesex Guildhall, on the opposite side of Parliament Square, and it will open when that historic building has been suitably converted. More pertinently for the new series is the expected replacement of the existing Commercial Court and Technology and Construction Court departments of the Queen's Bench Division (currently located in St Dunstan's House) with a new Business Court. (What is not certain is whether it will also include the Companies Court or any other sub-division of the Chancery Division.) Though the Business Law Reports will not be confined to decisions of the Business Court (and will certainly include those of the Supreme Court), the similarity of both name and purpose suggests the possibility of a fruitful symbiosis which it would be pointless to overlook.

As for the Weekly Law Reports, global expansion continues apace with the overseas printing of the Indian edition, after moving from Delhi to Lucknow, now also covering Nepal, Bhutan, Myanmar and the Maldives. As well as welcoming the many new readers this has brought us, may I also take this opportunity to thank all those from around the globe who have expressed their support and interest in both this publication and the Council's reports generally. It is thanks to that continued interest and enthusiasm that we find ourselves preparing a fourth reprint of this historic Special Issue.

Megarry House, 14 May 2007.

(1884) 14 Q.B.D. 273

A

[DIVISIONAL COURT]

THE QUEEN v. DUDLEY AND STEPHENS.

1884 Dec. 9

Lord Coleridge, C.J., Grove and Denman, JJ., Pollock and Huddleson, BB.

B

Criminal Law—Murder—Killing and eating Flesh of Human Being under Pressure of Hunger—"Necessity"—Special Verdict—Certiorari—Offence on High Seas—Jurisdiction of High Court

A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he C believes and has reasonable ground for believing that it affords the only chance of preserving his life.

At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners D. and S., seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1000 miles from land; that on the eighteenth day, when D they had been seven days without food and five without water, D. proposed to S. that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day D., with the assent of S., killed the boy, and both D. and S. fed on his flesh for four days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief; that under these circumstances there appeared to the E prisoners every probability that unless they then or very soon fed upon the boy, or one of themselves, they would die of starvation:—

Held, that upon these facts, there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder.

F INDICTMENT for the murder of Richard Parker on the high seas within the jurisdiction of the Admiralty.

At the trial before Huddleston, B., at the Devon and Cornwall Winter Assizes, November 7, 1884, the jury, at the suggestion of the learned judge, found the facts of the case in a special verdict which stated "that on July 5, 1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also an English G boy, between seventeen and eighteen years of age, the crew of an English yacht, a registered English vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. That in this boat they had no supply of water and no supply of food, except two 1lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the H fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and was probably more than 1000 miles away from land. That on the eighteenth day, when they had been seven days without

food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was not consulted. That on the 24th of July, the day before the act now in question, the prisoner Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy that their lives should be saved, and Dudley proposed that if there was no vessel in sight by the morrow morning the boy should be killed. That next day, the 25th of July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there; that the three men fed upon the body and blood of the boy for four days; that on the fourth day after the act had been committed the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men. But whether upon the whole matter by the jurors found the killing of Richard Parker by Dudley and Stephens be felony and murder the jurors are ignorant, and pray the advice of the Court thereupon, and if upon the whole matter the Court shall be of opinion that the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder as alleged in the indictment."

The learned judge then adjourned the assizes until the 25th of November at the Royal Courts of Justice. On the application of the Crown they were again adjourned to the 4th of December, and the case ordered to be argued before a Court consisting of five judges.

Dec. 4. *Sir H. James, A.G.* (*A. Charles, Q.C.*, *C. Mathews*, and *Danckwerts*, with him), appeared for the Crown.

The record having been read,

A. Collins, Q.C. (*H. Clark*, and *Pyke*, with him), for the prisoners, objected, first, that the statement in the verdict that the yacht was a

registered British vessel, and that the boat in which the prisoners were belonged to the yacht, was not part of any finding by the jury; secondly, that the formal conclusion of the verdict, "whether upon the whole matter the prisoners were and are guilty of murder, the jury are ignorant," &c., was also no part of the finding of the jury, as they simply found the facts relating to the death of Parker, and nothing else was referred to them; thirdly, that the record could not be filed, for it had been brought into the court by order only, and not by certiorari.

Sir H. James, A.G., for the Crown. As to the first point, the Crown are willing that the statement that the yacht was a registered British vessel, and that the boat belonged to the yacht, should be struck out of the record. With regard to the conclusion of the verdict it is according to the form of special verdicts in the Reports: *Rex v. Pedley*;[1] *Rex v. Oneby*;[2] *Mackally's Case*;[3] *Hazel's Case.*[4] As for the certiorari there was no necessity for it, for the Court of Assize is now part of this Court.

[THE COURT intimated that the points taken on behalf of the prisoners were untenable.]

With regard to the substantial question in the case—whether the prisoners in killing Parker were guilty of murder—the law is that where a private person acting upon his own judgment takes the life of a fellow creature, his act can only be justified on the ground of self-defence—self-defence against the acts of the person whose life is taken. This principle has been extended to include the case of a man killing another to prevent him from committing some great crime upon a third person. But the principle has no application to this case, for the prisoners were not protecting themselves against any act of Parker. If he had had food in his possession and they had taken it from him, they would have been guilty of theft; and if they killed him to obtain this food, they would have been guilty of murder. The case cited by Puffendorf in his Law of Nature and Nations, which was referred to at the trial, has been found, upon examination in the British Museum, in the work of Nicolaus Tulpius, a Dutch writer, and it is clear that it was not a judicial decision.[5]

[1] Leach, C. C. 242.
[2] 2 Ld. Raym. 1485.
[3] 9 Co. 65 b.
[4] Leach, C. C. 368.
[5] HUDDLESTON, B., stated that the full facts of the case had been discovered by Sir Sherston Baker, a member of the Bar, and communicated to him as follows:—

A Dutch writer, Nicolaus Tulpius, the author of a Latin work, Observationum Medicarum, written at Amsterdam in 1641, states that the following facts were given him by eye-witnesses. Seven Englishmen had prepared themselves in the Island of St. Christopher (one of the Caribbean Islands) for a cruise in a boat for a period of one night only, but a storm drove them so far out to sea that they could not get back to port before seventeen days. One of them proposed that they should cast lots to settle on whoso body they should assuage their ravenous hunger. Lots were cast, and the lot fell on him who had proposed it. None wished to perform the office of butcher; and lots were again cast to provide one. The body was afterwards eaten. At length the boat was cast on the shore of the Isle of St. Martin, one of the same group, where the six survivors were treated with kindness by the Dutch, and sent home to St. Christopher.

The principal passages in the original are as follows:—

" . . . Horribilis illa tragoedia quam non ita pridem conspexit India Occidentalis in septem Britannis; quibus necessitas famem fecit undecim dierum. Velut nobis sincere relatum, a testibus oculatis qui hœc ipsa ventorum ludibria et humaniter navibus suis excepêre, et officiosè ad suos reduxêre, septem Britanni accinxerant se in insulâ Christophorianâ unius solummodo noctis itineri, ultrà quam etiam non extenderant commeatum. At interveniens tempestas abripuit imparatos longius in mare quam at potuerint reverti ad portum destinatum ante diem septimum decimum. . . . Cujus intracti erroris, nullum finem promittente spatioso mari, adigebantur tandem (O durum necessitatis telum!) ancipiti sorti committere, cujus carne urgentem famem, et quo sanguine compescerent inexplebilem sitim. Sod jacta alea (quis eventum hunc non miretur!) destinabit primæ cædi primum hujus lanienæ auctorem. . . . Quâ

[He was stopped.]

A. Collins, Q.C., for the prisoners. The facts found on the special verdict shew that the prisoners were not guilty of murder, at the time when they killed Parker, but killed him under the pressure of necessity. Necessity will excuse an act which would otherwise be a crime. Stephen, Digest of Criminal Law, art. 32, Necessity. The law as to compulsion by necessity is further explained in Stephen's History of the Criminal Law, vol. ii., p. 108, and an opinion is expressed that in the case often put by casuists, of two drowning men on a plank large enough to support one only, and one thrusting the other off, the survivor could not be subjected to legal punishment. In the American case of *The United States v. Holmes*,[6] the proposition that a passenger on board a vessel may be thrown overboard to save the others is sanctioned. The law as to inevitable necessity is fully considered in Russell on Crimes, vol. i. p. 847, and there are passages relating to it in Bracton, vol. ii. p. 277; Hale's Pleas of the Crown, p. 54 and c. 40; East's Pleas of the Crown, p. 221, citing Dalton, c. 98, "Homicide of Necessity," and several cases, amongst others *McGrowther's Case*;[7] *Stratton's Case*.[8] Lord Bacon, Bac. Max., Reg. 5, gives the instance of two shipwrecked persons clinging to the same plank and one of them thrusting the other from it, finding that it will not support both, and says that this homicide is excusable through unavoidable necessity and upon the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, where one of them must inevitably perish. It is true that Hale's Pleas of the Crown, p. 54, states distinctly that hunger is no excuse for theft, but that is on the ground that there can be no such extreme necessity in this country. In the present case the prisoners were in circumstances where no assistance could be given. The essence of the crime of murder is intention and here the intention of the prisoners was only to preserve their lives.

Lastly, it is not shewn that there was jurisdiction to try the prisoners in England. They were part of the crew of an English yacht, but for anything that appears on the special verdict the boat may have been a foreign boat, so that they were not within the jurisdiction of the Admiralty: *Reg. v. Keyn.*[9] The indictment is not upon the Act 17 & 18 Vict. c. 104, for an offence committed by seamen employed or recently employed in a British ship. The special verdict cannot be amended in a capital case by stating the real facts.

Sir H. James, A.G., for the Crown.

[Lord Coleridge, C.J. The Court are of opinion that the conviction must be affirmed. What course do you invite us to take?]

To pronounce judgment and pass sentence. This was the practice even when, as formerly, the record was removed by certiorari: *Rex v. Royce*;[10] *Rex v. Athos*;[11] *Rex v. Cock.*[12]

oratione at non parum lenivit horrendi facinoris atrocitatem, sic erexit utique usque eò flaccidos ipsorum animos: at tandem reperiretur aliquis, sorte tamen priusductus qui petierit animose perorantis jugulem, et intulerit vim volenti. Cujus cadaveris expetiit quilibet illorum tam præproperè frustum, ut vix potuerit tam festinanter dividi.

" . . . At tandem misertus hujus erroris Deus deduxit ipsorum naviculam ad insulam Martiniam in quâ à præsidio Belgico et humaniter excepti, et benignè ad suos reducti fuêre. Sed vix attigerant terram quin accusarentur protinus a prætore homicidii. Sed diluente crimen inevitabili necessitate, dedit ipsis brevi veniam ipsorum judex."

[6] 1 Wallace, Jun. 25.
[7] 18 How. St. Tr. 391.
[8] 21 How. St. Tr. 1223.
[9] 2 Ex. D. 63.
[10] 4 Burr. 2073.
[11] 8 Mod. 136.
[12] 4 M. & S. 71.

A THE COURT intimated that judgment would be given on December 9th.

Dec. 9. The judgment of the Court (Lord Coleridge, C.J., Grove and Denman, JJ., Pollock and Huddleston, BB.) was delivered by

LORD COLERIDGE, C.J. The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th of July in the present year. They were tried before my Brother B Huddleston at Exeter on the 6th of November, and, under the direction of my learned Brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment.

The special verdict as, after certain objections by Mr. Collins to which the Attorney General yielded, it is finally settled before us is as follows. [His Lordship read the special verdict as above set out.] From C these facts, stated with the cold precision of a special verdict, it appears sufficiently that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned Brother's notes. But D nevertheless this is clear, that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving *him* of any possible chance of survival. The verdict finds in terms that "if the men had not fed upon the body of the boy they would *probably* not have survived," and that "the boy being in a much weaker condition was *likely* to have died before them." They might possibly have E been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, those who killed F him. Under these circumstances the jury say that they are ignorant whether those who killed him were guilty of murder, and have referred it to this Court to determine what is the legal consequence which follows from the facts which they have found.

Certain objections on points of form were taken by Mr. Collins before he came to argue the main point in the case. First it was contended that the conclusion of the special verdict as entered on the record, to the effect G that the jury find their verdict in accordance, either way, with the judgment of the Court, was not put to them by my learned Brother, and that its forming part of the verdict on the record invalidated the whole verdict. But the answer is twofold—(1) that it is really what the jury meant, and that it is but the clothing in legal phraseology of that which is already contained by necessary implication in their unquestioned finding, H and (2) that it is a matter of the purest form, and that it appears from the precedents with which we have been furnished from the Crown Office, that this has been the form of special verdicts in Crown cases for upwards of a century at least.

Next it was objected that the record should have been brought into this Court by certiorari, and that in this case no writ of certiorari had issued. The fact is so; but the objection is groundless. Before the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66), as the courts of Oyer and

Terminer and Gaol delivery were not parts of the Court of Queen's Bench, it was necessary that the Queen's Bench should issue its writ to bring before it a record not of its own, but of another Court. But by the 16th section of the Judicature Act, 1873, the courts of Oyer and Terminer and Gaol delivery are now made part of the High Court, and their jurisdiction is vested in it. An order of the Court has been made to bring the record from one part of the court into this chamber, which is another part of the same court; the record is here in obedience to that order; and we are all of opinion that the objection fails.

It was further objected that, according to the decision of the majority of the judges in the *Franconia Case*,[13] there was no jurisdiction in the Court at Exeter to try these prisoners. But (1) in that case the prisoner was a German, who had committed the alleged offence as captain of a German ship; these prisoners were English seamen, the crew of an English yacht, cast away in a storm on the high seas, and escaping from her in an open boat; (2) the opinion of the minority in the *Franconia Case* has been since not only enacted but declared by Parliament to have been always the law; and (3) 17 & 18 Vict. c. 104, s. 267, is absolutely fatal to this objection. By that section it is enacted as follows:—"All offences against property or person committed in or at any place either ashore or afloat, out of her Majesty's dominions by any master seaman or apprentice who at the time when the offence is committed is or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England." We are all therefore of opinion that this objection likewise must be overruled.

There remains to be considered the real question in the case—whether killing under the circumstances set forth in the verdict be or be not murder. The contention that it could be anything else was, to the minds of us all, both new and strange, and we stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before us, and we are now to consider and determine what it amounts to. First it is said that it follows from various definitions of murder in books of authority, which definitions imply, if they do not state, the doctrine, that in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or any one else. But if these definitions be looked at they will not be found to sustain this contention. The earliest in point of date is the passage cited to us from Bracton, who lived in the reign of Henry III. It was at one time the fashion to discredit Bracton, as Mr. Reeve tells us, because he was supposed to mingle too much of the canonist and civilian with the common lawyer. There is now no such feeling, but the passage upon homicide, on which reliance is placed, is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal, and the crime of murder, it is expressly declared, may be committed "linguâ vel facto"; so that a man, like Hero "done to death by slanderous tongues," would, it seems, in the opinion of Bracton,

[13] 2 Ex. D. 63.

A be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity, on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense—the repelling by violence, violence justified so far as it was necessary for the object, any illegal violence used towards oneself. If, says Bracton, the necessity be "evitabilis, et evadere posset absque occisione, tunc erit reus homicidii"—words which shew clearly that he is thinking of B physical danger from which *escape* may be possible, and that the "inevitabilis necessitas" of which he speaks as justifying homicide is a necessity of the same nature.

It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale. It is plain that in his view the necessity which justified homicide is that only which has always been C and is now considered a justification. "In all these cases of homicide by necessity," says he, "as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony" (1 Hale's Pleas of the Crown, p. 491). Again, he says that "the necessity which justifies homicide is of two kinds: (1) the necessity which is of a private nature; (2) the necessity which relates to the public justice and safety. The former is that necessity which obligeth a man D to his own defence and safeguard, and this takes in these inquiries:—(1.) What may be done for the safeguard of a man's own life;" and then follow three other heads not necessary to pursue. Then Lord Hale proceeds:—"As touching the first of these—viz., homicide in defence of a man's own life, which is usually styled se defendendo." It is not possible to use words more clear to shew that Lord Hale regarded the private E necessity which justified, and alone justified, the taking the life of another for the safeguard of one's own to be what is commonly called "self-defence." (Hale's Pleas of the Crown, i. 478.)

But if this could be even doubtful upon Lord Hale's words, Lord Hale himself has made it clear. For in the chapter in which he deals with the exemption created by compulsion or necessity he thus expresses himself:—F "If a man be desperately assaulted and in peril of death, and cannot otherwise escape unless, to satisfy his assailant's fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact, for he ought rather to die himself than kill an innocent; but if he cannot otherwise save his own life the law permits him in his own defence to kill the assailant, for by the violence of the assault, and the offence committed G upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector cum debito moderamine inculpatæ tutelæ." (Hale's Pleas of the Crown, vol. i. 51.)

But, further still, Lord Hale in the following chapter deals with the position asserted by the casuists, and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity, either of hunger or H clothing; "theft is no theft, or at least not punishable as theft, as some even of our own lawyers have asserted the same." "But," says Lord Hale, "I take it that here in England, that rule, at least by the laws of England, is false; and therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and animo furandi steal another man's goods, it is felony, and a crime by the laws of England punishable with death." (Hale, Pleas of the Crown, i. 54.) If, therefore, Lord Hale is clear—as he is—that extreme necessity of hunger

does not justify larceny, what would he have said to the doctrine that it justified murder? A

It is satisfactory to find that another great authority, second, probably, only to Lord Hale, speaks with the same unhesitating clearness on this matter. Sir Michael Foster, in the 3rd chapter of his Discourse on Homicide, deals with the subject of "homicide founded in necessity"; and the whole chapter implies, and is insensible unless it does imply, that in the view of Sir Michael Foster "necessity and self-defence" (which he defines as "opposing force to force even to the death") are convertible terms. B There is no hint, no trace, of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it.

In East's Pleas of the Crown (i. 271) the whole chapter on homicide by necessity is taken up with an elaborate discussion of the limits within which necessity in Sir Michael Foster's sense (given above) of self-defence C is a justification of or excuse for homicide. There is a short section at the end very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them, and the conclusion is left by Sir Edward East entirely undetermined.

What is true of Sir Edward East is true also of Mr. Serjeant Hawkins. The whole of his chapter on justifiable homicide assumes that the only D justifiable homicide of a private nature is the defence against force of a man's person, house, or goods. In the 26th section we find again the case of the two shipwrecked men and the single plank, with the significant expression from a careful writer, "*It is said* to be justifiable." So, too, Dalton c. 150, clearly considers necessity and self-defence in Sir Michael Foster's sense of that expression, to be convertible terms, though he prints E without comment Lord Bacon's instance of the two men on one plank as a quotation from Lord Bacon, adding nothing whatever to it of his own. And there is a remarkable passage at page 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him even in self-defence, "cuncta prius tentanda."

The passage in Staundforde, on which almost the whole of the dicta F we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable, and the example which he gives to illustrate his meaning is the very same which has just been cited from Dalton, shewing that the necessity he was speaking of was a physical necessity, and the self-defence a defence against physical violence. Russell G merely repeats the language of the old text-books, and adds no new authority, nor any fresh considerations.

Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by the commentator on Grotius and by Puffendorf has been discovered by a gentleman of the Bar, who communicated with my Brother Huddleston, to convey the authority (if it H conveys so much) of a single judge of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam, and is altogether, as authority in an English court, as unsatisfactory as possible. The American case cited by my Brother Stephen in his Digest, from Wharton on Homicide, in which it was decided, correctly indeed, that sailors had no right to throw

A passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my Brother Stephen says, be an authority satisfactory to a court in this country. The observations of Lord Mansfield in the case of *Rex v. Stratton and Others*,[14] striking and excellent as they are, were delivered in a political trial, where the question was whether a political necessity had arisen for deposing a B Governor of Madras. But they have little application to the case before us, which must be decided on very different considerations.

The one real authority of former time is Lord Bacon, who, in his commentary on the maxim, "necessitas inducit privilegium quoad jura privata," lays down the law as follows:—"Necessity carrieth a privilege in itself. Necessity is of three sorts—necessity of conservation of life, necessity C of obedience, and necessity of the act of God or of a stranger. First of conservation of life; if a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither se defendendo nor by misadventure, but justifiable." On this it is to be D observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat, it is said to be derived from the canonists. At any rate he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer; but it is permissible to much smaller men, relying upon principle and on the authority of others, E the equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true, but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day.

F There remains the authority of my Brother Stephen, who, both in his Digest and in his History of the Criminal Law, uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been necessary, we must with true deference have differed from him, but it is G satisfactory to know that we have, probably at least, arrived at no conclusion in which if he had been a member of the Court he would have been unable to agree. Neither are we in conflict with any opinion expressed upon the subject by the learned persons who formed the commission for preparing the Criminal Code. They say on this subject:—

"We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that H necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."

It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were in their judgment correct and exhaustive, and if not, in what way they should be

[14] 21 How. St. Tr. at p. 1223.

amended, but as it is we have, as they say, "to apply the principles of law to the circumstances of this particular case." A

Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances, an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country. Now it is admitted that the deliberate killing of this B unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity." But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are C not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of D shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead*; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any E absolute or unqualified necessity to preserve one's life. "Necesse est at eam, non at vivam," is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passage, in which the duty of dying for others has been laid down in glowing and F emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is G plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"—

> "So spake the Fiend, and with necessity,
> The tyrant's plea, excused his devilish deeds." * H

It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability

* Editor's note: see *Milton*, *Paradise Lost*, Book IV, lines 393–394.

A and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the B conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, C that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder.[15]

THE COURT then proceeded to pass sentence of death upon the prisoners.[16]

Solicitors for the Crown: The Solicitors for the Treasury.
D *Solicitors for the prisoners: Irvine & Hodges.*

A. P. S.

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[15] My brother Grove has furnished me with the following suggestion, too late to be embodied in the judgment but well worth preserving: "If the two accused men were justified in killing Parker, then if not rescued in time, two of the three survivors would be justified in killing the third, and of the two who remained the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving."—C.

[16] This sentence was afterwards commuted by the Crown to six months' imprisonment.

[IN THE COURT OF APPEAL]

CARLILL v. CARBOLIC SMOKE BALL COMPANY.

1892 Dec. 6, 7 — Lindley, Bowen and A. L. Smith, L.JJ.

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 100*l.* 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 100*l.* 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 newspapers, the following advertisement: "100*l.* 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. 1000*l.* 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, 10*s.*, post free. The ball can be refilled at a cost of 5*s.* 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 100*l.* 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

[1] [1892] 2 Q.B. 484.
[2] 4 B. & Ad. 621.

A 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 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 B 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 C 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 D 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 E 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 F Blackburn, in *Brogden v. Metropolitan Ry. Co.*, shews that merely doing the acts indicated is an acceptance of the proposal. It never was intended 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 G 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. Harding.*[9] *Williams v. Carwardine*[10] 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 H the event, it could have no effect, and the present case is within the

[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] Law Rep. 5 C.P. 561.
[10] 4 B. & Ad. 621.

language of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*[11] 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*,[12] 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 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 100*l.* 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.*[13] 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.*[14] the fact was ascertained by a public, not a secret act. The respondent relies on *Williams v. Carwardine*,[15] 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*;[16] and here there was no request. Then as to the

[11] 2 App. Cas. 666.
[12] 2 E. & B. 476.
[13] 2 App. Cas. 666, 692.
[14] 5 E. & B. 860.
[15] 4 B. & Ad. 621.
[16] 1 Sm. L. C. 9th ed. pp. 153, 157, 159.

A want of limitation as to time, it is conceded that the defendants cannot have meant to contract without some 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 B that there was no legal contract at all.

LINDLEY, L.J. [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 C 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 D to pay 100*l.* 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—"100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza 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 E 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: "1000*l.* 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 aid by the advertiser as proof F of his sincerity in the matter—that is, the sincerity of his promise to pay this 100*l.* 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 G 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 100*l.* 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*,[17] which has been followed by many other decisions upon H 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

[17] 4 B. & Ad. 621.

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.*[18]—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 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 100*l.* 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 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

[18] 2 App. Cas. 666, 691.

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 100*l.* will B 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, C 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 D 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 E advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing 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 F consideration for the promise.

We were pressed upon this point with the case of *Gerhard v. Bates*[19], 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, G 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 H 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,

[19] 2 E. & B. 476.

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, L.J. 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. 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 previously 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: "100*l.* 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

A 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 B 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 C 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 5*s*. 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 D carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be 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.

E Was it intended that the 100*l*. should, if the conditions were fulfilled, be paid? The advertisement says that 1000*l*. is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100*l*. 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 F promise 100*l*. 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.

G 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 H 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. 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.*[20] "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 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*,[21] and the very instructive judgment of Lord Blackburn in *Brogden v. Metropolitan Ry. Co.*,[22] 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

[20] Law Rep. 5 C. P. 561, 563.
[21] Law Rep. 7 Ch. 587.
[22] 2 App. Cas. 666, 691.

A 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 B 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.

C A further argument for the defendants was that this was a 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*[23] and Serjeant D Manning's note to *Fisher v. Pyne*,[24] 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*,[25] is this: "Any act of the plaintiff from which the defendant derives E 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 F 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 G 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.*[26] In *Gerhard v. Bates*, which arose upon demurrer, the point upon which the action failed was that the plaintiff did not allege that the promise was made to the class of which alone the plaintiff was a member, and that therefore there was no H 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

[23] 12 M. & W. 758.
[24] 1 M. & G. 265.
[25] 3 Scott, 238, 250.
[26] 2 E. & B. 476.

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 100*l*., 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 5*l*.," and he uses it, there is ample consideration for the promise.

A. L. SMITH, L.J. 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.*,[27] 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: "100*l*. reward will be paid 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 5*s*." 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 100*l*. 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 100*l*." 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, 1000*l*. 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 100*l*. 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

[27] 5 E. & B. 860.

A 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.

B 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

C 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.

D 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

E 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

F case in which actions on advertisements have been maintained, from the time of *Williams v. Carwardine*,[28] 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 it was nudum pactum. There are two considerations here. One is the consideration

G 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

H either of them.

Appeal dismissed.

Solicitors: J. Banks Pittman; Field & Roscoe.

H. C. J.

[28] 4 B. & Ad. 621.

[HOUSE OF LORDS]

M'ALISTER (OR DONOGHUE) (PAUPER) . . . APPELLANT

AND

STEVENSON . . . . . RESPONDENT

1932 May 26

Lord Buckmaster, Lord Atkin, Lord Tomlin, Lord Thankerton, and Lord Macmillan.

Negligence — Liability of Manufacturer to ultimate Consumer — Article of Food — Defect likely to cause Injury to Health

By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health:—

So *held*, by Lord Atkin, Lord Thankerton and Lord Macmillan; Lord Buckmaster and Lord Tomlin dissenting.

George v. Skivington (1869) L.R. 5 Ex. 1 approved.

Dicta of Brett M.R. in *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509–11 considered.

Mullen v. Barr & Co., Ld., and *M'Gowan v. Barr & Co., Ld.*, 1929 S.C. 461 overruled.

APPEAL against an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Moncrieff).

By an action brought in the Court of Session the appellant, who was a shop assistant, sought to recover damages from the respondent, who was a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. The appellant by her condescendence averred that the bottle of ginger-beer was purchased for the appellant by a friend in a café at Paisley, which was occupied by one Minchella; that the bottle was made of dark opaque glass and that the appellant had no reason to suspect that it contained anything but pure ginger-beer; that the said Minchella poured some of the ginger-beer out into a tumbler, and that the appellant drank some of the contents of the tumbler; that her friend was then proceeding to pour the remainder of the contents of the bottle into the tumbler when a snail, which was in a state of decomposition, floated out of the bottle; that as a result of the nauseating sight of the snail in such circumstances, and in consequence of the impurities in the ginger-beer which she had already consumed, the appellant suffered from shock and severe gastro-enteritis. The appellant further averred that the ginger-beer was manufactured by the respondent to be sold as a drink to the public (including the appellant); that it was bottled by the respondent and labelled by him with a label bearing his name; and that the bottles were thereafter sealed with a metal cap by the respondent. She further averred that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger-beer bottles, and that it was also his duty to provide an efficient system of inspection of

A the bottles before the ginger-beer was filled into them, and that he had failed in both these duties and had so caused the accident.

The respondent objected that these averments were irrelevant and insufficient to support the conclusions of the summons.

The Lord Ordinary held that the averments disclosed a good cause of action and allowed a proof.

B The Second Division by a majority (the Lord Justice-Clerk, Lord Ormidale, and Lord Anderson; Lord Hunter dissenting) recalled the interlocutor of the Lord Ordinary and dismissed the action.

1931. Dec. 10, 11. *George Morton K.C.* (with him *W. R. Milligan*) (both of the Scottish Bar) for the appellant. The facts averred by the appellant in her condescendence disclose a relevant cause of action. In C deciding this question against the appellant the Second Division felt themselves bound by their previous decision in *Mullen v. Barr & Co., Ld.*[1] It was there held that in determining the question of the liability of the manufacturer to the consumer there was no difference between the law of England and the law of Scotland—and this is not now disputed—and that the question fell to be determined according to the English authorities, and D the majority of the Court (Lord Hunter dissenting) were of opinion that in England there was a long line of authority opposed to the appellant's contention. The English authorities are not consistent, and the cases relied on by the Court of Session differed essentially in their facts from the present case. No case can be found where in circumstances similar to the present the Court has held that the manufacturer is under no liability to the consumer. The Court below has proceeded on the general principle E that in an ordinary case a manufacturer is under no duty to any one with whom he is not in any contractual relation. To this rule there are two well known exceptions: (1.) where the article is dangerous per se, and (2.) where the article is dangerous to the knowledge of the manufacturer, but the appellant submits that the duty owed by a manufacturer to members of the public is not capable of so strict a limitation, and that the question F whether a duty arises independently of contract depends upon the circumstances of each particular case. When a manufacturer puts upon a market an article intended for human consumption in a form which precludes the possibility of an examination of the article by the retailer or the consumer, he is liable to the consumer for not taking reasonable care to see that the article is not injurious to health. In the circumstances of this case the respondent owed a duty to the appellant to take care that the G ginger-beer which he manufactured, bottled, labelled and sealed (the conditions under which the ginger-beer was put upon the market being such that it was impossible for the consumer to examine the contents of the bottles), and which he invited the appellant to buy, contained nothing which would cause her injury: *George v. Skivington*;[2] and see *per* Brett M.R. in *Heaven v. Pender*[3] and *per* Lord Dunedin in *Dominion* H *Natural Gas Co. v. Collins & Perkins.*[4] *George v. Skivington* has not always been favourably commented on, but it has not been overruled, and it has been referred to by this House without disapproval: *Cavalier v. Pope.*[5] In

[1] 1929 S.C. 461.
[2] L.R. 5 Ex. 1.
[3] 11 Q.B.D. 503, 509 et seq.
[4] [1909] A.C. 640, 646.
[5] [1906] A.C. 428, 433.

the United States the law is laid down in the same way: *Thomas v. Winchester.*[6]

[He also referred to *Dixon v. Bell*;[7] *Langridge v. Levy*;[8] *Longmeid v. Holliday*;[9] *Bates v. Batey & Co., Ld.*;[10] *Weld-Blundell v. Stephens.*[11]]

W. G. Normand, Solicitor-General for Scotland (with him *J. L. Clyde* (of the Scottish Bar) and *T. Elder Jones* (of the English Bar)) for the respondent. In an ordinary case such as this the manufacturer owes no duty to the consumer apart from contract. Admittedly the case does not come within either of the recognized exceptions to the general rule, but it is sought to introduce into the law a third exception in this particular case—namely, the case of goods intended for human consumption sold to the public in a form in which investigation is impossible. The reason now put forward by the appellant was no part of Lord Hunter's dissent in the previous case; nor is there any hint of any such exception in any reported case. There is here no suggestion of a trap, and there are no averments to support it. It is said that people ought not to be allowed to put on the market food or drink which is deleterious, but is there any real distinction between articles of food or drink and any other article? In *Heaven v. Pender*[12] Brett M.R. states the principle of liability too widely, and in *Le Lievre v. Gould*[13] that principle is to a great extent whittled away by the Master of the Rolls himself and by A. L. Smith L.J. The true ground was that founded on by Cotton and Bowen L.JJ. in *Heaven v. Pender.* In *Blacker v. Lake & Elliot, Ld.*[14] both Hamilton and Lush JJ. treat *George v. Skivington*[15] as overruled. Hamilton J. states the principle to be that the breach of the defendant's contract with A. to use care and skill in the manufacture of an article does not per se give any cause of action to B. if he is injured by reason of the article proving defective, and he regards *George v. Skivington*, so far as it proceeds on duty to the ultimate user, as inconsistent with *Winterbottom v. Wright.*[16] [Counsel also referred to Pollock on Torts, 13th ed., pp. 570, 571, and Beven on Negligence, 4th ed., vol. i., p. 49.] In England the law has taken a definite direction, which tends away from the success of the appellant.

George Morton K.C. replied.

The House took time for consideration.

1932. May 26. [Lord Buckmaster, in a dissenting speech read by Lord Tomlin, said that although the principles of the common law were capable of application to meet new conditions not contemplated when the law was laid down, those principles could not be changed nor could additions be made to them because any particular meritorious case seemed outside their ambit. The common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration. The law books did not assist, so his Lordship turned to the decided cases to see if they supported the appellant's case. His Lordship

[6] (1852) 6 N.Y. 397.
[7] (1816) 5 M. & S. 198.
[8] (1837) 2 M. & W. 519; (1838) 4 M. & W. 337.
[9] (1851) 6 Ex. 761.
[10] [1913] 3 K.B. 351.
[11] [1920] A.C. 956, 985.
[12] 11 Q.B.D. 503.
[13] [1893] 1 Q.B. 491.
[14] (1912) 106 L.T. 533.
[15] L.R. 5 Ex. 1.
[16] (1842) 10 M. & W. 109.

referred to *Langridge v. Levy* (1837) 2 M. & W. 519; (1838) 4 M. & W. 337; *Winterbottom v. Wright* (1842) 10 M. & W. 109, 115; *Longmeid v. Holliday* (1851) 6 Ex. 761, 768 and *Blacker v. Lake & Elliot, Ld.* (1912) 106 L.T. 533, 536. The general principle was that a breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article did not of itself give any cause of action to B. when he was injured by reason of the article proving to be defective. From that general rule there were two well-known exceptions: (1) where the article was dangerous in itself; and (2) where the article, not in itself dangerous, was in fact dangerous by reason of some defect or for some other reason known to the manufacturer. No further modification of the rule had occurred until the case of *George v. Skivington* (1869) L.R. 5 Ex. 1 (a case about a noxious hairwash). Without that case, and the statement of Cleasby B. in *Francis v. Cockrell* (1870) L.R. 5 Q.B. 501, 515 and the dicta of Brett M.R. in *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509 et seq., the appellant would be destitute of authority. Few cases could have lived so dangerously and so long as *George v. Skivington*, which appeared to conflict with *Winterbottom v. Wright*; while *Francis v. Cockrell* had no bearing on the present case; and the dicta of Brett M.R. in *Heaven v. Pender* were not supported by authority. His Lordship also referred to *Le Lievre v. Gould* [1893] 1 Q.B. 491, *Earl v. Lubbock* [1905] 1 K.B. 253, *Bates v. Batey & Co. Ld.* [1913] 3 K.B. 351 (another ginger-beer case: the bottle exploded due to latent but discoverable defect, yet the manufacturers were held not liable to an injured consumer) and two American cases, *Thomas v. Winchester* (1852) 6 N.Y. 397 and *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382 (motor car regarded as falling within "dangerous article" exception). In his Lordship's view, the authorities were against the appellant's contention and, apart from authority, it was difficult to see how any common law proposition could be formulated to support her claim. In *Mullen v. Barr & Co., Ld.* 1929 S.C. 461, 479, "a case indistinguishable from the present excepting upon the ground that a mouse is not a snail," Lord Anderson had said it would be "little short of outrageous" to make a manufacturer responsible to members of the public for the condition of the contents of every bottle which issued from their works, for "they might be called on to meet claims of damages which they could not possibly investigate or answer." In agreeing with it, his Lordship found it hard to dissent from the emphatic nature of the language in which Lord Anderson's judgment was clothed. The present appeal should be dismissed.]

LORD ATKIN. My Lords, the sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises. The case has to be determined in accordance with Scots law; but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of

the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the laws of Scotland and of England are the same. I speak with little authority on this point, but my own research, such as it is, satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law; and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett M.R. in *Heaven v. Pender*,[17] in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to

[17] 11 Q.B.D. 503, 509.

A be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender*[18], as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould.*[19] Lord Esher says: "That case established that, B under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith L.J.: "The decision of *Heaven v. Pender* was founded upon the principle, that a duty to take due care did arise when C the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his D careless act. That this is the sense in which nearness of "proximity" was intended by Lord Esher is obvious from his own illustration in *Heaven v. Pender*[20] of the application of his doctrine to the sale of goods. "This" (i.e., the rule he has just formulated) "includes the case of goods, etc., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, E if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under F circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property." I draw particular G attention to the fact that Lord Esher emphasizes the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even of the person using, certainly of an intermediate person, may reasonably be interposed. With this necessary qualification of H proximate relationship as explained in *Le Lievre v. Gould*,[21] I think the judgment of Lord Esher expresses the law of England; without the qualification, I think the majority of the Court in *Heaven v. Pender*[22] were

[18] 11 Q.B.D. 503, 509.
[19] [1893] 1 Q.B. 491, 497, 504.
[20] 11 Q.B.D. 503, 510.
[21] [1893] 1 Q.B. 491.
[22] 11 Q.B.D. 503.

justified in thinking the principle was expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser—namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

A B C D E F

It will be found, I think, on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist. There are also dicta in such cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the Courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges.

G H

A In my opinion several decided cases support the view that in such a case as the present the manufacturer owes a duty to the consumer to be careful. A direct authority is *George v. Skivington.*[23] That was a decision on a demurrer to a declaration which averred that the defendant professed to sell a hairwash made by himself, and that the plaintiff Joseph George bought a bottle, to be used by his wife, the plaintiff Emma George, as the defendant then knew, and that the defendant had so negligently conducted B himself in preparing and selling the hairwash that it was unfit for use, whereby the female plaintiff was injured. Kelly C.B. said that there was no question of warranty, but whether the chemist was liable in an action on the case for unskilfulness and negligence in the manufacture of it. "Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the C compound was purchased." Pigott and Cleasby BB. put their judgments on the same ground. I venture to think that Cotton L.J., in *Heaven v. Pender*,[24] misinterprets Cleasby B.'s judgment in the reference to *Langridge v. Levy.*[25] Cleasby B. appears to me to make it plain that in his opinion the duty to take reasonable care can be substituted for the duty which existed in *Langridge v. Levy* not to defraud. It is worth noticing that *George v. Skivington* was referred to by Cleasby B. himself, sitting as a member of D the Court of Exchequer Chamber in *Francis v. Cockrell*,[26] and was recognized by him as based on an ordinary duty to take care. It was also affirmed by Brett M.R. in *Cunnington v. Great Northern Ry. Co.*,[27] decided on July 2 at a date between the argument and the judgment in *Heaven v. Pender*, though, as in that case the Court negatived any breach of duty, the expression of opinion is not authoritative. The existence of the duty E contended for is also supported by *Hawkins v. Smith*,[28] where a dock labourer in the employ of the dock company was injured by a defective sack which had been hired by the consignees from the defendant, who knew the use to which it was to be put, and had been provided by the consignees for the use of the dock company, who had been employed by them to unload the ship on the dock company's premises. The Divisional F Court, Day and Lawrance JJ., held the defendant liable for negligence. Similarly, in *Elliott v. Hall*,[29] the defendants, colliery owners, consigned coal to the plaintiff's employers, coal merchants, in a truck hired by the defendants from a wagon company. The plaintiff was injured in the course of unloading the coal by reason of the defective condition of the truck, and was held by a Divisional Court, Grove and A. L. Smith JJ., entitled to recover on the ground of the defendants' breach of duty to see that the G truck was not in a dangerous condition. It is to be noticed that in neither case was the defective chattel in the defendants' occupation, possession or control, or on their premises, while in the latter case it was not even their property. It is sometimes said that the liability in these cases depends upon an invitation by the defendant to the plaintiff to use his chattel. I do not find the decisions expressed to be based upon this ground, but rather upon H the knowledge that the plaintiff in the course of the contemplated use of the chattel would use it; and the supposed invitation appears to me to be

[23] L.R. 5 Ex. 1.
[24] 11 Q.B.D. 517.
[25] 4 M. & W. 337.
[26] L.R. 5 Q.B. 501, 515.
[27] (1883) 49 L.T. 392.
[28] (1896) 12 Times L.R. 532.
[29] (1885) 15 Q.B.D. 315.

in many cases a fiction, and merely a form of expressing the direct relation between supplier and user which gives rise to the duty to take care. A very recent case which has the authority of this House is *Oliver v. Saddler & Co.*[30] In that case a firm of stevedores employed to unload a cargo of maize in bags provided the rope slings by which the cargo was raised to the ship's deck by their own men using the ship's tackle, and then transported to the dockside by the shore porters, of whom the plaintiff was one. The porters relied on examination by the stevedores and had themselves no opportunity of examination. In these circumstances this House, reversing the decision of the First Division, held that there was a duty owed by the stevedore company to the porters to see that the slings were fit for use, and restored the judgment of the Lord Ordinary, Lord Morison, in favour of the pursuer. I find no trace of the doctrine of invitation in the opinions expressed in this House, of which mine was one: the decision was based upon the fact that the direct relations established, especially the circumstance that the injured porter had no opportunity of independent examination, gave rise to a duty to be careful.

I should not omit in this review of cases the decision in *Grote v. Chester and Holyhead Ry.*[31] That was an action on the case in which it was alleged that the defendants had constructed a bridge over the Dee on their railway and had licensed the use of the bridge to the Shrewsbury and Chester Railway to carry passengers over it, and had so negligently constructed the bridge that the plaintiff, a passenger of the last named railway, had been injured by the falling of the bridge. At the trial before Vaughan Williams J. the judge had directed the jury that the plaintiff was entitled to recover if the bridge was not constructed with reasonable care and skill. On a motion for a new trial the Attorney-General (Sir John Jervis) contended that there was misdirection, for the defendants were only liable for negligence, and the jury might have understood that there was an absolute liability. The Court of Exchequer, after consulting the trial judge as to his direction, refused the rule. This case is said by Kelly C.B., in *Francis v. Cockrell*[32] in the Exchequer Chamber, to have been decided upon an implied contract with every person lawfully using the bridge that it was reasonably fit for the purpose. I can find no trace of such a ground in the pleading or in the argument or judgment. It is true that the defendants were the owners and occupiers of the bridge. The law as to the liability to invitees and licensees had not then been developed. The case is interesting, because it is a simple action on the case for negligence, and the Court upheld the duty to persons using the bridge to take reasonable care that the bridge was safe.

It now becomes necessary to consider the cases which have been referred to in the Courts below as laying down the proposition that no duty to take care is owed to the consumer in such a case as this.

In *Dixon v. Bell*,[33] the defendant had left a loaded gun at his lodgings and sent his servant, a mulatto girl aged about thirteen or fourteen, for the gun, asking the landlord to remove the priming and give it her. The landlord did remove the priming and gave it to the girl, who later levelled it at the plaintiff's small son, drew the trigger and injured the boy. The action was in case for negligently entrusting the young servant with the gun. The jury at the trial before Lord Ellenborough had returned a verdict

[30] [1929] A.C. 584.
[31] (1848) 2 Ex. 251.
[32] L.R. 5 Q.B. 505.
[33] 5 M. & S. 198.

for the plaintiff. A motion by Sir William Garrow (Attorney-General) for a new trial was dismissed by the Court, Lord Ellenborough and Bayley J., the former remarking that it was incumbent on the defendant, who by charging the gun had made it capable of doing mischief, to render it safe and innoxious.

In *Langridge v. Levy*[34] the action was in case, and the declaration alleged that the defendant, by falsely and fraudulently warranting a gun to have been made by Nock and to be a good, safe, and secure gun, sold the gun to the plaintiff's father for the use of himself and his son, and that one of his sons, confiding in the warranty, used the gun, which burst and injured him. Plea not guilty and no warranty as alleged. The report is not very satisfactory. No evidence is reported of any warranty or statement except that the gun was an elegant twist gun by Nock. The judge left to the jury whether the defendant had warranted the gun to be by Nock and to be safe; whether it was in fact unsafe; and whether the defendant warranted it to be safe knowing that it was not so. The jury returned a general verdict for the plaintiff. It appears to have been argued that the plaintiff could recover wherever there is a breach of duty imposed on the defendant by contract or otherwise, and the plaintiff is injured by reason of its breach; by this is meant apparently that the duty need not be owed to the plaintiff, but that he can take advantage of the breach of a duty owed to a third party. This contention was negatived by the Court, who held, however, that the plaintiff could recover if a representation known to be false was made to a third person with the intention that a chattel should be used by the plaintiff, even though it does not appear that the defendant intended the false representation to be communicated to him; see *per* Parke B.[35] The same view was adopted by the Exchequer Chamber, the user by the plaintiff being treated by the Court as one of the acts contemplated by the fraudulent defendant. It is unnecessary to consider whether the proposition can be supported in its widest form. It is sufficient to say that the case was based, as I think, in the pleading, and certainly in the judgment, on the ground of fraud, and it appears to add nothing of value positively or negatively to the present discussion. *Winterbottom v. Wright*[36] was a case decided on a demurrer. The plaintiff had demurred to two of the pleas, as to which there was no decision by the Court; but on the hearing of the plaintiff's demurrer the Court, in accordance with the practice of the day, were entitled to consider the whole record, including the declaration, and, coming to the conclusion that this declaration disclosed no cause of action, gave judgment for the defendant: see Sutton's Personal Actions at Common Law, p. 113. The advantage of the procedure is that we are in a position to know the precise issue at law which arose for determination. The declaration was in case, and alleged that the defendant had contracted with the Postmaster-General to provide the mail-coach to convey mails from Hartford to Holyhead and to keep the mails in safe condition; that Atkinson and others, with notice of the said contract, had contracted with the Postmaster-General to convey the road mail-coach from Hartford to Holyhead; and that the plaintiff, relying on the said first contract, hired himself to Atkinson to drive the mail-coach; but that the defendant so negligently conducted himself and so utterly disregarded his aforesaid contract that the defendant, having the means of knowing, and well

[34] 2 M. & W. 519; 4 M. & W. 337.
[35] 2 M. & W. 531.
[36] 10 M. & W. 109.

knowing, all the aforesaid premises, the mail-coach, being in a dangerous condition, owing to certain latent defects and to no other cause, gave way, whereby the plaintiff was thrown from his seat and injured. It is to be observed that no negligence apart from breach of contract was alleged—in other words, no duty was alleged other than the duty arising out of the contract; it is not stated that the defendant knew, or ought to have known, of the latent defect. The argument of the defendant was that, on the face of the declaration, the wrong arose merely out of the breach of a contract, and that only a party to the contract could sue. The Court of Exchequer adopted that view, as clearly appears from the judgments of Alderson and Rolfe BB. There are dicta by Lord Abinger which are too wide as to an action of negligence being confined to cases of breach of a public duty. The actual decision appears to have been manifestly right; no duty to the plaintiff arose out of the contract; and the duty of the defendant under the contract with the Postmaster-General to put the coach in good repair could not have involved such direct relations with the servant of the persons whom the Postmaster-General employed to drive the coach as would give rise to a duty of care owed to such servant. We now come to *Longmeid v. Holliday*,[37] the dicta in which have had considerable effect in subsequent decisions. In that case the declaration in case alleged that the plaintiff, Frederick Longmeid, had bought from the defendant, the maker and seller of "the Holliday lamp," a lamp to be used by himself and his wife Eliza in the plaintiff's shop; that the defendant induced the sale by the false and fraudulent warranty that the lamp was reasonably fit for the purpose; and that the plaintiff Eliza, confiding in the said warranty, lighted the lamp, which exploded, whereby she was injured. It is perhaps not an extravagant guess to suppose that the plaintiffs' pleader had read the case of *Langridge v. Levy*.[38] The jury found all the facts for the plaintiffs except the allegation of fraud; they were not satisfied that the defendant knew of the defects. The plaintiff Frederick had already recovered damages on the contract of sale for breach of the implied warranty of fitness. The declaration made no averment of negligence. Verdict was entered at the trial by Martin B. for the plaintiff, but with liberty to the defendant to move to enter the verdict for him. A rule having been obtained, plaintiff's counsel sought to support the verdict on the ground that this was not an action for a breach of duty arising solely from contract, but for an injury resulting from conduct amounting to fraud. Parke B., who delivered the judgment of the Court, held that, fraud having been negatived, the action could not be maintained on that ground. He then went on to discuss cases in which a third person not a party to a contract may sue for damages sustained if it is broken. After dealing with the negligence of a surgeon, or of a carrier, or of a firm in breach of contract committing a nuisance on a highway, he deals with the case where any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun, and refers to *Dixon v. Bell*,[39] though what this case has to do with contract it is difficult to see. He then goes on: "But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that, if a machine not in its nature dangerous—a carriage for instance—but which might become so by a latent defect entirely unknown although discoverable

[37] 6 Ex. 761.
[38] 2 M. & W. 519; 4 M. & W. 337.
[39] 5 M. & S. 198.

A by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." It is worth noticing how guarded this dictum is. The case put is a machine such as a carriage, not in its nature dangerous, which might become dangerous by a latent defect entirely unknown. Then there is the saving, "although discoverable by the exercise of ordinary care," discoverable by B whom is not said; it may include the person to whom the innocent machine is "lent or given." Then the dictum is confined to machines "lent or given" (a later sentence makes it clear that a distinction is intended between these words and "delivered to the purchaser under the contract of sale"), and the manufacturer is introduced for the first time, "even by the person who manufactured it." I do not for a moment believe that Parke B. had in his C mind such a case as a loaf negligently mixed with poison by the baker which poisoned a purchaser's family. He is, in my opinion, confining his remarks primarily to cases where a person is seeking to rely upon a duty of care which arises out of a contract with a third party, and has never even discussed the case of a manufacturer negligently causing an article to be dangerous and selling it in that condition whether with immediate or D mediate effect upon the consumer. It is noteworthy that he only refers to "letting or giving" chattels, operations known to the law, where the special relations thereby created have a particular bearing on the existence or non-existence of a duty to take care. Next in this chain of authority come *George v. Skivington*[40] and *Heaven v. Pender*,[41] which I have already discussed. The next case is *Earl v. Lubbock.*[42] The plaintiff sued in the county court for personal injuries due to the negligence of the defendant. E The plaintiff was a driver in the employ of a firm who owned vans. The defendant, a master wheelwright, had contracted with the firm to keep their vans in good and substantial repair. The allegation of negligence was that the defendant's servant had negligently failed to inspect and repair a defective wheel, and had negligently repaired the wheel. The learned county court judge had held that the defendant owed no duty to the plaintiff, and F the Divisional Court (Lord Alverstone L.C.J., Wills and Kennedy JJ.) and the Court of Appeal agreed with him. The Master of the Rolls, Sir R. Henn Collins, said that the case was concluded by *Winterbottom v. Wright.*[43] In other words, he must have treated the duty as alleged to arise only from a breach of contract; for, as has been pointed out, that was the only allegation in *Winterbottom v. Wright*, negligence apart from contract being neither averred nor proved. It is true that he cites with approval the dicta G of Lord Abinger in that case; but obviously I think his approval must be limited to those dicta so far as they related to the particular facts before the Court of Appeal, and to cases where, as Lord Abinger says, the law permits a contract to be turned into a tort. Stirling L.J., it is true, said that to succeed the plaintiff must bring his case within the proposition of the majority in *Heaven v. Pender*, that any one who, without due warning, H supplies to others for use an instrument which to his knowledge is in such a condition as to cause danger is liable for injury. I venture to think that the Lord Justice is mistakenly treating a proposition which applies one test of a duty as though it afforded the only criterion.

[40] L.R. 5 Ex. 1.
[41] 11 Q.B.D. 503.
[42] [1905] 1 K.B. 253.
[43] 10 M. & W. 109.

Mathew L.J. appears to me to put the case on its proper footing when he says[44] the argument of the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that any one in this employment had a cause of action against the defendant. "It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on." I entirely agree. I have no doubt that in that case the plaintiff failed to show that the repairer owed any duty to him. The question of law in that case seems very different from that raised in the present case. The case of *Blacker v. Lake & Elliot, Ld.*,[45] approaches more nearly the facts of this case. I have read and re-read it, having unfeigned respect for the authority of the two learned judges, Hamilton and Lush JJ., who decided it, and I am bound to say I have found difficulty in formulating the precise grounds upon which the judgment was given. The plaintiff had been injured by the bursting of a brazing lamp which he had bought from a shopkeeper who had bought it from the manufacturer, the defendant. The plaintiff had used the lamp for twelve months before the accident. The case was tried in the county court before that excellent lawyer the late Sir Howland Roberts. That learned judge had directed the jury that the plaintiff could succeed if the defendants had put upon the market a lamp not fit for use in the sense that a person working it with reasonable care would incur a risk which a properly constructed lamp would not impose upon him. The jury found that the lamp was defective by reason of an improper system of making an essential joint between the container and the vaporizer; that the defendants did not know that it was dangerous, but ought as reasonable men to have known it. Hamilton J. seems to have thought that there was no evidence of negligence in this respect. Lush J. expressly says so and implies—"I also think"—that Hamilton J. so thought. If so, the case resolves itself into a series of important dicta. Hamilton J. says[46] that it has been decided in authorities from *Winterbottom v. Wright*[47] to *Earl v. Lubbock*[48] that the breach of the defendants' contract with A., to use care and skill in and about the manufacture or repair of an article, does not itself give any cause of action to B. when injured by the article proving to be defective in breach of that contract. He then goes on to say, how is the case of the plaintiffs any better when there is no contract proved of which there could be a breach. I think, with respect, that this saying does not give sufficient weight to the actual issues raised by the pleadings on which alone the older cases are an authority. If the issue raised was an alleged duty created by contract, it would have been irrelevant to consider duties created without reference to contract; and contract cases cease to be authorities for duties alleged to exist beyond or without contract. Moreover, it is a mistake to describe the authorities as dealing with the failure of care or skill in the manufacture of goods, as contrasted with repair. The only manufacturing case was *Longmeid v. Holliday*,[49] where negligence was not alleged. Hamilton J. recognizes that *George v. Skivington*[50] was a decision which, if it remained an authority, bound him. He says that, without presuming to

[44] [1905] 1 K.B. 259.
[45] 106 L.T. 533.
[46] 106 L.T. 536.
[47] 10 M. & W. 109.
[48] [1905] 1 K.B. 253.
[49] 6 Ex. 761.
[50] L.R. 5 Ex. 1.

A say it was wrong, he cannot follow it, because it is in conflict with *Winterbottom v. Wright.*[51] I find this very difficult to understand, for *George v. Skivington*[52] was based upon a duty in the manufacturer to take care independently of contract, while *Winterbottom v. Wright* was decided on demurrer in a case where the alleged duty was based solely on breach of a contractual duty to keep in repair, and no negligence was alleged. Lush J. says in terms that there are only three classes of cases in which a
B stranger to a contract can sue for injury by a defective chattel: one is that of fraud; the second of articles dangerous or noxious in themselves, where the duty is only to warn; the third of public nuisance. He does not bring the cases represented by *Elliott v. Hall*[53] (the defective coal wagon) within his classes at all. He says they belong to a totally different class, "where the control of premises or the management of a dangerous thing upon
C premises creates a duty." I have already pointed out that this distinction is unfounded in fact, for in *Elliott v. Hall*, as in *Hawkins v. Smith*[54] (the defective sack), the defendant exercised no control over the article and the accident did not occur on his premises. With all respect, I think that the judgments in the case err by seeking to confine the law to rigid and exclusive categories, and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed to
D those who will be immediately injured by lack of care. The last case I need refer to is *Bates v. Batey & Co., Ld.*,[55] where manufacturers of ginger-beer were sued by a plaintiff who had been injured by the bursting of a bottle of ginger-beer bought from a shopkeeper who had obtained it from the manufacturers. The manufacturers had bought the actual bottle from its maker, but were found by the jury to have been negligent in not taking
E proper means to discover whether the bottle was defective or not. Horridge J. found that a bottle of ginger-beer was not dangerous in itself, but this defective bottle was in fact dangerous; but, as the defendants did not know that it was dangerous, they were not liable, though by the exercise of reasonable care they could have discovered the defect. This case differs from the present only by reason of the fact that it was not the manufacturers of the ginger-beer who caused the defect in the bottle; but,
F on the assumption that the jury were right in finding a lack of reasonable care in not examining the bottle, I should have come to the conclusion that, as the manufacturers must have contemplated the bottle being handled immediately by the consumer, they owed a duty to him to take care that he should not be injured externally by explosion, just as I think they owed a duty to him to take care that he should not be injured
G internally by poison or other noxious thing. I do not find it necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton L.J. in *Hodge & Sons v. Anglo-*
H *American Oil Co.*,[56] a case which was ultimately decided on a question of fact. "Personally, I do not understand the difference between a thing

[51] 10 M. & W. 109.
[52] L.R. 5 Ex. 1
[53] 15 Q.B.D. 315.
[54] 12 Times L.R. 532.
[55] [1913] 3 K.B. 351.
[56] (1922) 12 Ll.L.Rep. 183, 187.

dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf." The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. In the *Dominion Natural Gas Co., Ld. v. Collins and Perkins*[57] the appellants had installed a gas apparatus and were supplying natural gas on the premises of a railway company. They had installed a regulator to control the pressure and their men negligently made an escape-valve discharge into the building instead of into the open air. The railway workmen—the plaintiffs—were injured by an explosion in the premises. The defendants were held liable. Lord Dunedin, in giving the judgment of the Judicial Committee (consisting of himself, Lord Macnaghten, Lord Collins, and Sir Arthur Wilson), after stating that there was no relation of contract between the plaintiffs and the defendants, proceeded: "There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity." This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved; but clearly in the class of things enumerated there is a special duty to take precautions. This is the very opposite of creating a special category in which alone the duty exists. I may add, though it obviously would make no difference in the creation of a duty, that the installation of an apparatus to be used for gas perhaps more closely resembles the manufacture of a gun than a dealing with a loaded gun. In both cases the actual work is innocuous; it is only when the gun is loaded or the apparatus charged with gas that the danger arises. I do not think it necessary to consider the obligation of a person who entrusts to a carrier goods which are dangerous or which he ought to know are dangerous. As far as the direct obligation of the consignor to the carrier is concerned, it has been put upon an implied warranty: *Brass v. Maitland*;[58] but it is also a duty owed independently of contract, e.g., to the carrier's servant: *Farrant v. Barnes.*[59] So far as the cases afford an analogy they seem to support the proposition now asserted. I need only mention to distinguish two cases in this House which are referred to in some of the cases which I have reviewed. *Caledonian Ry. Co. v. Mulholland or Warwick*,[60] in which the appellant company were held not liable for injuries caused by a defective brake on a coal wagon conveyed by the railway company to a point in the transit where their contract ended, and where the wagons were taken over for haulage for the last part of the journey by a second railway

A B C D E F G H

[57] [1909] A.C. 640, 646.
[58] (1856) 6 E. & B. 470.
[59] (1862) 11 C.B.(N.S.) 553, 563.
[60] [1898] A.C. 216.

company, on which part the accident happened. It was held that the first railway company were under no duty to the injured workmen to examine the wagon for defects at the end of their contractual haulage. There was ample opportunity for inspection by the second railway company. The relations were not proximate. In the second (*Cavalier v. Pope*[61]), the wife of the tenant of a house let unfurnished sought to recover from the landlord damages for personal injuries arising from the non-repair of the house, on the ground that the landlord had contracted with her husband to repair the house. It was held that the wife was not a party to the contract, and that the well known absence of any duty in respect of the letting an unfurnished house prevented her from relying on any cause of action for negligence.

In the most recent case (*Bottomley v. Bannister*[62]), an action under Lord Campbell's Act, the deceased man, the father of the plaintiff, had taken an unfurnished house from the defendants, who had installed a gas boiler with a special gas-burner which if properly regulated required no flue. The deceased and his wife were killed by fumes from the apparatus. The case was determined on the gound that the apparatus was part of the realty and that the landlord did not know of the danger; but there is a discussion of the case on the supposition that it was a chattel. Greer L.J. states with truth that it is not easy to reconcile all the authorities, and that there is no authority binding on the Court of Appeal that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. When the danger is in fact occasioned by his own lack of care, then in cases of a proximate relationship the present case will, I trust, supply the deficiency.

It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of Cardozo J. in *MacPherson v. Buick Motor Co.* in the New York Court of Appeals,[63] in which he states the principles of the law as I should desire to state them, and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise, prevented the relation between manufacturer and the user of the car being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.

My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate

[61] [1906] A.C. 428.
[62] [1932] 1 K.B. 458; (1932) 101 L.J.(K.B.) 46, 54.
[63] 217 N.Y. 382.

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.

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

[LORD TOMLIN gave a short dissenting speech, agreeing with the views of Lord Buckmaster and emphasising the extent to which *Winterbottom v. Wright*, 10 M. & W. 109 was directly against the appellant. LORD THANKERTON and LORD MACMILLAN both gave speeches concurring with that of Lord Atkin.]

Interlocutor of the Second Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondent to pay to the appellant the costs of the action in the Inner House and also the costs incurred by her in respect of the appeal to this House, such last mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.
Lords' Journals, May 26, 1932.

Agents for the appellant: *Horner & Horner, for W. G. Leechman & Co., Glasgow and Edinburgh.*

Agents for the respondent: *Lawrence Jones & Co., for Niven, Macniven & Co., Glasgow, and Macpherson & Mackay, W.S., Edinburgh.*

[1935] A.C. 462

A [HOUSE OF LORDS]

WOOLMINGTON . . . . . APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS . . RESPONDENT

B 1935 April 5; May 23. Viscount Sankey L.C., Lord Hewart L.C.J., Lord Atkin, Lord Tomlin, and Lord Wright.

Criminal Law — Murder — Onus of Proof — Accident — Unlawful Intention — Direction to the Jury — Reasonable Doubt of Guilt — Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4.

C In a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death and malice has been given, the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his D explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

Statement of the Law in Foster's Crown Law (1762), p. 255, and summing up of Tindal C.J. in *Rex v. Greenacre* (1837) 8 C. & P. 35 disapproved.

Order of the Court of Criminal Appeal reversed.

APPEAL from an order of the Court of Criminal Appeal refusing leave E to Reginald Woolmington, the appellant, to appeal against his conviction of the wilful murder of Violet Kathleen Woolmington, who was his wife.

The appellant was convicted on February 14, 1935, at Bristol Assizes before Swift J. and a jury. The appellant and his wife were married on August 25, 1934. He was a farm labourer and bore a good character. His age was twenty-one and a half years, and his wife was four years younger. F They lived at Castleton, near Sherborne, on the farm of one Cheeseman, the appellant's employer. On November 22, 1934, the appellant's wife left him and went to live with her mother, Lilian Smith, a widow, at 24 Newtown, Milborne Port. The appellant wanted her to go back to him and made efforts to induce her to go back, but she would not.

Next door to Mrs. Smith lived a Mrs. Brine, a sister of Mrs. Smith and aunt of the deceased woman. On the morning of December 10, 1934, G Mrs. Brine, who was in the back yard of No. 25, heard the appellant's voice saying: "Are you coming back or not?" and "Where's your mother?" Then she heard the back door of No. 24 slam, and then the report of a gun. She looked out of her front window, and saw the appellant. She called to him; he made no reply, but mounted his bicycle and rode away. She went into No. 24, and found her niece lying on the mat. She had been H shot through the heart.

The appellant gave evidence to the following effect: After a sleepless night on December 9–10 he thought he might frighten his wife into obedience by threatening to shoot himself. On December 10 he went to the farm till 8.20 a.m.; came home to have his breakfast; then went back to the farm, and took a gun belonging to Mr. Cheeseman, which lay on a shelf in a barn. Near the gun was a box containing two cartridges. With a fret-saw belonging to his father he sawed off part of the barrels and threw

that part and the saw into a brook, and loaded the gun with the two cartridges. Then he put the gun under his overcoat in a pocket used for carrying rabbits, and returned home. There he attached to the gun some flex for carrying electric current, and with this he suspended the gun from his right shoulder and under his overcoat; and so equipped he rode on his bicycle to Mrs. Brine's house. There he tapped at the front door; his wife opened it; she was washing clothes in the kitchen. They went into the back room. He said: "Are you coming back or not, Vi?" but got no answer. His wife shut the back door, and they went into the front room. His wife said she would not go back, but had decided to go into service. Then he said, if she would not come back to him he would shoot himself; and, to explain how he meant to do this, and to show her the gun with which he meant to do it, he unbuttoned his overcoat, and brought the gun across his waist. The gun went off; he did not know it was pointing at his wife. She fell to the ground. He did not know what to do. He went out of the house and to his own home. There he saw his mother and told her that he had been up and shot his wife. He threw the gun on a bench in the outhouse and rode to Mr. Cheeseman and said to him: "I shall not be coming to work any more, as I have shot my wife."

A note was found in the pocket of the appellant's coat. It was in these terms:—

> "Good bye all.
>
> "It is agonies to carry on any longer. I have kept true hoping she would return this is the only way out. They ruined me and I'll have my revenge. May God forgive me for doing this but it is the Best thing. Ask Jess to call for the money paid on motor bike (Wed.). Her mother is no good on this earth but have no more cartridges only 2 one for her and one for me. I am of a sound mind now. Forgive me for all trouble caused
>
> "Good bye
>
> "ALL
>
> "*I love Violet with all my heart*
>
> Reg."

The appellant was cross-examined about the date when this note was written, whether it was before or after the death of his wife. He persisted in his statement that it was written after the death, and gave his explanation of its contents.

He said that after having written it he went downstairs and waited for the police; he intended to shoot himself; he went outside and met his father in the lane. He told his father he was going to shoot himself, but his father persuaded him not to. Then the policeman arrived and took him to the police station. When he was charged, he said: "I want to say nothing, except I done it, and they can do what they like. It was jealousy I suppose. Her mother enticed her away from me. I done all I could to get her back, that's all."

The appellant was first tried at Taunton on January 23, 1935, before Finlay J. and a jury. After considering their verdict for an hour and twenty-five minutes that jury disagreed.

At the trial out of which the present appeal arises Swift J. in his summing-up gave the following direction to the jury: "A charge is made against Reginald Woolmington, the prisoner at the bar, of wilful murder. It is said that on the morning of December 10, about half-past nine, he murdered his wife. That she died whilst he was in that house you will, I

should think, have little doubt. It is a matter entirely for you. If you accept his evidence, you will have little doubt that she died in consequence of a gun-shot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, unless the contrary appeareth.'[1] That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."

Then, after reviewing and commenting upon the evidence, the learned judge added these words: "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case, which alleviate the crime so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident."

The jury, after considering their verdict for an hour and nine minutes, found the appellant guilty of wilful murder.

The appellant applied to the Court of Criminal Appeal for leave to appeal against his conviction, but that Court, as stated above, refused the application.

The Attorney-General having certified that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that, in his opinion, it was desirable in the public interest that a further appeal should be brought, the present appeal was brought before this House.

April 4. *T. J. O'Connor K.C.* and *J. D. Casswell* for the appellant. In delivering the judgment of the Court of Criminal Appeal, Avory J. said: "The point, and really the only point, of complaint as regards this summing-up is that the learned judge did not anywhere use the expression that the jury should acquit the accused altogether, or convict him only of manslaughter, if they entertained any reasonable doubt about the truth of his explanation of how his wife came by her death. It may be that it would have been better if the learned judge had in those few words said to the jury that if they entertained reasonable doubt whether they could accept his explanation, they should either acquit him altogether or convict him of manslaughter only."

[1] Foster's Crown Law (1762), p. 255.

This is precisely the exception which the appellant takes to the summing-up of Swift J.; and the complaint which he makes against the order of the Court of Criminal Appeal is that the learned judges did not take a more serious view of the omission of the trial judge to make it quite clear that the onus still lay upon the prosecution. If at the end of a trial for murder a reasonable doubt remains in the minds of the jury whether the crime has been committed, it is their duty to acquit. However the matter may have been regarded in former years, at the present time the Criminal Law rests on the foundation that, apart from statutory enactment to the contrary, the prosecution must prove the guilt of the prisoner; otherwise he must be acquitted. Earlier authorities, such as Sir Michael Foster in the Introduction to the Discourse of Homicide in that learned judge's work on Crown Law;[2] *Mackalley's* case;[3] *Rex v. Legg*;[4] *Rex v. Oneby*;[5] East, Pleas of the Crown;[6] *Rex v. Greenacre*;[7] and Blackstone, Commentaries,[8] are concerned primarily with the definition of homicide and malice. Sir Michael Foster's description of murder is repeated in Archbold's Criminal Pleading and Evidence[9] and Russell on Crimes.[10] The proper direction to the jury is that which was given by Finlay J. at the former trial. That learned judge said: "The case for the prosecution is deliberate shooting. The defence is, Not Guilty of murder. They" (the prosecution) "prove the killing, and in the absence of explanation that is murder. The defence say 'Excusable, because accidental.' Consider whether you entertain the slightest doubt that this was a deliberate killing. If you have no doubt, it is your duty to convict. . . . If the result of a dispassionate survey is to leave a reasonable doubt in your minds, then your duty as well as your pleasure is to acquit." It is for the prosecution to satisfy the jury on all the evidence that the prisoner is not an innocent man, but a guilty man. They must take the whole of the evidence into consideration and then it is not for the prisoner to say: "My explanation is such that it must satisfy you." It is enough for him if he says: "This is my explanation," and if the jury on considering it are left in a reasonable doubt, then it is their duty to acquit the prisoner. "Where, a prima facie case having been made against him, the defendant offers an explanation, the jury must be directed that the onus of proof of guilt is still on the prosecution, and that, if on the whole evidence they are in doubt, they should acquit": Roscoe, Criminal Evidence.[11] This is the result of numerous decisions: *Rex v. Stoddart*;[12] *Rex v. Davies*;[13] *Rex v. Abramovitch*;[14] *Rex v. Aubrey*;[15] *Rex v. Grinberg*;[16] *Rex v. Sanders*;[17] *Lawrence v. The King.*[18]

A B C D E F G H

[2] (1762) Clarendon Press, p. 255.
[3] (1611) 9 Co.Rep. 65 b.
[4] (1674) Kelyng, 27.
[5] (1727) 2 Ld.Raym. 1484, 1493.
[6] (1803), p. 224.
[7] 8 C. & P. 35, 42.
[8] Book IV., c. 14.
[9] 29th Ed. (1934), p. 873.
[10] 8th Ed. (1923), Vol. 1, p. 615.
[11] 15th Ed. (1928), p. 300.
[12] (1909) 2 Cr.App.R. 217, 244.
[13] (1913) 29 Times L.R. 350; 8 Cr.App.R. 211.
[14] (1914) 31 Times L.R. 88.
[15] (1915) 11 Cr.App.R. 182.
[16] (1917) 33 Times L.R. 428.
[17] (1919) 14 Cr.App.R. 11.
[18] [1933] A.C. 699, 706.

A [The following cases were also referred to: *Rex v. Sturgess*;[19] *Rex v. Davies*;[20] *Rex v. Hopper*;[21] *Rex v. Brain.*[22]]

April 5. *J. G. Trapnell K.C.* and *Reginald Knight* for the respondent. The killing of any human creature is homicide: Blackstone, Commentaries.[23] Felonious homicide is the killing of a human creature without justification or excuse.[24] Manslaughter is the unlawful killing of
B another without malice either express or implied.[25] "When a man of sound memory, and of the age of discretion, unlawfully killeth . . . any reasonable creature in rerum natura under the king's peace, with malice forethought, either expressed by the party, or implied by law"[26] this is murder. Then comes the question of proving the commission of the crime. The Crown must prove that the prisoner killed the man. The prisoner
C knows how he did it; formerly he could not give evidence, but he still knew. The dead man knew, but cannot say. In the absence of evidence of others, the Court must needs resort to inference. It considers how the death wound was inflicted; by a gun, or a knife, or a hammer or other lethal weapon. Such facts supply evidence of malice prepense. When all the knowledge is in the mind of the accused, it is most reasonable that he should state, or his advocate should suggest, how the death occurred. It is
D not necessary to press the point that, in the absence of other available evidence, killing is per se prima facie evidence of malice, because in the present case death was inflicted by a lethal weapon; but even so, one cannot with a light heart dismiss the statement of so high an authority as Sir Michael Foster,[27] followed in East;[28] Blackstone, Commentaries;[29] and repeated in Archbold, Criminal Pleading and Evidence,[30] and Halsbury,
E Laws of England.[31] Moreover, the appellant's own explanation, that he intended to frighten his wife into obedience by threatening to shoot himself, and showing her the gun which he meant to use, discloses an unlawful intention and is sufficient evidence of malice aforethought.

The additional facts of the note found in the pocket of his coat, and the words: "May God forgive me for doing this but it is the best thing. . . .
F Her mother is no good . . . but I have no more cartridges only 2 one for her and one for me," show first, that the note was written before the deed, and secondly that he intended to shoot his wife and himself and that, if he had had a third cartridge, he would have used it also. Those facts together show that he went to the house with a malicious intention. If in pursuing a malicious intention a man, even by accident, kills another person, that is murder.

G In that view the case is a proper one for the application of s. 4 of the Criminal Appeal Act, 1907.

Counsel was not called on in reply.

[19] (1913) 9 Cr.App.R. 120.
[20] (1913) 29 Times L.R. 350; 8 Cr.App.R. 211.
[21] (1915) 11 Cr.App.R. 136.
H [22] (1918) 13 Cr.App.R. 197.
[23] Book IV., Ch. 14, passim.
[24] Ibid; p. 188.
[25] Ibid; p. 191.
[26] Coke, 3 Inst. 47.
[27] Crown Law (1762), p. 255.
[28] Pleas of the Crown (1803), p. 224.
[29] Book IV., c. 14, pp. 200, 201.
[30] 29th Ed. (1934), p. 873.
[31] 2nd Ed. (1933), Vol. 9, p. 426.

At the end of the argument for the respondent VISCOUNT SANKEY L.C. announced that the order of the Court of Criminal Appeal would be reversed and that the conviction would be quashed; and that their Lordships would give their reasons at a later date.

May 23. VISCOUNT SANKEY L.C. My Lords, the appellant, Reginald Woolmington, after a trial at the Somerset Assizes at Taunton on January 23, at which, after an absence of one hour and twenty-five minutes, the jury disagreed, was convicted at the Bristol Assizes on February 14 of the wilful murder of his wife on December 10, 1934, and was sentenced to death. He appealed to the Court of Criminal Appeal, substantially upon the ground that the learned judge had misdirected the jury by telling them that in the circumstances of the case he was presumed in law to be guilty of the murder unless he could satisfy the jury that his wife's death was due to an accident.

The appeal came before the Court of Criminal Appeal upon March 18 and was dismissed. The Court said "it may be that it might have been better" had the learned judge who tried the case said to the jury that if they entertained reasonable doubt whether they could accept his explanation they should either acquit him altogether or convict him of manslaughter only; but, relying upon s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, which provides "that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred," they dismissed the appeal.

Thereupon the Attorney-General gave his fiat certifying that the appeal of Reginald Woolmington involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. The matter now comes before your Lordships' House.

The facts are as follows. Reginald Woolmington is $21\frac{1}{2}$ years old. His wife, who was killed, was $17\frac{1}{2}$ years old last December. They had known each other for some time and upon August 25 they were married. Upon October 14 she gave birth to a child. Shortly after that there appears to have been some quarrelling between them and she left him upon November 22 and went to live with her mother. Woolmington apparently was anxious to get her to come back, but she did not come. The prosecution proved that at about 9.15 in the morning of the 10th Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. While she was engaged in that occupation, she heard voices from the next door house, No. 24. She knew that in that house her niece, Reginald Woolmington's wife, was living. She heard and could recognize the voice of Reginald Woolmington saying something to the effect "are you going to come back home?" She could not hear the answer. Then the back door in No. 24 was slammed. She heard a voice in the kitchen but could not tell what it said. Then she heard the sound of a gun. Upon that she looked out of the front window and she saw Reginald Woolmington, whose voice she had heard just before speaking in the kitchen, go out and get upon his bicycle, which had been left or was standing against the wall of her house, No. 25. She called out to him but he gave no reply. He looked at her hard and then he rode away.

A According to Reginald Woolmington's own story, having brooded over and deliberated upon the position all through the night of December 9, he went on the morning of the 10th in the usual way to the milking at his employer's farm, and while milking conceived this idea that he would take the old gun which was in the barn and he would take it up that morning to his wife's mother's house where she was living, and that he would show her that gun and tell her that he was going to commit suicide if she did not B come back. He would take the gun up for the purpose of frightening her into coming back to him by causing her to think that he was going to commit suicide. He finished his milking, went back to his father's house, had breakfast and then left, taking with him a hack saw. He returned to the farm, went into the barn, got the gun, which had been used for rook shooting, sawed off the barrels of it, then took the only two cartridges C which were there and put them into the gun. He took the two pieces of the barrel which he had sawn off and the hack saw, crossed a field about 60 yards wide and dropped them into the brook. Having done that, he returned on his bicycle, with the gun in his overcoat pocket, to his father's house and changed his clothes. Then he got a piece of wire flex which he attached to the gun so that he could suspend it from his shoulder underneath his coat, and so went off to the house where his wife was D living. He knocked at the door, went into the kitchen and asked her: "Are you coming back?" She made no answer. She came into the parlour, and on his asking her whether she would come back she replied she was going into service. He then, so he says, threatened he would shoot himself, and went on to show her the gun and brought it across his waist, when it somehow went off and his wife fell down and he went out of the house. He E told the jury that it was an accident, that it was a pure accident; that whilst he was getting the gun from under his shoulder and was drawing it across his breast it accidentally went off and he was doing nothing unlawful, nothing wrong, and this was a pure accident. There was considerable controversy as to whether a letter in which he set out his grievances was written before or after the above events. But when he was arrested at 7.30 on the evening of the 10th and charged with having F committed murder he said: "I want to say nothing, except I done it, and they can do what they like with me. It was jealousy I suppose. Her mother enticed her away from me. I done all I could to get her back. That's all."

The learned judge in summing-up the case to the jury said:—

"If you accept his evidence, you will have little doubt that she died in consequence of a gunshot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, G at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of H killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law will presume the fact to have been founded in malice until the contrary appeareth.' That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was

something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified." A

At the end of his summing-up he added: "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident." B

In the argument before the Court of Criminal Appeal cases were cited by the learned counsel on either side and textbooks of authority were referred to, but the learned judges contented themselves with saying "there can be no question to start with that the learned judge laid down the law applicable to a case of murder in the way in which it is to be found in the old authorities." They repeated the learned judge's words and said: "No doubt there is ample authority for that statement of the law." They then relied, as I have already mentioned, upon the proviso to s. 4 of the Criminal Appeal Act, 1907, and dismissed the appeal. C

It is true as stated by the Court of Appeal that there is apparent authority for the law as laid down by the learned judge. But your Lordships' House has had the advantage of a prolonged and exhaustive inquiry dealing with the matter in debate from the earliest times, an advantage which was not shared by either of the Courts below. Indeed your Lordships were referred to legal propositions dating as far back as the reign of King Canute (994–1035). But I do not think it is necessary for the purpose of this opinion to go as far back as that. Rather would I invite your Lordships to begin by considering the proposition of law which is contained in Foster's Crown Law, written in 1762, and which appears to be the foundation for the law as laid down by the learned judge in this case. It must be remembered that Sir Michael Foster, although a distinguished judge, is for this purpose to be regarded as a text-book writer, for he did not lay down the doctrine in any case before him, but in an article which is described as the "Introduction to the Discourse of Homicide." In the folio edition, published at Oxford at the Clarendon Press in 1762, at p. 255, he states: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them." D E F G

Now the first part of this passage appears in nearly every text-book or abridgment which has been since written. To come down to modern times, the passage appears in Stephen's Digest of the Criminal Law;[32] also in the well known treatise of Archbold, Criminal Pleading, Evidence and Practice,[33] which is the companion of lawyers who practise in the criminal courts. It also appears almost textually in Russell on Crimes[34] and in the H

[32] 7th Ed. (1926), p. 235.
[33] 29th Ed. (1934), p. 873.
[34] 8th Ed. (1923), Vol. 1, p. 615.

second edition of Halsbury's Laws of England,[35] which purports to state the law as on May 1, 1933, where it is said: "When it has been proved that one person's death has been caused by another, there is a prima facie presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder." The authority for that proposition is given as Foster, pp. 255, 290, and also the case of *Rex v. Greenacre.*[36]

The question arises, Is that statement correct law? Is it correct to say, and does Sir Michael Foster mean to lay down, that there may arise in the course of a criminal trial a situation at which it is incumbent upon the accused to prove his innocence? To begin with, if that is what Sir Michael Foster meant, there is no previous authority for his proposition, and I am confirmed in this opinion by the fact that in all the text-books no earlier authority is cited for it. Before, however, one considers the earlier criminal law several facts have to be remembered.

First, it was not till 1907 that the Court of Criminal Appeal was set up. It is perfectly true that from time to time there have been famous occasions on which the Judges and Barons were called together to give their opinion upon the law bearing on murder. Examples of this will be found; in the year 1611, in the case of *Mackalley*,[37] all the Judges and Barons were moved to give their opinion; in 1706, in the case of *Reg. v. Mawgridge*,[38] which case was argued before all the Judges and all of them except Lord Chief Justice Trevor were of opinion that Mawgridge was guilty of murder; and in 1843 in the case of *Reg. v. M'Naughton*,[39] where all the Judges gave answers to your Lordships' House upon the test of insanity.

M'Naughton's case stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *M'Naughton's* case the onus is definitely and exceptionally placed upon the accused to establish such a defence. See *Rex v. Oliver Smith*,[40] where it is stated that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, must be established by the defendant. But it was added that all the judges had met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit. See also Archbold, 29th Edition.[41] It is not necessary to refer to *M'Naughton's* case again in this judgment, for it has nothing to do with it.

It is true that at a later period certain cases were reserved by the judges for the consideration of the Court of Crown Cases Reserved, but many of the propositions with regard to criminal law are contained either in the summing-up of the judges or in text-books of authority as distinguished from a Court sitting in banc.

[35] (1933), Vol. 9, p. 426.
[36] 8 C. & P. 35.
[37] 9 Co.Rep. 65b.
[38] (1706) Kelyng, 119; 17 St.Tr. 57.
[39] (1843) 4 St.Tr.(N.S.) 847.
[40] (1910) 6 Cr.App.R. 19.
[41] (1934) 18, 874.

The learned author of Stephen's Digest of the Criminal Law[42] has an interesting note on the definition of murder and manslaughter. But his remarks are rather directed to the ingredients of the crime than to the proof of it. None the less, the author does not hesitate to tread a path of very robust criticism of the previous authorities. He speaks of the "intricacy, confusion and uncertainty of this branch of the law." He refers to the definition of Coke (1552–1623) and says "these passages, overloaded as Coke's manner is, with a quantity of loose, rambling gossip, form the essence of his account of murder." He describes Coke's chapter on manslaughter as "bewildering" and adds that Hale (1609–1676) treats manslaughter in a manner so meagre and yet so confused that no opinion of it can be obtained except by reading through chapters 38 to 40 and trying to make sense of them, and concludes by saying (p. 466) that Sir Michael Foster "to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence."

Next it must be remembered that prisoners were not entitled to be represented by counsel, except in cases of felony, where counsel might argue the law on their behalf.

Thirdly, it must not be forgotten that the prisoner himself was not allowed to give evidence before the Act passed in 1898.[43]

Bearing these considerations in mind, I now turn to some of the cases cited to us. I doubt whether in any of the early ones the question of the burden of proof was considered. Rather they were concerned with the ingredients of the crime of murder. One of the first difficulties was to settle the meaning of express and implied malice. It was not till 1825 that Bayley J, in *Bromage v. Prosser*,[44] gave his famous definition of malice as meaning a wrongful act, done intentionally without just cause or excuse. The older cases were rather concerned to give examples of what might be malice. This was so in *Mackalley's* case.[45] the prisoner was there accused of murdering a serjeant of London. The Courts were already considering cases of express or implied malice, and the passage in Coke appears simply to mean that if a man does acts calculated to kill, and actually does kill, that is evidence of malice or intent; in other words, evidence of one of the ingredients of murder, but it does not seem to be at all concerned with onus of proof or to support the statement of Sir Michael Foster on that point.

One of the most famous of the earlier treatises on criminal law was the History of the Pleas of the Crown by Sir Matthew Hale. That celebrated judge died on Christmas Day, 1675. It was known that he had left a treatise on the subject, and upon November 29, 1680, it was ordered by the House of Commons that the executors of Sir Matthew Hale be desired to print the manuscript relating to Crown Law and a Committee be appointed to take care of the printing thereof. It is not said that anything appears in Hale suggesting that the burden of proving his innocence lay on the prisoner. Looking at the edition of 1800[46] we find him again concerned with what malice is. It is headed "Concerning murder by malice implied presumptive, or malice in law," and *Mackalley's* case is duly cited.

[42] 7th Ed. (1926), pp. 461, 462.
[43] The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36).
[44] (1825) 4 B. & C. 247.
[45] 9 Co.Rep. 65 b.
[46] Chapter 37, Vol. 1, p. 454.

A As appears from Foster's Pleas of the Crown, Sir Michael Foster was familiar with Hale's treatise (see his preface), and although in the course of his book he makes reference to Hale, he gives no authority for the proposition which is under discussion. It cannot be doubted that at that time in English Courts of justice the law of evidence was in a very fluid condition. Indeed in some civil cases it differed on different circuits. See *Weeks v. Sparke*[47] and also the note xx. in Stephen's Digest of the Law of B Evidence.[48] It was only later that the Courts began to discuss such things as presumption and onus. In Wigmore on Evidence,[49] a reference is made to the judgment of Weaver J. in the case of *The State v. Brady.*[50] This was cited in the case of *Rex v. Stoddart*:[51]—

"The use of the terms 'presumption of guilt' and 'prima facie evidence of guilt' with reference to the possession of stolen goods has perhaps been C too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. . . . 'Presumptions' of guilt and 'prima facie' cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged."

We were referred to the case of *Rex v. Legg*,[52] where it is said that at D the Newgate Session in 1674 "one John Legg, being indicted for the murder of Mr. Robert Wise, it was upon the evidence agreed that if one man kill another, and no sudden quarrel appeareth, this is murder." *Mackalley's* case[53] is quoted as an authority and the report goes on: "and it lieth upon the party indicted to prove the sudden quarrel." With regard to Kelyng's Reports, the critics have greatly differed. Sir John Kelyng was Chief Justice of the King's Bench. He died in 1671 and whatever opinion E may be held about him as a judge, upon which see Foss's Biographical Dictionary of The Judges of England,[54] the critics have differed greatly upon the value of his Reports. Lord Campbell in his Life of Kelynge, Lives of the Chief Justices,[55] says "He compiled a folio volume of decisions in criminal cases, which are of no value whatever." But, on the other hand, there are others who regard the book as of high authority: see F Wallace on The Reporters.[56]

The report of *Legg's* case[57] is meagre and unsatisfactory and cannot, I think, be held to mean that unless the prisoner prove the sudden quarrel, he must be convicted of murder. The word "onus" is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving or sometimes the conclusion of the whole matter.

Mawgridge's case,[58] already referred to, was cited to us from Kelyng's G Reports, but it was not reported by Kelyng for the simple reason that it was not tried till 1706. Campbell, in the Lives of the Chief Justices,[59] says

[47] (1813) 1 M. & S. 679, 687, 688.
[48] 11th Ed. (1930), p. 182.
[49] Vol. 4, section 2513, note on page 3562.
[50] (1902) Ia. 91 N. W. 801.
[51] 2 Cr.App.R. 217, 233. H
[52] Kelyng, 27.
[53] 9 Co.Rep. 65 b.
[54] (1870), p. 381.
[55] (1849) Vol. 1, p. 511.
[56] London (1882), p. 327. [F. F. Heard, the editor of this reprint, made additions and alterations in Wallace's text without notice to the reader. Wallace himself (3rd ed. Philadelphia 1855, p. 209) dismissed Kelyng with a very short paragraph. . . . F.P.]
[57] Kelyng, 27.
[58] Kelyng, 119; 17 St.Tr. 57.
[59] Vol. 2, p. 176.

it was reported by Holt and makes caustic comments on Holt's English composition. It was added by Holt to his Edition of Kelyng's Reports and is described as a case of "great expectation" and gives the history of murder trials in English Courts from the earliest times. The case, however, is no authority for saying that the prisoner at any time is called upon to prove his innocence; quite the contrary. It is another of those cases which deal with malice and with what is such provocation as will make the act of killing to be manslaughter only.

In Hawkins' Pleas of the Crown:[60] "It is also agreed, that no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or se defendendo, but that he must plead 'not guilty,' and give the special matter in evidence." This points to the fact that the verdict must be given not on any special pleading given by the prisoner but upon and as the result of the whole of the case, and it nowhere suggests that the burden of proof either at the beginning or at the end of a case is not on the prosecution.

The case of *Rex v. Greenacre*[61] was certainly heard by a very distinguished judge, Tindal, C.J. But it is to be observed that the dictum relied upon by the prosecution in this case—namely: "that where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder," was contained in the summing-up of the learned judge to the jury. It is the passage in Sir Michael Foster and this summing-up which are usually relied on as the authority for the proposition that at some particular time of a criminal case the burden of proof lies on the prisoner to prove his innocence. The presumption of innocence in a criminal case is strong: see Taylor On Evidence,[62] and it is doubtful whether either of these passages means any such thing. Rather do I think they simply refer to stages in the trial of a case. All that is meant is that if it is proved that the conscious act of the prisoner killed a man and nothing else appears in the case, there is evidence upon which the jury may, not must, find him guilty of murder. It is difficult to conceive so bare and meagre a case, but that does not mean that the onus is not still on the prosecution.

If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law. It would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he

[60] 8th Ed. (Curwood), 1824, Vol. 1, p. 88, s. 25.
[61] 8 C. & P. 35, 42.
[62] 11th Ed. (1920), ss. 113, 114, Vol. 1, pp. 107, 108; 12th Ed. (1931), Vol. 1, pp. 107, 108.

is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

This is the real result of the perplexing case of *Rex v. Abramovitch*,[63] which lays down the same proposition, although perhaps in somewhat involved language. Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in *Rex v. Davies*,[64] the headnote of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (*a*) death as the result of a voluntary act of the accused and (*b*) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i.) intentional and (ii.) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. It is not the law of England to say, as was said in the summing-up in the present case: "if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident." If the proposition laid down by Sir Michael Foster[65] or in the summing-up in *Rex v. Greenacre*[66] means this, those authorities are wrong.

We were then asked to follow the Court of Criminal Appeal and to apply the proviso of s. 4 of the Criminal Appeal Act, 1907, which says: "the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." There is no doubt that there is ample jurisdiction to

[63] (1914) 11 Cr.App.R. 45.
[64] 29 Times L.R. 350; 8 Cr.App.R. 211.
[65] Ante, p. 474 [p. 48F–G in this edition].
[66] 8 C. & P. 35, 42.

apply that proviso in a case of murder. The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion.

In the result we decline to apply the proviso and, as already stated, we order that the appeal should be allowed and the conviction quashed.

My noble and learned friend Lord Atkin, who has to preside at the Privy Council to-day, asks me to say that he concurs in the opinion which I have delivered.

LORD HEWART C.J. My Lords, I concur.

LORD TOMLIN. My Lords, I also concur.

LORD WRIGHT. My Lords, I also concur.

Order of the Court of Criminal Appeal reversed, and conviction quashed: Further ordered that the cause be remitted back to the Court of Criminal Appeal to do therein as shall be just and consistent with this judgment.
Lords' Journals, April 5, 1935.

Solicitors for appellant: *C. Butcher & Simon Burns, for Clarke, Willmott & Clarke, Taunton.*
For the respondent: *The Director of Public Prosecutions.*

[1944] K.B. 718

A [COURT OF APPEAL]

YOUNG v. BRISTOL AEROPLANE COMPANY, LIMITED.

1944 June 6, 7, 8; July 28 — Lord Greene M.R., Scott, MacKinnon, Luxmoore, Goddard and du Parcq L.JJ.

B *Court of Appeal—Obligation to follow previous decisions*

The Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction, and the "full" court is in the same position in this respect as a division of the court consisting of three members. The only exceptions to this rule are:—(1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2.) the court is bound to refuse to follow a decision of its own which, though not C expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; (3.) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g., where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.

D APPEAL from Laski K.C. sitting as commissioner at Lancaster assizes.

The plaintiff, who was employed at the defendants' workshops, received injury in an accident arising out of and in the course of his employment and received compensation under the Workmen's Compensation Acts. He then sought to obtain damages in respect of the same accident, alleging that the defendants, in breach of their statutory duty, had failed to fence one of their machines which he was using. In their E defence, the defendants pleaded: "In the further alternative the defendants say that the plaintiff before the commencement of this action claimed and received compensation under the Workmen's Compensation Acts in respect of [the accident]. The plaintiff is thereby barred from recovering damages in respect of the said accident." This plea was based on s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925. On the authority of a F decision of the Court of Appeal in *Perkins v. Hugh Stevenson & Sons, Ld.*,[1] the commissioner gave effect to the plea in favour of the defendants. The plaintiff appealed.

Paull K.C. and *Henry Barton* for the plaintiff. No doubt *Selwood v. Townley Coal & Fireclay Co., Ld.*,[2] and *Perkins v. Hugh Stevenson & Sons, Ld.*, in which the Court of Appeal held that acceptance of compensation G known to be such under the Workmen's Compensation Act, 1925, precludes an action for damages, are against the plaintiff, but, if this court is of opinion that those cases were wrongly decided, it has power to come to another conclusion: see *Wynne-Finch v. Chaytor*,[3] where the Court of Appeal not only refused to follow its own decision in *Daglish v. Barton*,[4] but also purported to overrule it. *Perkins'* case and *Selwood's* case are H inconsistent with *Kinneil Cannel and Coking Coal Co. v. Sneddon*[5] in the House of Lords, and are, therefore, not binding on this court. There is no statutory or common law obligation on the court to follow its own

[1] [1940] 1 K.B. 56.
[2] [1940] 1 K.B. 180.
[3] [1903] 2 Ch. 475, 485.
[4] [1900] 1 Q.B. 284.
[5] [1931] A.C. 575.

decisions. Where courts have done so, it was by virtue of custom or "comity among judges": *per* Brett M.R. in *The Vera Cruz (No. 2)*.[6] In any case, the matter is different where the court which has to consider previous decisions is the full Court of Appeal, for such a court is entitled to consider whether or not it will follow the decision of a smaller number of judges: *per* Lord Esher M.R. in *Kelly & Co. v. Kellond*.[7] The House of Lords follows its own decisions because they are the final tribunal: see *London Street Tramways Co. v. London County Council*,[8] but that is not the case with the Court of Appeal. At any rate, it is a matter of discretion. [*Hart v. Riversdale Mill Co.*[9] was also referred to.]

Lynskey K.C. and *Matabele Davies* for the defendants. The Court of Appeal is bound by its own decisions. In *Velasquez, Ld. v. Inland Revenue Commissioners*,[10] Cozens-Hardy M.R. said: "But there is one rule by which, of course, we are bound to abide—that when there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law." That is the principle which this court is invited to adopt. No doubt, a decision of a Court of Appeal the members of which are equally divided is not binding on a subsequent court, and the same is true where there are inconsistent decisions of the Court of Appeal when the subsequent court can follow its own opinion. *London Street Tramways Co. v. London County Council* where the House of Lords held itself bound by its own decisions is really conclusive of this case. If the appellant is right an intermediate court between the Court of Appeal and the House of Lords would exist.

Cur. adv. vult.

July 28. LORD GREENE M.R. read the judgment of the court in which he stated the facts and continued: After a very careful review of the facts, the learned commissioner arrived at the following conclusions: (1.) That the plaintiff did not make a claim for compensation (namely, compensation under the Workmen's Compensation Act) "as such"; (2.) that the plaintiff could not be said to have exercised the option given to him by s. 29, sub-s. 1, of the Act, since he did not know of "his right to elect"; (3.) that "the plaintiff received the payments made to him as compensation under the Workmen's Compensation Act," and that "the payments were paid to him as such." We see no reason to differ from any of these conclusions. The learned commissioner, having come to these conclusions, considered himself bound by the authority of judgments of this court, in particular those in *Perkins v. Hugh Stevenson & Sons, Ld.*,[11] and *Selwood v. Townley Coal & Fireclay Co.*,[12] to hold that the third of his findings was fatal to the plaintiff's claim. In so holding, we are of opinion that he was clearly right. *Perkins'* case differed from the present case in that there the workman had claimed compensation, but in *Selwood's* case there had been no claim and no exercise by the workman of his option. The court in *Selwood's* case regarded this distinction as immaterial so far as concerned

[6] (1884) 9 P.D. 96, 98.
[7] (1888) 20 Q.B.D. 569, 572.
[8] [1898] A.C. 375, 380.
[9] [1928] 1 K.B. 176.
[10] [1914] 3 K.B. 458, 461.
[11] [1940] 1 K.B. 56.
[12] Ibid. 180.

what was referred to as "the second limb" of the sub-section, that is to say, the sentence which begins with the words "but the employer shall not be liable": see specially the judgment of Slesser L.J.[13] It is manifest from all the judgments in *Selwood's* case that, in the view of the court, the decision which was then arrived at followed logically and inevitably from the ratio decidendi in *Perkins'* case. As a result of these two decisions, therefore, it must be regarded as having been decided by this court that a workman who has been paid compensation under the Act, which he has knowingly accepted as such compensation, is thereby precluded from recovering damages from his employers at common law.

We were reminded by counsel for the plaintiff that in *Unsworth v. Elder Dempster Lines, Ld.*,[14] one part of the reasoning on which the decision in *Perkins'* case had been based was criticized and doubted: see *per* MacKinnon L.J. and *per* Goddard L.J.[15] That criticism in no way affects the validity of the decision in *Perkins'* case, since, as both MacKinnon and Goddard L.JJ. pointed out, those passages in the judgments which they regarded as open to doubt were not necessary to the decision and are to be regarded as obiter dicta. Mr. Paull, for the plaintiff, while frankly conceding that the decisions to which we have referred made his task in this court difficult, and, perhaps, impossible, suggested that they might be treated as inconsistent with the decision of the House of Lords in *Kinneil Cannel & Coking Coal Co. v. Sneddon*,[16] and for that reason ought not to be followed. It is a conclusive answer to this submission that *Kinneil's* case was cited to this court in *Perkins'* case.[17] Mr. Paull's argument, therefore, involves a submission that in *Perkins'* case this court, with the relevant authorities before it, came to a wrong decision. We will, however, add that we are of opinion that there is no inconsistency between the decision of the House of Lords and those of this court. The House of Lords in the *Kinneil* case was dealing with the right of a widow to claim damages at common law on behalf of her children and herself in respect of an accident which had already been the foundation of a successful claim for compensation under the Workmen's Compensation Act by another dependant. It was held that the claims of the widow and children at common law could not be defeated by the act of somebody to whom the common law remedy was not open. The House of Lords said nothing contrary to the view that the second limb of the sub-section precluded a workman from claiming damages after receiving compensation under the Act. Of this second limb Lord Buckmaster said:[18] "The latter provision is intended to relate only to cases where the proceedings are taken by the same persons and affects only the cases where the workman proceeding under the statute had the option of proceeding either under the statute or at common law." For these reasons we are clearly of opinion that the present case is covered by the earlier decisions of this court.

Our attention was called to the opinion expressed by Lord Patrick in a case heard by him in the Court of Session in Scotland on December 10, 1943: *Brown v. William Hamilton & Co., Ld.*[19] In that opinion Lord Patrick referred to *Perkins*' and *Selwood's* cases[20] and refused to follow them

[13] Ibid. 184–6
[14] Ibid. 658, 670.
[15] Ibid. 673.
[16] [1931] A.C. 575.
[17] [1940] 1 K.B. 56.
[18] [1931] A.C. 580.
[19] Unreported.
[20] [1940] 1 K.B. 56 and 180.

because he thought they were contrary to the current of decision in Scotland, to the true intent of the Workmen's Compensation Act, 1925, and to the proper construction of s. 29, sub-s. 1, of that Act. His criticism deserves the most careful consideration, but, even if we were inclined to accept it, we should not, by reason of it, be entitled to ignore the decisions in *Perkins'*[21] and *Selwood's* cases,[22] which, for reasons which we now proceed to state, are, in our opinion, binding on us, and must, therefore, be followed.

We now turn to what is the more important question raised by this appeal. When it first came on for hearing before Lord Greene M.R., MacKinnon and Goddard L.JJ., Mr. Paull stated that, unless he could establish that *Perkins'* case and *Selwood's* case could not stand with the decision of the House of Lords in *Kinneil's* case,[23] his only chance of succeeding lay in satisfying this court that those two cases were wrongly decided and that he wished to argue that this court was not bound to follow them. The question thus raised as to the jurisdiction of this court to refuse to follow decisions of its own was obviously one of great general importance and directions were given for the appeal to be argued before the full court. It is surprising that so fundamental a matter should at this date still remain in doubt. To anyone unacquainted with the rare cases in which it has been suggested or asserted that this court is not bound to follow its own decisions or those of a court of co-ordinate jurisdiction the question would, we think, appear to be beyond controversy. Cases in which this court has expressed its regret at finding itself bound by previous decisions of its own and has stated in the clearest terms that the only remedy of the unsuccessful party is to appeal to the House of Lords are within the recollection of all of us and numerous examples are to be found in the reports. When in such cases the matter has been carried to the House of Lords it has never, so far as we know, been suggested by the House that this view was wrong and that this court could itself have done justice by declining to follow a previous decision of its own which it considered to be erroneous. On the contrary, the House has, so far as we are aware, invariably assumed and in many cases expressly stated that this court was bound by its own previous decision to act as it did. The attitude both of this court and of the House of Lords is so well-known that citations are scarcely necessary, but we take three modern examples at random. The first is *Produce Brokers Co. v. Olympia Oil & Cake Co.*,[24] in which Buckley L.J. began his judgment as follows:[25] "I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning such as they are, I should say that it is wrong. But I am bound by authority—which, of course, it is my duty to follow—and, following authority, I feel bound to pronounce the judgment which I am about to deliver."[26] Phillimore L.J. and Pickford L.J. similarly expressed themselves to be bound by previous decisions of this court with which they did not agree. The decision was reversed by the House of Lords.[27] The second example is *Velasquez, Ld. v. Inland Revenue*

[21] [1940] 1 K.B. 56.
[22] Ibid. 180.
[23] [1931] A.C. 575.
[24] (1915) 21 Com.Cas. 320.
[25] Ibid. 322.
[26] The authority was *In re North Western Rubber Co. and Huttenbach* [1908] 2 K.B. 907 in the Court of Appeal.
[27] [1916] 1 A.C. 314; 21 Com.Cas. 331.

A *Commissioners*[28] where this court held itself bound by a previous decision of its own which, it considered, had not been overruled by an intervening decision of the House of Lords. Lord Cozens-Hardy M.R., said:[29] "But there is one rule by which, of course, we are bound to abide—that when there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If it is B contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have power to settle the law and hold that the decision which is binding upon us is not good law." The correctness of the decision in *Velasquez's* case was impugned in *English Scottish & Australian Bank, Ld. v. Inland Revenue Commissioners*.[30] This court had held that it was bound to follow Velasquez's case, and in C the House of Lords Lord Buckmaster said[31] that it was right in so holding. In the result, the appeal was allowed and *Velasquez's* case overruled. This was a strong case since, even before the question was set at rest by the House of Lords, *Velasquez's* case was generally regarded as having been wrongly decided. The third example is the very recent one of *Perrin v. Morgan*.[32] There this court held itself bound by previous decisions to give D a narrow construction to the word "money" in a will. In the House of Lords Viscount Simon L.C., said[33] that this court "could take no other course than follow and apply the rule of construction by which, owing to previous decisions of courts of co-ordinate jurisdiction, it was bound." It is true that in this and similar cases the court which held itself to be bound by previous decisions consisted of three members only, but we can find no E warrant for the argument that what is conveniently but inaccurately called the full court has any greater power in this respect than a division of the court consisting of three members only.

The Court of Appeal is a creature of statute and its powers are statutory. It is one court though it usually sits in two or three divisions. Each division has co-ordinate jurisdiction, but the full court has no greater powers or jurisdiction than any division of the court. Its jurisdiction is F mainly appellate, but it has some original jurisdiction. To some extent its decisions are final (for example, in appeals in bankruptcy and from the county courts), but in the majority of cases there is an appeal from its decisions to the House of Lords either with the leave of the Court of Appeal or of the House of Lords. Neither in the statute itself nor (save in two cases mentioned hereafter) in decided cases is there any suggestion G that the powers of the Court of Appeal sitting with six or nine or more members are greater than those which it possesses when sitting as a division with three members. In this respect, although we are unable to agree with certain views expressed by Greer L.J.[34] as will presently appear, we think that he was right in saying that what can be done by a full court can equally well be done by a division of the court. The corollary of this H is, we think, clearly true, namely, that what cannot be done by a division of the court cannot be done by the full court.

[28] [1914] 3 K.B. 458.
[29] Ibid. 461.
[30] [1932] A.C. 238.
[31] Ibid. 242.
[32] [1943] A.C. 399.
[33] Ibid. 405.
[34] *In re Shoesmith* [1938] 2 K.B. 637, 644.

In considering the question whether or not this court is bound by its previous decisions and those of courts of co-ordinate jurisdiction, it is necessary to distinguish four classes of case. The first is that with which we are now concerned, namely, cases where this court finds itself confronted with one or more decisions of its own or of a court of co-ordinate jurisdiction which cover the question before it and there is no conflicting decision of this court or of a court of co-ordinate jurisdiction. The second is where there is such a conflicting decision. The third is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. The fourth (a special case) is where this court comes to the conclusion that a previous decision was given per incuriam. In the second and third classes of case it is beyond question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this judgment.

For the moment it is the first class which we have to consider. Although the language both of decision and of dictum as well as the constant practice of the court appears to us clearly to negative the suggested power, there are to be found dicta, and, indeed, decisions, the other way. So far as dicta are concerned, we are, of course, not bound to follow them. In the case of decisions we are entitled to choose between those which assert and those which deny the existence of the power. In recent times the question was discussed obiter in *Newsholme Bros. v. Road Transport & General Insurance Co.*[35] In that case Scrutton L.J. said:[36] "The decision of the Court of Appeal on fact is not binding on any other court, except as between the same parties. When the decision is that from certain facts certain legal consequences follow, the decision is, I think, binding on the Court of Appeal in any case raising substantially similar facts," but Greer L.J. in the same case said:[37] "I should like to point out this fact, that [this court] has, at least on two occasions, sitting as a full court, differed from a previous decision by the same court: and it seems to me that if that is right, it is equally right to say that, sitting with a quorum of three judges, it has exactly the same power as if it were sitting with six judges, though it would only be in most exceptional cases that those powers would be exercised." In *In re Shoesmith*,[38] Greer L.J. said: "I wish to repeat what I said in the course of the argument, that the court has more than once, sitting as a court with all its six members, decided that it can overrule a decision of the Court of Appeal which has held the field for a number of years. If the Court of Appeal, sitting with its six members, can do so, equally a court sitting with a quorum of members can do the same thing." It is noteworthy that the substantial question in *Newsholme Bros. v. Road Transport & General Insurance Co.* was, not whether the Court of Appeal had jurisdiction to overrule a previous decision, but how it should exercise its choice between apparently irreconcilable decisions given by it previously. The two decisions mentioned by Greer L.J. in the passage first quoted are *Kelly & Co. v.*

[35] [1929] 2 K.B. 356.
[36] Ibid. 375.
[37] Ibid. 384.
[38] [1938] 2 K.B. 637, 644.

A *Kellond*,[39] and *Wynne-Finch v. Chaytor*.[40] In the former case Lord Esher said:[41] "This court is one composed of six members, and if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think this court is entitled, sitting as a full court, to decide whether we will follow or not the decision arrived at by the smaller number." This dictum of Lord Esher was not assented to by Fry L.J. who said:[42] "As to the power of this court when sitting as a full B court to overrule the decision of a court consisting of a smaller number, I do not think it is necessary to give an opinion." It is not very clear what view was taken by Lopes L.J., the other member of the court. He said:[43] "I do not desire to express an opinion as to what is the power of a full Court of Appeal in respect of a decision of three of their number, but I understand that the full court was called together in *Ex parte Stanford*,[44] C to consider the question arising in that case, and to revise and reconsider any decision touching the point in that case which had been previously laid down." Lower down on the page he is reported as having said that, if the earlier decision decided what was contended for, it was overruled by the later decision, a view which seems inconsistent with what he said in the passage quoted. It is to be observed that the question in *Kelly & Co. v. Kellond* also was not whether a particular decision should be overruled, D but which of two inconsistent decisions should be followed. The two decisions in question were *Roberts v. Roberts*[45] and *Ex parte Stanford*, the latter being a decision of the full Court of Appeal, and the court followed *Ex parte Stanford*. Although the decision in *Roberts v. Roberts* was cited during the hearing of *Ex parte Stanford* by the full court the decision was not commented on or even referred to in the judgment. It appears to have E been open to the court in *Kelly & Co. v. Kellond* to choose between the two decisions but, of course, in such circumstances the decision of the full court would be likely to carry greater weight than that of a division of the court. In *Wynne-Finch v. Chaytor* the decision was on a point of practice, the question being whether an application ought to have been made to the Chancery Division to set aside a judgment directed to be entered by an official referee to whom the whole action had been referred, or whether F the proper procedure was by way of appeal to the Court of Appeal. The question was directed to be argued before the full court. Reference was made to *Daglish v. Barton*[46] where Stirling L.J., who delivered the judgment of the court, said:[47] "With the greatest respect, we are unable to agree with *Daglish v. Barton*, and think that it ought not to be followed; and it is, therefore, overruled." It may be that the true explanation of this G decision is that the court came to the conclusion that the decision in *Daglish v. Barton* was manifestly incorrect and contrary to the plain words of the statute. Nevertheless, the case is, we think, an authority in favour of the proposition that the court has power to overrule its previous decisions. Certainly it cannot be said that there is any statutory right of appeal from a decision of the Court of Appeal to the full court, although on occasions where there has been a conflict caused by the existence of

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[39] 20 Q.B.D. 569.
[40] [1903] 2 Ch. 475.
[41] 20 Q.B.D. 572.
[42] Ibid. 574.
[43] Ibid. 575.
[44] (1886) 17 Q.B.D. 259.
[45] (1884) 13 Q.B.D. 794.
[46] [1900] 1 Q.B. 284.
[47] [1903] 2 Ch. 485.

inconsistent earlier decisions the court has ordered the case to be argued before a full court. Apart from a recent case which falls under the fourth class referred to above, we only know of one other case in which the Court of Appeal appears to have exercised the suggested power. That was *Mills v. Jennings*.[48] It is to be noted that the earlier authority which the court refused to follow was a decision, not of the Court of Appeal, but of the old Court of Appeal in Chancery. Indeed, this fact was given as the justification of the view which the Court of Appeal then took. Cotton L.J. in delivering the judgment of the court, said:[49] "We think that we are at liberty to reconsider and review the decision in that case as if it were being re-heard in the old Court of Appeal in Chancery, as was not uncommon."

It remains to consider the quite recent case of *Lancaster Motor Co. (London) v. Bremith, Ld.*,[50] in which a court consisting of the present Master of the Rolls, Clauson L.J. and Goddard L.J., declined to follow an earlier decision of a court consisting of Slesser L.J. and Romer L.J.[51] This was clearly a case where the earlier decision was given per incuriam. It depended on the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam. We do not think that it would be right to say that there may not be other cases of decisions given per incuriam in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. Two classes of decisions per incuriam fall outside the scope of our inquiry, namely, those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords.

On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3.) The court is not bound to

[48] (1880) 13 Ch. D. 639.
[49] Ibid. 648.
[50] [1941] 1 K.B. 675.
[51] In *Gerard v. Worth of Paris Ld.* [1936] 2 All E. R. 905.

follow a decision of its own if it is satisfied that the decision was given per incuriam.

I should perhaps add, speaking for myself individually, with regard to the observations in *Unsworth's* case[52] mentioned in this judgment, that I have carefully considered my own observations there mentioned in *Perkins'* case[53] and I have come to the conclusion that the criticism of them in *Unsworth's* case is justified, and that what I said was wrong. What I said there formed no part of the ratio decidendi, as will appear from a reading of the judgment, and does not affect its validity for that reason.

Appeal dismissed.

Solicitor for plaintiff: *W. H. Thompson.*
Solicitors for defendants: *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester.*

W. L. L. B.

[52] [1940] 1 K.B. 658.
[53] [1940] 1 K.B. 56.

[KING'S BENCH DIVISION]

CENTRAL LONDON PROPERTY TRUST LIMITED v. HIGH TREES HOUSE LIMITED.

1946 July 18 Denning J.

Contract — Agreement intended to create legal relations — Promise made thereunder — Knowledge of promisor that promisee will act on promise — Promise acted on — Enforceability of agreement without strict consideration — Agreement under seal — Variation of by agreement of lesser value — Estoppel.

By a lease under seal dated September 24, 1937, the plaintiff company let to the defendant company (a subsidiary of the plaintiffs) a block of flats for a term of ninety-nine years from September 29, 1937, at a ground rent of 2,500*l.* a year. In the early part of 1940, owing to war conditions then prevailing, only a few of the flats in the block were let to tenants and it became apparent that the defendants would be unable to pay the rent reserved by the lease out of the rents of the flats. Discussions took place between the directors of the two companies, which were closely connected, and, as a result, on January 3, 1940, a letter was written by the plaintiffs to the defendants confirming that the ground rent of the premises would be reduced from 2,500*l.* to 1,250*l.* as from the beginning of the term. The defendants thereafter paid the reduced rent. By the beginning of 1945 all the flats were let but the defendants continued to pay only the reduced rent. In September, 1945, the plaintiffs wrote to the defendants claiming that rent was payable at the rate of 2,500*l.* a year and, subsequently, in order to determine the legal position, they initiated friendly proceedings in which they claimed the difference between rent at the rates of 2,500*l.* and 1,250*l.* for the quarters ending September 29 and December 25, 1945. By their defence the defendants pleaded that the agreement for the reduction of the ground rent operated during the whole term of the lease and, as alternatives, that the plaintiffs were estopped from demanding rent at the higher rate or had waived their right to do so down to the date of their letter of September 21, 1945.

Held (1.) that where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value; and

(2.) that the arrangement made between the plaintiffs and the defendants in January, 1940, was one which fell within the above category and, accordingly, that the agreement for the reduction of the ground rent was binding on the plaintiff company, but that it only remained operative so long as the conditions giving rise to it continued to exist and that on their ceasing to do so in 1945 the plaintiffs were entitled to recover the ground rent claimed at the rate reserved by the lease.

ACTION tried by Denning J.

By a lease under seal made on September 24, 1937, the plaintiffs, Central London Property Trust Ld., granted to the defendants, High Trees House Ld., a subsidiary of the plaintiff company, a tenancy of a block of flats for the term of ninety-nine years from September 29, 1937, at a

A ground rent of 2,500*l.* a year. The block of flats was a new one and had not been fully occupied at the beginning of the war owing to the absence of people from London. With war conditions prevailing, it was apparent to those responsible that the rent reserved under the lease could not be paid out of the profits of the flats and, accordingly, discussions took place between the directors of the two companies concerned, which were closely associated, and an arrangement was made between them which was put B into writing. On January 3, 1940, the plaintiffs wrote to the defendants in these terms, "we confirm the arrangement made between us by which the ground rent should be reduced as from the commencement of the lease to 1,250*l.* per annum," and on April 2, 1940, a confirmatory resolution to the same effect was passed by the plaintiff company. On March 20, 1941, a receiver was appointed by the debenture holders of the plaintiffs and on C his death on February 28, 1944, his place was taken by his partner. The defendants paid the reduced rent from 1941 down to the beginning of 1945 by which time all the flats in the block were fully let, and continued to pay it thereafter. In September, 1945, the then receiver of the plaintiff company looked into the matter of the lease and ascertained that the rent actually reserved by it was 2,500*l.* On September 21, 1945, he wrote to the defendants saying that rent must be paid at the full rate and claiming that D arrears amounting to 7,916*l.* were due. Subsequently, he instituted the present friendly proceedings to test the legal position in regard to the rate at which rent was payable. In the action the plaintiffs sought to recover 625*l.*, being the amount represented by the difference between rent at the rate of 2,500*l.* and 1,250*l.* per annum for the quarters ending September 29, and December 25, 1945. By their defence the defendants pleaded E (1.) that the letter of January 3, 1940, constituted an agreement that the rent reserved should be 1,250*l.* only, and that such agreement related to the whole term of the lease, (2.) they pleaded in the alternative that the plaintiff company were estopped from alleging that the rent exceeded 1,250*l.* per annum and (3.) as a further alternative, that by failing to demand rent in excess of 1,250*l.* before their letter of September 21, 1945 (received by the defendants on September 24), they had waived their rights F in respect of any rent, in excess of that at the rate of 1,250*l.*, which had accrued up to September 24, 1945.

Fortune for the plaintiffs. The plaintiffs are entitled to recover rent on the basis of it being at the rate of 2,500*l.* a year, the amount reserved by the lease. The document in question was under seal and consequently G could not be varied by a parol agreement or an agreement in writing not under seal. If there was a fresh agreement, it was void since it was made without consideration and in any event it was only an agreement of a purely temporary character necessitated by the difficult conditions prevailing when it was made, and coming to an end when those conditions ceased to exist at the end of 1944 or the beginning of 1945. Even supposing that the plaintiffs were held to be estopped from denying the H existence of a new agreement, such estoppel would only operate so long as the conditions giving rise to the arrangement on which the estoppel was based, continued. [Denning J. This subject was considered by Simonds J. *in Re William Porter & Co., Ld.*[1]] It has recently been considered by Humphreys J. in *Buttery v. Pickard.*[2] He also referred to *Forquet v.*

[1] [1937] 2 All E.R. 361.
[2] [1946] W.N. 25.

Moore,[3] Crowley and *Others v. Vitty*[4] and Foa, Landlord and Tenant, 6th ed., p. 701.

Ronald Hopkins for the defendants. The company are only liable to pay rent at the rate of 1,250*l.* per annum. The letters passing between the parties and the entry in the minute book of the plaintiff company constitute evidence of an agreement, which, although possibly not supported by such consideration as would strictly be necessary at common law, was of a type which a court of equity would enforce if it were satisfied that the parties intended to give contractual efficacy to that to which they were agreeing. The reduction in rent was made so that the defendants might be enabled to continue to run their business and that was sufficient to enable a court to hold the agreement binding on the plaintiff company. With regard to the variation of an agreement under seal by a parol agreement or an agreement in writing, in *Berry v. Berry*,[5] Swift J. said it was true that a covenant could not be varied except by some contract of equal value, but, he continued "although that was the rule of law, the courts of equity have always held themselves at liberty, to allow the rescission or variation by a simple contract of a contract under seal by preventing the party who has agreed to the rescission or variation from suing under the deed. In *Nash v. Armstrong*[6] it was held that a parol agreement not to enforce performance of a deed and to substitute other terms for some of its covenants was a good consideration for a promise to perform the substituted contract . . ." If the above contentions fail, the defendants rely on the doctrine of estoppel. The propositions of law laid down *in Re William Porter & Co., Ld.*[7] exactly apply to the present case. The reduction in the rent was made in order that the defendants might be able to carry on their business. As a result of the reduction the business was carried on and the defendants arranged their affairs on the basis of the reduced rent with the result that the plaintiffs are estopped from claiming any rent beyond 1,260*l.* per annum for the whole period of the lease. Finally, the letters passing between the parties constituted a waiver by the plaintiffs of their right to a higher rent than 1,250*l.* down to the date of their letter of September 21, 1945.

Fortune in reply.

DENNING J. stated the facts and continued: If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500*l.* a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not), but only by deed. Equity, however stepped in, and said that if there has been a variation of a deed by a simple contract (which in the case of a lease required to be in writing would have to be evidenced by writing), the courts may give effect to it as is shown in *Berry v. Berry*.[8] That equitable doctrine, however, could hardly apply in the present case because the variation here might be said to have been made without consideration. With regard to estoppel, the

[3] (1852) 22 L.J. (Ex.) 35.
[4] (1852) 21 L.J. (Ex.) 135.
[5] [1929] 2 K.B. 316, 319.
[6] (1861) 10 C.B.(N.S.) 259.
[7] [1937] 2 All E.R. 361.
[8] [1929] 2 K.B. 316.

representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in *Jorden v. Money*,[9] a representation as to the future must be embodied as a contract or be nothing.

But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden v. Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are: *Fenner v. Blake*,[10] *In re Wickham*,[11] *Re William Porter & Co., Ld.*[12] and *Buttery v. Pickard*.[13] As I have said they are not cases of estoppel in the strict sense. They are really promises—promises intended to be binding, intended to be acted on, and in fact acted on. *Jorden v. Money* can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes v. Metropolitan Ry. Co.*,[14] *Birmingham and District Land Co. v. London & North Western Ry. Co.*[15] and *Salisbury (Marquess) v. Gilmore*,[16] afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes v. Beer*.[17] At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to

[9] (1854) 5 H.L.C. 185.
[10] [1900] 1 Q.B. 426.
[11] (1917) 34 T.L.R. 158.
[12] [1937] 2 All E.R. 361.
[13] [1946] W.N. 25.
[14] (1877) 2 App.Cas. 439, 448.
[15] (1888) 40 Ch.D. 268, 286.
[16] [1942] 2 K.B. 38, 51.
[17] (1884) 9 App.Cas. 605.

me that, to the extent I have mentioned, that result has now been achieved by the decisions of the courts.

I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250*l.* a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945.

If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

Judgment for plaintiffs.

Solicitors for the plaintiffs: *Henry Boustred & Sons.*
Solicitors for the defendants: *Callingham, Griffith & Bates.*

P. B. D.

[1947] K.B. 223

[COURT OF APPEAL]

ASSOCIATED PROVINCIAL PICTURE HOUSES, LIMITED v. WEDNESBURY CORPORATION.

1947 Nov. 7, 10 Lord Greene M.R., Somervell L.J. and Singleton J.

Cinematograph—Sunday performances—Licence—Condition that "no children under the age of fifteen years shall be admitted to any entertainments whether accompanied by adult or not"—Action by licensees—Claim for declaration that condition ultra vires or unreasonable—Sunday Entertainments Act, 1932 (22 & 23 Geo. 5, c. 51), s. 1, sub-s. 1.

By s. 1, sub-s. 1, of the Sunday Entertainments Act, 1932, an authority having power in any area to grant licences for cinematograph performances under the Cinematograph Act, 1909, is given power to allow a licensed place to be open and used on Sundays, "subject to such conditions as the authority think fit to impose."

When a local authority granted to the plaintiffs leave for Sunday performances subject to the condition that no children under fifteen years of age should be admitted to Sunday performances with or without an adult:—

Held, that the local authority had not acted unreasonably or ultra vires in imposing the condition.

In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power.

Harman v. Butt [1944] K. B. 491 approved.

Theatre De Luxe (Halifax), Ld. v. Gledhill [1915] 2 K. B. 49 considered. Dissenting judgment of Atkin J. explained and preferred.

APPEAL from Henn Collins J.

The plaintiff company, the owners and licensees of the Gaumont Cinema, Wednesbury, Staffordshire, were granted by the defendants who were the licensing authority for that borough under the Cinematograph Act, 1909, a licence to give performances on Sunday under s. 1, sub-s. 1, of the Sunday Entertainments Act, 1932;[1] but the licence was granted subject to a condition that "no children under the age of fifteen years shall be admitted to any entertainment whether accompanied by an adult or not." In these circumstances the plaintiffs brought an action for a declaration that the condition as ultra vires and unreasonable.

Henn Collins J. dismissed the action, following *Harman v. Butt*[2] and holding that the decision in *Theatre de Luxe (Halifax), Ld. v. Gledhill*[3] was not in pari materia. The plaintiffs appealed.

[1] The Sunday Entertainments Act, 1932, s. 1, sub-s. 1, provides: "The authority having power, in any area to which this section extends, to grant licences under the Cinematograph Act, 1909, may, notwithstanding anything in any enactment relating to Sunday observance, allow places in that area licensed under the said Act to be opened and used on Sundays for the purpose for cinematograph entertainments, subject to such conditions as the authority think fit to impose."

[2] [1944] K.B. 491.

[3] [1915] 2 K.B. 49.

Gallop K.C. and *Sidney Lamb* for the plaintiff. Henn Collins J. has followed a judgment of Atkinson J. in *Harman v. Butt*,[4] in which he held that a similar condition was intra vires. The licensing of cinematographs was first imposed by the Cinematograph Act, 1909. On the question which arose under that Act whether the power to make regulations was confined to matters relating to safety or extended to wider questions of public policy, there have been conflicting opinions. When the opening of cinemas on Sunday was permitted by the Sunday Entertainments Act, 1932, it referred back to the Act of 1909, but the power to make regulations is differently worded. During the war, Defence Regulation 42B gave power to a competent naval, military or air force authority to certify that Sunday opening was desirable and to the local authority to permit opening in accordance with such certificate. There are thus three different positions: (1.) weekday opening under the 1909 Act; (2.) Sunday opening under the 1932 Act; (3.) Sunday opening under reg. 42B which is in force till the end of 1947. The present case has to do only with (2.).

In *Theatre de Luxe (Halifax), Ld. v. Gledhill*,[5] the majority judgment to some extent limited the scope of the power to make regulations under the Act of 1909. Atkin J. delivered a dissenting judgment, favouring a wider interpretation, but the decision has never been dealt with by the Court of Appeal. That decision was under the Act of 1909, but in the Act of 1932 the words are "subject to such conditions as the authority think fit to impose," and the question is whether there is any limitation or whether those words enable the authority to say that no man or woman may take his or her child under fifteen to the cinema on Sunday. It is admittedly on the party attacking the regulation to establish that it is unreasonable. The true view seems to be that the court looks on such conditions benevolently, but does not treat the decision of the local authority as binding. In *Harman v. Butt* Atkinson J. held a similar condition reasonable, and in the present case Henn Collins J. followed that decision, without forming an independent judgment. Though the subject matter of *Roberts v. Hopwood*[6] was very far from the present case, there are passages in the opinions which throw light on the attitude of the court in considering the validity of regulations.

It is material that in the present case there had been a poll of the electorate in favour of Sunday opening.

[Lord Greene M.R. That does not seem to carry the matter any further. The vote was merely for opening the cinema on Sunday "subject to such regulations as the authority think fit to impose."]

On an analysis the electorate has to consider whether it wishes the local authority to allow performances on Sunday. That, in effect, means that it wishes for performances, subject to conditions, but it cannot intend to leave the conditions to be imposed at large. It must at least intend any condition imposed to be reasonable. Whether this condition is reasonable is a matter for the court as being a high matter of policy. Of course unreasonableness has to be established but it is for the court to exercise its own judgment on the facts established. No reasonable authority could have imposed the condition preventing the persons who have voted for Sunday performances taking their children under fifteen with them. Where what has been done is unreasonable, the plaintiffs are entitled to go for

[4] [1915] 2 K.B. 491.
[5] [1915] 2 K.B. 49.
[6] [1925] A.C. 578.

relief to the court: *Rex v. Burnley Justices. Ex parte Longmore*.[7] It is true that the authority had wrongly delegated their powers but the actual decision was based on the unreasonableness of the condition. Henn Collins J. was wrong in not accepting the obligation to decide as to reasonableness. The exclusion of children accompanied by their parent or parents is unreasonable if not also ultra vires: see the majority decision in *Theatre de Luxe (Halifax), Ld. v. Gledhill*.[8] [They referred also to *London County Council v. Bermondsey Bioscope Co.*;[9] *R. v. London County Council. Ex parte London & Provincial Electric Theatres, Ld.*;[10] and *Ellis v. Dubowski*.[11]]

FitzGerald K.C. and *Vernon Gattie* for the defendants. [Lord Greene M.R. We do not require to hear you but will you say if there is any authority that we ought to have in mind.] They referred to *Short v. Poole Corporation*[12] and *Mills v. London County Council*.[13]

LORD GREENE M.R. In the action out of which this appeal arises, the plaintiffs, who are the proprietors of a cinema theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, the corporation of Wednesbury, on the grant of a licence for Sunday performances in that cinema was ultra vires. The action was dismissed by Henn Collins J. and, in my opinion, his decision was clearly right. The powers and duties of the Local Authority are to be found in the Sunday Entertainments Act, 1932. That Act legalized the opening of cinemas on Sundays, subject to certain specified conditions and subject to such conditions as the licensing authority think fit to impose. The licensing authority are the licensing authority set up under the Cinematograph Act, 1909, and in this case are the council of the borough of Wednesbury. Before the Act of 1932, the opening of cinematograph theatres on Sundays was, in fact, illegal. Local authorities had purported in some cases to allow Sunday opening under the licences which they granted, but that permission was strictly irregular. The position under the Act now with regard to licensing is stated conveniently by Atkinson J. in *Harman v. Butt*.[14] He there says: "It is apparent that there are at least three totally different occasions on which licensing justices may be called on to exercise their discretion to issue a licence and to determine on what conditions the licence shall be issued. The application may be under the Cinematograph Act, 1909, relating to six days of the week, excluding Sundays. It may be one relating solely to Sundays under the Sunday Entertainments Act, 1932, where in the case of a borough the majority of the local government electors have expressed a desire for Sunday performances. Thirdly, it may be one where the local government electors have expressed no such wish, but where the application is made for the benefit of those members of the forces who are stationed in the neighbourhood for the time being." Under a regulation, the commanding officer of forces stationed in the neighbourhood had power to make a representation to the licensing

[7] (1916) 85 L.J.(K.B.) 1565.
[8] [1915] 2 K.B. 49.
[9] [1911] 1 K.B. 445.
[10] [1915] 2 K.B. 466.
[11] [1921] 3 K.B. 621.
[12] [1926] Ch. 66.
[13] [1925] 1 K.B. 213.
[14] [1944] K.B. 491, 493.

authority and the case of *Harman v. Butt* was, in fact, a case where that had taken place. A

The actual words in question here are to be found in s. 1, sub-s. 1, of the Act of 1932. [His Lordship read the sub-section.] The power to impose conditions is expressed in quite general terms. The sub-section goes on to refer to certain conditions which must be imposed, but with those we are not concerned. In the present case, the defendants imposed the following condition in their licence: "No children under the age of fifteen years shall B be admitted to any entertainment, whether accompanied by an adult or not." Mr. Gallop, for the plaintiffs, argued that it was not competent for the Wednesbury Corporation to impose any such condition and he said that if they were entitled to impose a condition prohibiting the admission of children, they should at least have limited it to cases where the children were not accompanied by their parents or a guardian or some adult. His C argument was that the imposition of that condition was unreasonable and that in consequence it was ultra vires the corporation. The plaintiffs' contention is based, in my opinion, on a misconception as to the effect of this Act in granting this discretionary power to local authorities. The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as D language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened E the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as F the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an G absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to H those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be

considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty—those of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation*[15] gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In the present case, it is said by Mr. Gallop that the authority acted unreasonably in imposing this condition. It appears to me quite clear that the matter dealt with by this condition was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition should be attached to the grant of this licence. Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider. Here Mr. Gallop did not, I think, suggest that the council were directing their mind to a purely extraneous and irrelevant matter, but he based his argument on the word "unreasonable," which he treated as an independent ground for attacking the decision of the authority; but once it is conceded, as it must be conceded in this case, that the particular subject-matter dealt with by this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case. Once that is granted, Mr. Gallop is bound to say that the decision of the authority is wrong because it is unreasonable, and in saying that he is really saying that the ultimate arbiter of what is and is not reasonable is the court and not the local authority. It is just there, it seems to me, that the argument breaks down. It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have

[15] [1926] Ch. 66, 90, 91.

considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

This case, in my opinion, does not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something prima facie within the powers of the executive authority, but reference has been made to a number of cases. I can deal, I think, quite shortly with them. First, Henn Collins J. followed a decision of Atkinson J. in the case I have mentioned of *Harman v. Butt*.[16] In that case a condition of this character had been imposed and I think the only difference between the two cases is that in *Harman v. Butt* the licence to open on Sundays originated in a representation by the commanding officer of forces stationed in the neighbourhood. Atkinson J. dealt with the matter thus:[17] "I am satisfied that the defendants were entitled to consider matters relating to the welfare, including the spiritual well-being, of the community and of any section of it, and I hold that this condition that no child under the age of sixteen should be admitted to this cinematograph theatre on Sunday is not ultra vires on the ground that it is not confined to the user of the premises by the licensee, but relates to the interest of a section of the community." Then he goes on to deal with the question of reasonableness. That was a case in which the decision, in my opinion, is unassailable. There are two other cases relied upon. One is *R. v. Burnley Justices*,[18] and another not dissimilar case on one point, *Ellis v. Dubowski*.[19] Those were cases where the illegal element which the authority had imported into the conditions imposed consisted of a delegation of their powers to some outside body. It was not that the delegation was a thing which no reasonable person could have thought was a sensible thing to do. It was outside their powers altogether to pass on this discretion which the legislature had confided to them to some outside body. Another case on which Mr. Gallop relied is *Roberts v. Hopwood*.[20] That was a totally different class of case. The district auditor had surcharged the members of a council who had made payments of a minimum wage of 4*l*. a week to

[16] [1944] K.B. 491.
[17] Ibid. 499.
[18] 85 L.J.(K.B.) 1565.
[19] [1921] 3 K.B. 621.
[20] [1925] A.C. 578.

A their lowest grade of workers. That particular sum had been fixed by the local authority not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether, and the substance of the decision was that they had not fixed 4*l.* a week as wages at all and that they had acted unreasonably. When the case is examined, the word "unreasonable" is found to be used rather in the sense that I mentioned a short while ago, namely, that in fixing 4*l.* they B had fixed it by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage. That is no authority whatsoever to support the proposition that the court has power, a sort of overriding power, to decide what is reasonable and what is unreasonable. The court has nothing of the kind.

C I do not think I need take up time by referring to other authorities, but I might say this in conclusion. An early case under the Cinematograph Act, 1909, much discussed before us, was *Theatre de Luxe (Halifax), Ld. v. Gledhill*.[21] That was a decision of a Divisional Court as to the legality or a condition imposed under the Act to the following effect: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or D guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m." That case was heard by a Divisional Court of the King's Bench Division, consisting of Lush, Rowlatt and Atkin JJ. The majority, consisting of Lush and Rowlatt JJ. held that the condition was ultra vires as there was no connexion, as the headnote says, "between the ground upon which the condition was E imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions." That case is one which, I think, I am right in saying has never been referred to with approval, but often referred to with disapproval, though it has never been expressly overruled. I myself take the view that the decision of the majority in that case puts much too narrow a construction upon the F licensing power given by that Act, which, of course, is not the same Act as we have to consider here. Atkin J. on the other hand, delivered a dissenting judgment in which he expressed the opinion that the power to impose conditions was nothing like so restricted as the majority had thought. Quoting again from the headnote, his opinion was "that the conditions must be (1.) reasonable; (2.) in respect of the use of the licensed G premises; (3.) in the public interest. Subject to that restriction there is no fetter upon the power of the licensing authority." If I may venture to express my own opinion about that, I think that Atkin J. was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language may not perhaps be read in rather a different sense from that which I think he must have intended. I do not find in the language that he H used any justification for thinking that it is for the court to decide on the question of reasonableness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is prima facie within the power of the local authority is a condition which no reasonable authority, acting

[21] [1915] 2 K.B. 49.

within the four corners of their jurisdiction, could have decided to impose. Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is a proper and legitimate thing which the council or the licensing authority can and ought to have in mind. He certainly does not suggest anywhere that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority have properly taken into consideration a matter of public interest such as, in the present case, the moral and physical health of children, there is, it seems to me, nothing in what Atkin J. says to suggest that the court could interfere with a decision because it took a different view as to what was in the public interest. It is obviously a subject on which different minds may have different views. I do not read him as saying any more than that the local authority can and should take that matter into account in coming to their decision.

In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. The appeal must be dismissed with costs.

SOMERVELL L.J. I agree that the appeal must be dismissed for the reasons which have been given by the Master of the Rolls, and I do not desire to add anything.

SINGLETON J. I agree.

Appeal dismissed.

Solicitors: Norman, Hart & Mitchell; Sharpe, Pritchard & Co., for G. F. Thompson, Wednesbury.

H. C. G.

A [COURT OF APPEAL]

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES v. ATTORNEY-GENERAL AND OTHERS

[1969 I. No. 5934]

1971 June 28, 29, 30; July 1; Oct. 14

B Russell, Sachs and Buckley L.JJ.

Charity—Charitable purposes—Law reporting—Company limited by guarantee with objects of preparation and publication of reports of judicial decisions—Charges for publications—Carrying on business—Profits not payable to members—Whether objects exclusively charitable—Charitable Uses Act 1601 (43 Eliz. 1, c. 4), Preamble—Charities Act 1960 (8 & 9 Eliz. 2, c. 58), ss. 4 (1), 5 (3), 45 (1), 46.[1]

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The Incorporated Council of Law Reporting for England and Wales was a company limited by guarantee and its primary object was:

"The preparation and publication . . . at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England."

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By its memorandum of association all property and income was applicable solely for the promotion of the council's objects and no portion could be paid by way of profit to its members. The memorandum authorised the payment of remuneration to editors, reporters and other persons for services rendered.

In 1966 the council applied under section 4 of the Charities Act 1960 for registration as a charity. In 1967, on refusal of the Charity Commissioners for England and Wales to register it as a charity, the council appealed under section 5 (3) of the Act of 1960 joining as parties the Commissioners of Inland Revenue and the Attorney-General. Foster J. allowed the appeal and granted a declaration that the council was entitled to registration, on the grounds that publication of law reports to enable judge-made law to be properly developed and administered by the courts was a purpose beneficial to the community.

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On appeal by the Commissioners of Inland Revenue:—

Held, dismissing the appeal, (1) that the council was established for exclusively charitable purposes since its purpose was to further the development and administration of the law and to make it known or accessible to all members of the community, which was a purpose beneficial to the community and of general public utility and came within the equity of the Statute of Elizabeth I; that it was immaterial that publication also supplied professional men with the tools of their trade; and that the trade or business carried on by the council was not inconsistent with a

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[1] Charities Act 1960, s. 4: "(1) There shall be a register of charities which shall be established and maintained by the commissioners and in which there shall be entered such particulars as the commissioners may from time to time determine of any charity there registered."

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S. 5: "(3) An appeal against any decision of the commissioners to enter or not to enter an institution in the register of charities, . . . may be brought in the High Court by the Attorney-General, or by the persons who are or claim to be the charity trustees of the institution, . . ."

S. 45: "(1) In this Act, except in so far as the context otherwise requires,—'charity' means any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities; . . ."

S. 46: "In this Act, except in so far as the context otherwise requires,—. . . 'charitable purposes' means purposes which are exclusively charitable according to the law of England and Wales; . . ."

charitable character in its objects since its profits were not payable to its members and the element of unselfishness was an important and well-recognised aspect of charity.

Income Tax Special Purposes Commissioners v. Pemsel [1891] A.C. 531, H.L.(E.) applied.

(2) (Russell L.J. dissenting) That the council's purposes were charitable as being for the advancement of education since the purpose of the law reports was to provide essential material for the study of the law, which was a learned profession and a science, and that remained its substantially exclusive purpose even though professional men used the knowledge acquired to earn their living.

Decision of Foster J. [1971] Ch. 626; [1971] 2 W.L.R. 550; [1971] 1 All E.R. 436 affirmed.

The following cases are referred to in the judgments:

Attorney-General v. Heelis (1824) 2 Sim. & St. 67.
Beaumont v. Oliveira (1869) 4 Ch.App. 309.
Bowman v. Secular Society Ltd. [1917] A.C. 406, H.L.(E.).
British School of Egyptian Archaeology, In re [1954] 1 W.L.R. 546; [1954] 1 All E.R. 887.
Cranston, In re [1898] 1 I.R. 431.
General Medical Council v. Inland Revenue Commissioners, (1928) 44 T.L.R. 439, C.A.
General Nursing Council for England and Wales v. St. Marylebone Borough Council [1959] A.C. 540; [1959] 2 W.L.R. 308; [1959] 1 All E.R. 325, H.L.(E.).
Hunter v. Attorney-General [1899] A.C. 309, H.L.(E.).
Income Tax Special Purposes Commissioners v. Pemsel [1891] A.C. 531, H.L.(E.).
Inland Revenue Commissioners v. City of Glasgow Police Athletic Association [1953] A.C. 380; [1953] 2 W.L.R. 625; [1953] 1 All E.R. 747, H.L.(Sc.).
Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners [1931] 2 K.B. 465, C.A.; [1932] A.C. 650, H.L.(E.).
Lopes, In re [1931] 2 Ch. 130.
Morice v. Bishop of Durham (1804) 9 Ves. 399; (1805) 10 Ves. 522.
Royal College of Nursing v. St. Marylebone Borough Council [1959] 1 W.L.R. 1077; [1959] 3 All E.R. 663, C.A.
Royal College of Surgeons of England v. National Provincial Bank Ltd. [1951] Ch. 485; [1951] 1 All E.R. 494, C.A.; [1952] A.C. 631; [1952] 1 All E.R. 984, H.L.(E.).
Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corporation [1968] A.C. 138; [1967] 3 W.L.R. 1132; [1967] 3 All E.R. 215, H.L.(Sc.).
Smith v. Incorporated Council of Law Reporting for England and Wales [1914] 3 K.B. 674.
Smith v. Kerr [1900] 2 Ch. 511; [1902] 1 Ch. 774, C.A.
Tennant Plays Ltd. v. Inland Revenue Commissioners [1948] 1 All E.R. 506, C.A.
Thomson v. Trustees of the Honourable Society of the Inner Temple (unreported), May 30, 1967.
Westminster City Council v. Royal United Service Institution [1938] 2 All E.R. 545, D.C.
Wedgwood, In re [1915] 1 Ch. 113, C.A.

The following additional cases were cited in argument:

Attorney-General v. Brown (1818) 1 Swan. 265.
Attorney-General v. National Provincial & Union Bank of England [1924] A.C. 262, H.L.(E.).

Chartered Insurance Institute v. London Corporation [1957] 1 W.L.R. 867; [1957] 2 All E.R. 638, D.C.
Delius, decd., In re [1957] Ch. 299; [1957] 2 W.L.R. 548; [1957] 1 All E.R. 854.
Foveaux, In re [1895] 2 Ch. 501.
Geologists' Association v. Inland Revenue Commissioners (1928) 14 T.C. 271, C.A.
Hall v. Derby Sanitary Authority (1885) 16 Q.B.D. 163, D.C.
Hoare v. Osborne (1864) 33 L.J. Ch. 586.
Incorporated Council of Law Reporting for England and Wales, In re Duty on the Estate of (1888) 22 Q.B.D. 279, D.C.
Inland Revenue Commissioners v. Falkirk Temperance Café Trust (1926) 11 T.C. 353.
Inland Revenue Commissioners v. Forrest (1890) 15 App.Cas. 334, H.L.(E.).
Jones v. Williams (1767) Amb. 651.
Kendall v. Granger (1842) 5 Beav. 300.
London University v. Yarrow (1857) 1 De G. & J. 72.
Macduff, In re [1896] 2 Ch. 451, C.A.
National Anti-Vivisection Society v. Inland Revenue Commissioners [1948] A.C. 31; [1947] 2 All E.R. 217, H.L.(E.).
Nightingale v. Goulbourn (1847) 5 Hare 484; (1848) 2 Ph. 594.
Oppenheim v. Tobacco Securities Trust Co. Ltd. [1951] A.C. 297; [1951] 1 All E.R. 31, H.L.(E.).
Williams' Trustees v. Inland Revenue Commissioners [1947] A.C. 447; [1947] 1 All E.R. 513, H.L.(E.).
Wokingham Fire Brigade Trusts, In re [1951] Ch. 373; [1951] 1 All E.R. 454.

APPEAL from Foster J.

The Incorporated Council of Law Reporting for England and Wales ("the council"), a company limited by guarantee and not having a share capital, was incorporated on July 28, 1870, under the Companies Acts 1862 and 1867. Among the objects of the council set out in clause 3 of the memorandum of association were the following:

> "1. The preparation and publication in a convenient form, at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England. 2. The issue, periodically or occasionally, of any subsidiary or other publications relating to legal subjects which it may be considered expedient to combine with the publication of such reports, including the statutes of the realm, or any part thereof, if deemed expedient. 3. The continuation (in furtherance of the above objects) of the series of reports called 'The Law Reports' . . . under their present or any other name . . . and the issue periodically or occasionally of any legal digests or other publications connected with 'The Law Reports' or subsidiary thereto . . . and the acquiring by purchase or otherwise . . . the copyright of any (rival or) other publications of law reports . . . and the making of any agreement or arrangement for the purpose of procuring the discontinuance of such reports, or the publishing thereof . . . 4. The doing all such other lawful things as are incidental or conducive to the attainment of the above objects."

By clause 4:

> "The income and property of the association, whencesoever derived, shall be applied solely towards the promotion of the objects of the association as set forth in this memorandum of association, and no portion thereof shall be paid or transferred, directly or indirectly, by

way of dividend, bonus, or otherwise howsoever by way of profit, to . . . members of the association . . . Provided that nothing herein shall prevent the payment, in good faith, of remuneration of any editors, reporters, secretaries, officers or servants, of the association, or to any member of the association or other person in return for any services actually rendered to the association."

By letters dated December 1, 1966, and June 14, 1967, the council applied to the Charity Commissioners for England and Wales (the commissioners) for registration as a charity under section 4 of the Charities Act 1960, on the ground that its main object was the advancement of the administration of the law by the provision, without gain to members of the council, of a reliable series of reports, an object which was charitable both as being analogous to a gift for the building of a sessions house (a purpose accepted as charitable) and also because it was within the spirit and intendment of the Charitable Uses Act 1601, as providing a benefit, which, while not ejusdem generis with the purposes recited in the preamble thereto, was charitable in the same sense.

By a letter dated December 6, 1967, the commissioners rejected the council's application on the ground that, while it was not disputed that the advancement of the administration of the law was a charitable purpose, the work of the council could not be said to be for the advancement of the administration of the law in a way that was charitable and any contribution made by the council to the administration of law was too indirect and remote.

By an originating summons dated September 24, 1969, pursuant to R.S.C., Ord. 108, r. 4, against the Attorney-General the council sought a declaration by way of appeal under section 5 (3) of the Act of 1960 that it was entitled to be registered as a charity under section 4 of the Act on the ground that its purposes consisted exclusively of all or any of the following purposes: (1) a purpose beneficial to the community, namely, the advancement of the administration of the law; (2) a purpose beneficial to the community, namely, the exposition of the law; (3) the advancement of education. The Commissioners of Inland Revenue were joined at their own request. Foster J. granted the declaration holding that the council was established for purposes beneficial to the community and was charitable within the spirit and intendment of the preamble to the Charitable Uses Act 1601.

The Commissioners of Inland Revenue appealed on the grounds that there was no warrant for the implicit finding of the judge that the council was established exclusively for the purpose of enabling judge-made law to be properly developed and administered by the courts; and that, in any event, to enable judge-made law to be properly developed and administered by the courts was not a purpose that was within the spirit and intendment of the preamble. The council sought to affirm the judge's decision on the additional ground that the council was established for the advancement of education in a manner which was charitable at law.

H. E. Francis Q.C. and *Peter Gibson* for the Commissioners of Inland Revenue. [Reference was made to sections 4, 5, 45 and 46 of the Charities Act 1960.] The judge's approach was fundamentally erroneous. The court has to look at the memorandum of association alone to determine what the objects of the council are. Reliance is placed upon *Tennant Plays Ltd. v. Inland Revenue Commissioners* [1948] 1 All E.R. 506 and *Royal College*

A *of Nursing v. St. Marylebone Borough Council* [1959] 1 W.L.R. 1077. Then the court has to decide as a matter of law whether those objects are charitable: see *Hunter v. Attorney-General* [1899] A.C. 309. It is not permissible to look at the motives and intentions of the founders or promoters of the council, nor at the manner in which the objects are in fact carried out: see *Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners* [1931] 2 K.B. 465; affirmed [1932] A.C. 650, H.L.(E.). In B the memorandum it is not stated that the purpose of the council is to advance the administration of the law, and it was clearly not established for that charitable purpose. It is not necessary to look at extrinsic evidence to see what the council in fact does, because its purposes are clear from the memorandum. It was established to carry on the trade or business mentioned in its memorandum: see *In re Duty on the Estate of* C *Incorporated Council of Law Reporting for England and Wales* (1888) 22 Q.B.D. 279. It is still a trade although profits cannot be distributed to members.

Alternatively if it is permissible to look at extrinsic evidence to determine whether or not the objects stated in the memorandum are charitable, the judge was wrong in finding that the only main purpose of the council was to enable judge-made law to be properly developed and D administered by the courts. His conclusion was limited to the use made of The Law Reports in court, and overlooked the fact that they play an essential role as part of the professional equipment of practising lawyers. A major purpose for which the council was established was to serve the interests of members of the legal profession by providing them with an essential tool of their trade, and, accordingly, the council was not E established exclusively for charitable purposes. The memorandum shows that the publication of reports was to be under the control of the legal profession, and that is inconsistent with the council being a charity because if it is it would be under the control of the Charity Commissioners or of the court. The objects stated in the memorandum are not clearly charitable.

Although the availability of accurate law reports is essential to the due F administration of justice in the courts, more use is made of them outside the courts. They are constantly used by practising lawyers for matters which never reach court. Even in the courts the reports perform a professional function because they enable advocates to fulfil their duty. The main purpose of the council is to benefit the legal profession: see *Smith v. Incorporated Council of Law Reporting for England and Wales* [1914] 3 K.B. 674, *per* Scrutton J. at p. 681, and the report of Lord G Simond's Law Reporting Committee appointed in 1940. To benefit members of a profession is not charitable: see *General Medical Council v. Inland Revenue Commissioners* (1928) 44 T.L.R. 439; *General Nursing Council for England and Wales v. St. Marylebone Borough Council* [1959] A.C. 540 and *Royal College of Surgeons of England v. National Provincial Bank Ltd.* [1951] Ch. 485, C.A.; [1952] A.C. 631, H.L.(E.). The council has H several purposes, but providing the legal profession with reliable law reports, which are an essential part of the professional equipment is one of its main purposes.

It is not disputed that publication of The Law Reports is for the public benefit, but it does not fall within the spirit and intendment of the preamble to the Charitable Uses Act 1601. Not everything which is for public benefit is charitable. It must also be within the spirit and intendment of the preamble. To promote the proper development and

administration of the law is not charitable. If it had been stated in the memorandum that the object of the council was to advance the proper development and science of the law by specified means, that would have been the sole primary object, and the actual publication and dissemination of The Law Reports would be the means of carrying out that object. The position is different if no such primary object is stated. Assisting the administration of the law is the result of the council's activities, and is not the purpose for which it was established.

If Foster J. was right in finding that the council was established for the purpose of advancing the administration of the law, such a purpose although for the benefit of the community is not within the spirit and intendment of the preamble: see *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corporation* [1968] A.C. 138. It is impossible to say that to advance the administration of the law falls naturally and in its own right within the spirit of the preamble. It can only be brought within on the basis of analogy. To supply members of a profession with the tools of their trade is not a sufficiently wide benefit to come within the spirit of the preamble. [Reference was made to *Tudor on Charities* 6th ed. (1967), p. 84]. To advance the administration of the law would be a purpose essentially political in character, because that is a function of the government or state. It is not a matter which should be left to charity. The law is not only concerned with the preservation of law and order, but also with trade, preservation of property and citizens' rights, and other matters outside the realms of charity. The contents of the preamble do not have any relation to the administration of law as such. The construction of a court house would come within the general heading of public works, and would therefore be charitable because it would benefit the community in a physical sense.

Gibson following. The purposes of the council are not exclusively charitable. It is remarkable that the council so many years after its incorporation should now claim for the first time to be a charity. Prima facie it would have made a difference if in the memorandum the council's object was stated as the promotion of the study of the science of the law, though *Geologists' Association v. Inland Revenue Commissioners* (1928) 14 T.C. 271 shows that even if the objects stated in the memorandum are prima facie charitable the court must still find what the true purposes are and must have regard to the persons who are intended to benefit. The court is entitled to take account of the fact that the legal profession gathered together to do something for its own benefit, although it might also benefit the public.

The claim that the administration of justice is within the scope of charity is a novel one for which there is no precedent. The administration of justice is a function of government and at the time of Elizabeth I it would not have been regarded as a function of charity.

Raymond Walton Q.C. and *Spencer G. Maurice* for the council. Foster J. was correct in holding that the council was a charity within the fourth category in *Income Tax Special Purposes Commissioners v. Pemsel* [1891] A.C. 531, 583. Alternatively it ranks as an educational charity under the second category.

The council's objects are those stated in clause 3 of its memorandum of association, which has to be construed. The vital question is whether what the council does in furtherance of its objects is something which can be classified as being of public utility and therefore charitable. Clause 3 is not ambiguous, but background evidence is admissible. The court can

A have regard to the situation at the time of incorporation and is entitled to look at the results of the activities which are carried on in order to determine if what the council was established to do is beneficial to the public. The council in fulfilling its objects and the hopes and intentions of its founders is thereby furthering the administration of justice. The public makes use of the services it provides. Publication of reports by the council assisted the development of the judicial doctrine of binding precedents: see B *Radcliffe and Cross, The English Legal System,* 4th ed. (1964), pp. 365–367. That is for the public benefit because it facilitates knowledge of and certainty in the law.

The council has only one main purpose, namely the publication of The Law Reports at a moderate price available for everyone. *General Medical Council v. Inland Revenue Commissioners,* 44 T.L.R. 439; *Royal College of* C *Surgeons of England v. National Provincial Bank Ltd.* [1952] A.C. 631; *Royal College of Nursing v. St. Marylebone Borough Council* [1959] 1 W.L.R. 1077 and *Geologists' Association v. Inland Revenue Commissioners,* 14 T.C. 271 can be distinguished from the present case, because in those cases there were two main objects, one benefiting members of the body or profession and one benefiting the public, and the question in each case was which was the dominant object. An essential feature here is that members D of the council derive no benefit from the association. The fact that the immediate beneficiaries from the council's activities are members of the legal profession, who take advantage of The Law Reports for the benefit of their clients, does not prevent its purposes from being charitable. Reliance is placed upon *Inland Revenue Commissioners v. Forrest* (1890) 15 App.Cas. 334.

E If it is right that the council fulfils a public benefit in disseminating The Law Reports, which further the advancement of the law, the question is whether that is a charitable purpose within Lord Macnaghten's fourth category in *Pemsel's* case [1891] A.C. 531, 583.

The fourth category has developed by analogies: see Chitty J. in *In re Foveaux* [1895] 2 Ch. 501, 504, and Lord Reid in the *Scottish Burial Society's* case [1968] A.C. 138, 146. The purpose of assisting the F administration of the law is analogous to the establishment of a sessions house, which is charitable: see *Duke on Charitable Uses,* ed. 1676, p. 109. Lord Eldon L.C. in *Attorney-General v. Brown* (1818) 1 Swan. 265, 297 refers to Duke as a high authority, and Leach V.-C. in *Attorney-General v. Heelis* (1824) 2 Sim. & St. 67, 76 treated a sessions house as a decided case. Accordingly, if an analogy is required a sessions house is sufficiently analogous for the advancement of the law by the publication of The Law G Reports to be within the spirit and intendment of the preamble. It is too narrow a construction of the Statute of Elizabeth I to say that a sessions house is a public work analogous to the repair of bridges, because a sessions house is built to be used for a particular purpose and it must be part of the decision that the carrying out of that purpose is charitable. The supply of The Law Reports is part of the machinery of the advancement of H the law, and is also directly analogous with houses of correction. In addition it is analogous to maintaining the efficiency of the army and police, and the preservation of order: *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association* [1953] A.C. 380. The subject is equally interested in all aspects of the law whether connected with public order or not, and it is to the advantage of the public as a whole that the law should be properly and impartially administered from accurate and up to date source material.

Alternatively, if there is not a sufficient analogy, the proper test for the fourth category is that the activities claimed to be charitable are of general public utility, as qualified by Lindley L.J. in *In re Macduff* [1896] 2 Ch. 451, 467, and need not necessarily come within the spirit and intendment of the preamble. The purpose must be a general purpose, and must profit persons who would not be profited without the activity in question: see *Attorney-General v. National Provincial & Union Bank of England* [1924] A.C. 262. It must be for the benefit of the public and not merely of individuals, and the utility must be beneficial to the community at large or a sufficient section of it. [Reference was made to *Jones v. Williams* (1767) Amb. 651; *Attorney-General v. Heelis* (1824) 2 Sim. & St. 67; *Kendall v. Granger* (1842) 5 Beav. 300; *Nightingale v. Goulbourn* (1847) 5 Hare 484, affirmed (1848) 2 Ph. 594; *London University v. Yarrow* (1857) 1 De G. & J. 72; *Pemsel's* case [1891] A.C. 531; *In re Cranston* [1898] 1 I.R. 431; *In re Wedgwood* [1915] 1 Ch. 113; *Inland Revenue Commissioners v. Falkirk Temperance Café Trust* (1926) 11 T.C. 353 and *In re Wokingham Fire Brigade Trusts* [1951] Ch. 373.] Making judge-made law available is a general utility of benefit to the community. Those cases show that direct analogy with the Statute of Elizabeth I is not necessary. *In re Foveaux* [1895] 2 Ch. 501 was overruled by *National Anti-Vivisection Society v. Inland Revenue Commissioners* [1948] A.C. 31. Reliance is placed upon the *Scottish Burial Society's* case [1968] A.C. 138, 156.

The legal profession as a whole would constitute a sufficient section of the community to satisfy the public nature of the benefit. *Oppenheim v. Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297 can be distinguished. Reliance is placed upon *Hall v. Derby Borough Sanitary Authority* (1885) 16 Q.B.D. 163.

The other possibility is that the activities of the council fall within the second category in *Pemsel's* case [1891] A.C. 531, 583. *Smith v. Kerr* [1900] 2 Ch. 511; [1902] 1 Ch. 774 shows that law can be the proper subject of an educational charity. The main object of the council is to disseminate information as to the latest state of the science of the law, and that is therefore an educational purpose. There is a distinction between an educational purpose involving public dissemination of educational material, and pure learning which is not necessarily charitable. Reliance is placed upon *In re British School of Egyptian Archaeology* [1954] 1 W.L.R. 546. The practitioners of any science are always learning and are continuously instructing themselves. There is an element of learning in the citation of authorities in court, because the court is being instructed in the extent and scope of the material available from which to decide the particular case. There must be a contribution to the common stock of human knowledge. The publication of The Law Reports furnishes the profession with the opportunity to make itself more learned, and that applies to academic scholars, practising lawyers and everyone concerned with the law.

N. Browne-Wilkinson for the Attorney-General addressed the court on the basis of the interests of charity as a whole, and did not support either side. The relevant question is whether the body is established for purposes exclusively charitable. Despite the word "established" in section 45 (1) of the Charities Act 1960, it is not correct to look at the position at the date when the council was incorporated, because the court must determine at the date of the application for registration for what purposes the body is then established. The motives and purposes for the establishment of the particular body are irrelevant: see *Hoare v. Osborne* (1864) 33 L.J.Ch. 586

A and *In re Delius, decd.* [1957] Ch. 299. To decide whether the council's purposes are charitable regard must be had solely to its objects as stated in clause 3 of its memorandum of association. In construing clause 3 the ordinary rules of construction apply. The main object is the publication of The Law Reports, and since the charitable nature of the object is not clearly apparent the court must see if performance of it is necessarily exclusively charitable. Accordingly, if performing the objects stated in B clause 3 must necessarily achieve a charitable purpose, the council is established for an exclusively charitable purpose. In cases under the fourth category the court in considering the authorised activity must inform itself of the impact on the public of the performance of the activity. The council must show that publication of The Law Reports can only have a charitable result, and evidence is admissible as to the effect of publication. C That evidence shows that the necessary result of the council's activities is for the public benefit. It is immaterial that members of the legal profession also benefit, because only if benefit to the body itself is one of its objects is the charitable nature vitiated: see *Royal College of Nursing v. St. Marylebone Borough Council* [1959] 1 W.L.R. 1077. Benefit to the legal profession is not one of the council's objects but is merely incidental to the objects stated in clause 3. Making the law known is for the public benefit, D and the fact that some members of the public benefit more than others does not prevent that object from being charitable.

The purposes of the council are analogous to those stated in the preamble to the Statute of Elizabeth I. In all cases falling within the fourth category the court must find that the activities come within the spirit and intendment of the preamble: see *Williams' Trustees v. Inland Revenue Commissioners* [1947] A.C. 447. If a specific public service is being E provided that is necessarily within the spirit and intendment of the preamble. The purposes must be of a type which would fall within the spirit and intendment, and it is not necessary to find a precise analogy. [Reference was made to *Tudor on Charities,* 6th ed., p. 74.] Reliance is placed upon the approach of Lord Wilberforce in the *Scottish Burial Society's* case [1968] A.C. 138, 156. There is no ease in which the provision F of a non-commercial specific public utility beneficial to the public at large has failed as not falling within the spirit and intendment of the preamble.

The purposes of the council are not exclusively educational, because a major function of The Law Reports is their use in the courts as the raw material by which the law is made in court, and that is not educational. However if that view is too narrow the submissions made on behalf of the council are supported.

G *Francis Q.C.* in reply. The words "at a moderate price" in clause 3 of the memorandum of association are important. They show that the business of the council is to be conducted by way of trade. The council makes a profit, and is not merely a benevolent or philanthropic organisation. There is no difference between the business conducted by the council, and that of the publishers of the All England Reports. The fact H that there is a prohibition in the council's memorandum of association against distributing profits to members does not make the council's activities charitable.

In all cases in which benefit to a profession has been held to be incidental to the benefit to the public, in the constitutions of the institutions objects were stated which were clearly charitable: see *Inland Revenue Commissioners v. Forrest* 15 App.Cas. 334; *Royal College of Surgeons of England v. National Provincial Bank Ltd.* [1952] A.C. 631 and

Royal College of Nursing v. St. Marylebone Borough Council [1959] 1 W.L.R. 1077. The fact that the activities of the council result in benefit to the public or advance some charitable purpose does not mean that it was in fact established for that purpose. The objects for which an institution was established must be distinguished from the consequences flowing from the performance of those objects: see *General Medical Council v. Inland Revenue Commissioners*, 44 T.L.R. 439.

The question here is whether carrying out the objects stated in the memorandum results exclusively in the advancement of the administration of justice, or of education, or of both, and the use made of The Law Reports by practising lawyers is not a use for charitable purposes. Any professional skill and knowledge derived from study of The Law Reports is used by practising lawyers for the benefit of their clients and not for the benefit of the public. Clients are not a sufficient section of the public because they are identified solely by their nexus with the lawyers. The service given by the lawyers is professional and not charitable. The purpose of the council is not to educate lawyers, but to supply The Law Reports for practising lawyers who use them to provide a professional service for reward. Practising lawyers are not engaged in the administration of the law, although they may assist in the administration of justice by the courts. The Law Reports are used in ways which do not advance the administration of the law at all.

The mere publication and sale of The Law Reports does not serve an educational purpose. The Law Reports are only useful to trained lawyers and students, and it is not for the public benefit for everyone to have The Law Reports and to be able to read them. The use of The Law Reports by judges in court is not educational, because they merely have regard to them to assist in reaching a correct decision. Activities designed to benefit a particular profession by enabling members to perform their profession are not educational: see *Chartered Insurance Institute v. London Corporation* [1957] 1 W.L.R. 867. In so far as The Law Reports increase the knowledge of members of the legal profession, that is an incidental result and not a purpose of the council. The council sells The Law Reports to subscribers and is not concerned with the use they make of them, and therefore it would be difficult to say that the council is concerned to promote education.

Cur. adv. vult.

October 14. The following judgments were read.

RUSSELL L.J. The question raised in this appeal is whether a company limited by guarantee incorporated on July 28, 1870, under the Companies Acts 1862 and 1867 entitled the Incorporated Council of Law Reporting for England and Wales (hereinafter called "the association") is a corporate institution which is established for purposes which are exclusively charitable according to the law of England and Wales and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities. If it is such, then it is a charity within the Charities Act 1960 (see sections 45 (1) and 46); and it is entitled to be entered as such on the register of charities to be maintained by the Charity Commissioners under section 4 of the Act of 1960. The association applied to be so registered: the Commissioners of Inland Revenue objected on the ground that the association was not a charity: the Charity Commissioners

upheld the objection and declined to register the association: the association appealed to the High Court by the appropriate procedure, joining as parties to the appeal the Commissioners of Inland Revenue and the Attorney-General. Foster J. ([1971] Ch. 626) allowed the appeal on the ground that the association was a charity within the fourth of the categories in *Income Tax Special Purposes Commissioners v. Pemsel* [1891] A.C. 531, 583, this contention of the association being supported by the Attorney-General: but he did not accept the additional or alternative contention of the association that it was an educational charity, a contention which was not supported by the Attorney-General.

From this decision that the association was a charity entitled to registration as such the Commissioners of Inland Revenue appeal, and the association seeks to support the decision on the additional or alternative ground of education.

In order to see for what purposes the association was established and whether those purposes are exclusively charitable, attention must be focused upon its memorandum and articles of association, bearing in mind, of course, that purposes merely ancillary to a main charitable purpose, which if taken by themselves would not be charitable, will not vitiate the claim of an institution to be established for purposes that are exclusively charitable. Hereunder the objects clause in the memorandum must plainly play the leading role. That is in the following terms:

> "The objects for which the association is established are: 1. The preparation and publication, in a convenient form, at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England. 2. The issue, periodically or occasionally, of any subsidiary or other publications relating to legal subjects which it may be considered expedient to combine with the publication of such reports, including the statutes of the realm, or any part thereof, if deemed expedient. 3. The continuation (in furtherance of the above objects) of the series of reports called 'The Law Reports' (now in course of publication by the present Council of Law Reporting) under their present or any other name, and either in their present form and according to the present system or subject to any alterations of form or system that may be considered conducive to the promotion of the above objects; and the issue periodically or occasionally of any legal digests or other publications connected with 'The Law Reports', or subsidiary thereto, or which may be considered likely to increase the utility thereof; and the acquiring by purchase or otherwise, on such terms or conditions as shall be considered expedient, the copyright of any (rival or) other publications of law reports which may now or shall hereafter exist or be in course of publication, and the making of any agreement or arrangement for the purpose of procuring the discontinuance of such reports, or the publishing thereof, or the discontinuance of preparing reports for any such publication by any other persons. The taking over and assuming all the assets and liabilities of the existing Council of Law Reporting. 4. The doing all such other lawful things as are incidental or conducive to the attainment of the above objects."

Clause 4 of the memorandum is in the following terms:

> "The income and property of the association, whencesoever derived, shall be applied solely towards the promotion of the objects of the

association as set forth in this memorandum of association, and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever by way of profit, to the persons who at any time are or have been members of the association, or to any of them, or to any person claiming through any of them: Provided, that nothing herein shall prevent the payment, in good faith, of remuneration to any editors, reporters, secretaries, officers or servants of the association, or to any member of the association, or other person in return for any services actually rendered to the association."

The signatories to the memorandum were five of Her Majesty's counsel and two solicitors. By the articles of association membership of the council was limited to 20 in number. Eligibility for membership of the association was confined to (*a*) "nominated persons" (up to two nominated by each of the four Inns of Court and the Law Society), (*b*) up to two more members nominated or selected by or with the approval of the council of management of the association ("the council")—called "elected members," (*c*) the Law Officers and President of the Law Society—called "ex officio members," and (*d*) (since 1951) any other persons up to five in number nominated by the council—called "co-opted members." Provision was made for retirement by rotation and resignation of membership of the association. Article 34 provided that membership of the association should ipso facto confer and be a requirement of membership of the council. By article 39 the management of the affairs of the association is vested in the council which (article 37) may appoint an executive committee of the council to which supervision of the day-to-day management of the association's affairs are delegated. I do not think that any other reference to the articles is needed.

There are some matters which require no proof. The making of the law of this country is partly by statutory enactment (including therein subordinate legislation) and partly by judicial exposition in the decision of cases brought before the courts. It cannot be doubted that dissemination by publication of accurate copies of statutory enactments is beneficial to the community as a whole: and this is not the less so because at least in many instances the ordinary member of the public either does not attempt to, or cannot by study, arrive at a true conclusion of their import, or because the true understanding is largely limited to persons engaged professionally or as public servants in the field of any particular enactment, or otherwise interested in that field. The fact that to perhaps the majority of those who acquire and study a copy of (for example) a Finance Act it constitutes what might be described as a tool of their trades or professions or avocations in no way lessens the benefit to the community that results if accurate versions of that Finance Act are published and not kept like a cat in a bag to be let out haphazard. The same is to be said of the other source of our law, judicial decisions and the reasons therefor, especially in the light of our system of precedent. It is in my view just as beneficial to the community that reliable reports of judicial decisions of importance in the applicability of the law to varying but probably recurrent circumstances, or demonstrating development in the law, should be published; and all the more so if the publication be supervised by those who by training are best qualified to present the essence of a decision correctly and to distinguish the ephemeral from the significant. To state that the publication *also* supplied many professional

men with the tools of their trade does not seem to me in any way to detract from the benefit that accrues to the community from the fact that the law does not remain locked in the bosom of the judiciary.[2]

Now the first contention of the Commissioners of Inland Revenue is shortly stated. When the stated objects of the association are considered they amount to no more (it is said) than to carry on the trade of publishers and sellers of law reports: there is (it is said) no difference between the objects of the association and the objects of the publishers of the All England Reports with the one exception that the association is to make no profit from its trade that is not to be applied in the production and publication of law reports—i.e. the association is in that sense non-profit-making. This short contention does not supply the answer to the case. The fact that the association carries on a trade or business is admittedly not inconsistent with a charitable character in its objects. The difference between the two cases is in my view a vital distinction. The element of unselfishness is well recognised as an aspect of charity, and an important one. Suppose on the one hand a company which publishes the Bible for the profit of its directors and shareholders: plainly the company would not be established for charitable purposes. But suppose an association or company which is non-profit-making, whose members or directors are forbidden to benefit from its activities, and whose object is to publish the Bible; equally plainly it would seem to me that the main object of the association or company would be charitable—the advancement or promotion of religion.

It was next contended for the Commissioners of Inland Revenue that a main purpose, even if not the only main purpose, of the association is to advance the interests of the legal profession by supplying it with the tools of its trade. Reference hereunder was made to the fact that the association and its unincorporated predecessor were brought into being by members of the legal profession: to the fact that it is to be supposed that the main body of "consumers" would be such members: to the fact that Scrutton J. in *Smith v. Incorporated Council of Law Reporting for England and Wales* [1914] 3 K.B. 674, 681 (very much by the way) remarked that the association "publish The Law Reports for the benefit of the profession": and to the fact that Lord Simonds' Law Reporting Committee appointed by Viscount Caldecote L.C. in 1940 contained this reference to the aims of the association:

> "No other purpose was to be served than to produce the best possible reports at the lowest possible price for the benefit of the profession and of the public at large."

To this may be added the comment of Professor Goodhart, a member of that committee, that the committee recommended continuance of The Law Reports in their established form "as they perform an essential function for the legal profession." I am not persuaded of the validity of this contention. It seems to me that *if* the publication of reliable reports of decisions of the courts is for the benefit of the community and of general

[2] See *The Speeches of the Rt. Hon. Edmund Burke in the House of Commons and in Westminster Hall*, ed. 1816, vol. 4, pp. 201–202, on the report of the Committee of Managers on the causes of the duration of Warren Hasting's trial: ". . . the English jurisprudence has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, any juridical traditionary line of decisions contained in the notes taken, and from time to time published (mostly under the sanction of the judges), called reports . . . To give judgment privately is to put an end to reports; and to put an end to reports, is to put an end to the law of England."

public utility in the charitable sense, it is an inevitable and indeed necessary step in the achievement of that benefit that the members of the legal profession are supplied with the tools of their trade. I do not see how the benefit to the public, assuming it to be a charitable object, could otherwise be achieved. So it would be if there were a non-profit-making association under gratuitous professional supervision for the production at moderate expense of pure medical drugs or efficient surgical instruments. But the only main object or purpose in such case would be, it seems to me, the relief of the sick. We were in this connection referred to a number of cases, some on one side of the line and some on the other, where the question was whether a main object was the promotion of the interests of a professional body or organisation. I do not find these helpful. Here the association consists of members who as such can derive no conceivable benefit from their gratuitous supervision of the activities of the association. Nor to my mind is the contention now under consideration fortified, as was I think at least at one stage in argument suggested, by the fact that clause 3 of the memorandum of association does not open with the words: "The objects for which the association is established are to advance and promote the proper development of law by the following means:".

Accordingly I reject the contention that the association is not established for purposes which are exclusively charitable in so far as that contention is based upon the submission that a main purpose or object is to supply members of the legal profession with tools of their trade.

I come now to the question whether, if the main purpose of the council is, as I think it is, to further the sound development and administration of the law in this country, and if, as I think it is, that is a purpose beneficial to the community or of general public utility, that purpose is charitable according to the law of England and Wales.

On this point the law is rooted in the Statute of Elizabeth I, a statute the object of which was the oversight and reform of abuses in the administration of property devoted by donors to purposes which were regarded as worthy of such protection as being charitable. The preamble to the Statute listed certain examples of purposes worthy of such protection. These were from an early stage regarded merely as examples, and have through the centuries been regarded as examples or guideposts for the courts in the differing circumstances of a developing civilisation and economy. Sometimes recourse has been had by the courts to the instances given in the preamble in order to see whether in a given case sufficient analogy may be found with something specifically stated in the preamble, or sufficient analogy with some decided case in which already a previous sufficient analogy has been found. Of this approach perhaps the most obvious example is the provision of crematoria by analogy with the provision of burial grounds by analogy with the upkeep of churchyards by analogy with the repair of churches. On other occasions a decision in favour or against a purpose being charitable has been based in terms upon a more general question whether the purpose is or is not within "the spirit and intendment" of the Statute of Elizabeth I and in particular its preamble. Again (and at an early stage in development) whether the purpose is within "the equity" or within "the mischief" of the Statute. Again whether the purpose is charitable "in the same sense" as purposes within the preview of the Statute. I have much sympathy with those who say that these phrases do little of themselves to elucidate any particular problem. "Tell me", they say, "what you define when you speak of spirit, intendment, equity, mischief, the same sense, and I will tell you whether a

A purpose is charitable according to law. But you never define. All you do is sometimes to say that a purpose is none of these things. I can understand it when you say that the preservation of sea walls is for the safety of lives and property, and therefore by analogy the voluntary provision of lifeboats and fire brigades are charitable. I can even follow you as far as crematoria. But these other generalities teach me nothing."

I say I have much sympathy for such approach: but it seems to me to B be unduly and improperly restrictive. The Statute of Elizabeth I was a statute to reform abuses: in such circumstances and in that age the courts of this country were not inclined to be restricted in their implementation of Parliament's desire for reform to particular examples given by the Statute: and they deliberately kept open their ability to intervene when they thought necessary in cases not specifically mentioned, by applying as the C test whether any particular case of abuse of funds or property was within the "mischief" or the "equity" of the Statute.

For myself I believe that this rather vague and undefined approach is the correct one, with analogy, its handmaid, and that when considering Lord Macnaghten's fourth category in *Pemsel's* case [1891] A.C. 531, 583 of "other purposes beneficial to the community" (or as phrased by Sir Samuel Romilly (then Mr. Romilly) in argument in *Morice v. Bishop of* D *Durham* (1805) 10 Ves. 522, 531: "objects of general public utility") the courts, in consistently saying that not all such are necessarily charitable in law, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is prima facie charitable in law, but have left open a line of retreat based on the equity of the Statute in case they are faced with a purpose (e.g. a political purpose) which could not have been E within the contemplation of the Statute even if the then legislators had been endowed with the gift of foresight into the circumstances of later centuries.

In a case such as the present, in which in my view the object cannot be thought otherwise than beneficial to the community and of general public utility, I believe the proper question to ask is whether there are any grounds for holding it to be outside the equity of the Statute: and I think F the answer to that is here in the negative. I have already touched upon its essential importance to our rule of law. If I look at the somewhat random examples in the preamble to the Statute I find in the repair of bridges, havens, causeways, sea banks and highways examples of matters which if not looked after by private enterprise must be a proper function and responsibility of government, which would afford strong ground for a G statutory expression by Parliament of anxiety to prevent misappropriation of funds voluntarily dedicated to such matters. It cannot I think be doubted that if there were not a competent and reliable set of reports of judicial decisions, it would be a proper function and responsibility of government to secure their provision for the due administration of the law. It was argued that the specific topics in the preamble that I have mentioned are all concerned with concrete matters, and that so also is the H judicially accepted opinion that the provision of a court house is a charitable purpose. But whether the search be for analogy or for the equity of the Statute this seems to me to be too narrow or refined an approach. I cannot accept that the provision, in order to facilitate the proper administration of the law, of the walls and other physical facilities of a court house is a charitable purpose, but that the dissemination by accurate and selective reporting of knowledge of a most important part of the law to be there administered is not.

Accordingly the purpose for which the association is established is exclusively charitable in the sense of Lord Macnaghten's fourth category. I would not hold that the purpose is purely the advancement of education: but in determining that the purpose is within the equity of the Statute I by no means ignore the function of the purpose in furthering knowledge in legal science.

I would dismiss the appeal.

SACHS L.J. The right of the Incorporated Council of Law Reporting for England and Wales to be registered as a charity under section 4 of the Charities Act 1960 depends on whether it is one "which is established for charitable purposes": see the definition of "charity" in section 45 (1). By section 46 "charitable purposes" is defined as meaning "purposes which are exclusively charitable according to the law of England and Wales." For the best part of four centuries the question whether the purposes of any given trust or institution are charitable has been decided by reference to the preamble to the Charitable Uses Act 1601—"the Statute of Elizabeth I." Since 1891 the courts have followed the guidance given in the classic speech of Lord Macnaghten in *Pemsel's* case [1891] A.C. 531, 583 where it is stated that "'Charity' in its legal sense comprises four principal divisions": in every case since then the issue has been whether the purposes of any given trust or institution fell within one of those divisions. The result of the present case depends on whether the purposes of the council fall within the second—"trusts for the advancement of education," or alternatively within the fourth—"trusts for other purposes beneficial to the community" not falling within any of the other heads.

To come to a conclusion whether those purposes fall within either of the two above divisions—and, in particular, whether it falls within the fourth—it is necessary to have regard to what since the judgment of Sir William Grant M.R. in *Morice v. Bishop of Durham* (1804) 9 Ves. 399, 405 has been termed the "spirit and intendment" of the above preamble, words commonly regarded as having the same meaning as "the equity of the statute." It so happens that there are available to us through judgments given in open court the contents of two documents substantially contemporaneous with the Statute of Elizabeth I which throw useful light both as to the spirit and intendment of that Statute in relation to administration of the law in general and to the word "education" in reference thereto: the charters of an Inn of Chancery (Clifford's Inn) and an Inn of Court (Inner Temple) dated respectively 1618 and 1608. It is, however, preferable first to approach each of the questions that arise in the instant case apart from what can be learnt from these documents.

Before considering more closely what are the answers to these questions with the aid of the education to be derived from studying the judgments in the 41 reports cited to us and the mass of learning shown to have been devoted, at any rate over the last two centuries, to the relevant problems, it is convenient at the outset to mention some points which have often been repeated in those judgments.

First, the word "charity" is "of all words in the English language . . . one which more unmistakeably has a technical meaning in the strictest sense of the term, . . . peculiar to the law" (*per* Lord Macnaghten in *Pemsel's* case [1891] A.C. 531, 581), one that is "wide, elastic" (*per* Lord Ashbourne C. in *In re Cranston* [1898] 1 I.R. 431, 442), and one that can include something quite outside the ordinary meaning the word has in popular speech (compare Lord Cozens-Hardy M.R. in *In re Wedgwood*

A [1915] 1 Ch. 113, 117). It is thus necessary to eliminate from one's mind a natural allergy, stemming simply from the popular meaning of "charity," to the idea that law reporting might prove to be a charitable activity. Secondly, it is clear that the mere fact that charges on a commercial scale are made for services rendered by an institution does not of itself bar that institution from being held to be charitable—so long, at any rate, as all the profits must be retained for its purposes and none can enure to the benefit B of its individual members: compare *Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corporation* [1968] A.C. 138. Thirdly, that there have, over at any rate the past century, been a number of references to the oddity that the tests by which the courts decide whether an institution is charitable depend entirely upon the preamble to the Statute of Elizabeth I. The most recent is one opining that this state of affairs was "almost C incredible to anyone not familiar with this branch of the English law": *per* Lord Upjohn in *Scottish Burial Reform and Cremation Society Ltd.'s* case at p. 151. To this I will return later.

Turning now to the points of substance argued before us, there came in limine the question as to what material we were entitled to look at to determine whether the purposes of the council were charitable. Mr. Francis contended that in substance the court could and should only look at D clause 3 of the memorandum of association and in particular at its important first sub-paragraph:

> "The objects for which the association is established are: (1) the preparation and publication, in convenient form, at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England."

E

This contention involved the proposition that we could neither look at any of the facts to which Foster J. [1971] Ch. 626, 639 referred under the heading of "the historical background," nor at any available evidence as to what at any time since July 1870 had been the use to which The Law Reports are put. That in effect would mean looking at clause 3 (1) as if it F were situate in a vacuum. That cannot be right.

Moreover he went on to submit that (a) the courts cannot look at the motives of the founders in order to show the purposes of an institution—at any rate, when those purposes as otherwise ascertained might be shown not to be charitable, and (b) the absence in the opening phrase of clause 3 of general words such as "for the purpose of the advancement and promotion of the science of law" was fatal to the council's claim even if on G the facts it was shown that that was the exclusive purpose of their activities and that that purpose was charitable.

Whilst the first of those submissions was correct, (see *Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners* [1931] 2 K.B. 465, *per* Lawrence L.J., at p. 484), the second was not. The courts look at the substance of what is being effected.

H A further question discussed was whether the use of the words "is established" in the section 45(1) definition of "charity" is to bind the court to look only at facts as existing at the date the Act of 1960 came into force, or whether the court could or should look only at the facts as at the date of the incorporation of the council. It makes no practical difference in the present case whether one looks at-the circumstances of 1870 or of 1960, but to my mind it is the foundation date that matters when considering whether an institution is established for charitable purposes.

Whilst appreciating what has been said as to the courts not being permitted, where plain language is used in a charter or memorandum, to admit extrinsic evidence as to its construction, it is yet plain from the course adopted by the courts in many cases that they are entitled to and do look at the circumstances in which the institution came into existence and at the sphere in which it operates to enable a conclusion to be reached on whether its purposes are charitable. Such matters were likewise regularly taken into account over the 117 years of the operation of the Scientific Societies Act 1843, when the issue was whether buildings belonged "to any society instituted for purposes of science, literature or the fine arts exclusively."

The necessity for this course is all the more obvious when the purposes of an ancient institution become the subject of examination, remembering that if it started as a charity it so remains. An example of the above approach is to be found in *Smith v. Kerr* [1900] 2 Ch. 511; [1902] 1 Ch. 774 (the Clifford's Inn case) where at first instance Cozens-Hardy J. fully examined the circumstances affecting Clifford's Inn, and Sir Richard Collins M.R. on appeal followed the same course, to ascertain the purpose to which the funds were to be applied. (The question whether in fact it has applied or is applying some of its funds to non-charitable purposes is, of course, a separate issue which arises when tax or rate exemptions are under consideration.)

As to the circumstances in which the council came into existence and the sphere in which it has since operated, the facts are admirably marshalled in the affidavit of Professor Goodhart with the accustomed lucidity of that eminent jurist. Reference can also be made to the report in 1853 of the Society for Promoting the Amendment of the Law, an extract from page 4 of which is aptly cited by Foster J. [1971] Ch. 626, 640. In the main the relevant circumstances and sphere are within judicial knowledge and need no detailed exposition in this judgment. The kernel of the matter is the vital function of judge-made law in relation not only to the common law and to equity, but to declaring the meaning of statutory law. No one—layman or lawyer—can have reasonably full knowledge of how the law affects what he or his neighbours are doing without recourse to reports of judicial decisions as well as to the statutes of the realm.

What in that state of affairs is the purpose of law reports? There is in substance only one purpose. To provide essential material for the study of the law—in the sense of acquiring knowledge of what the law is, how it is developing and how it applies to the enormous range of human activities which it affects.

At this juncture it is apposite to recall that the profession of the law is a learned profession. It was one of the earliest to be recognised as such—well before the Statute of Elizabeth I: to establish that point there is no need to have recourse to examples of this recognition such as the traditional House of Commons appellation "honourable and *learned*" to members of the profession. Similarly it is plainly correct to speak of law as a science and of its study as a study of science in the same way as one speaks of the study of medicine or chemistry. If further exemplification were needed of the categories of learning and science the pursuit of which have been held to be charitable, one can turn to the names of the institutions listed in *Tudor on Charities,* 6th ed. (1967), p. 29: there one finds such divers names as the Royal Literary Society, the British School of Egyptian Archaeology and the Institution of Civil Engineers. That the law is such a science happens to be illustrated by Sir Frederick Pollock's

celebrated essay on *The Science of Case Law* (1882): but this merely provides from within the profession an authoritative view which plainly accords in principle both with the decisions affecting the above cited institutions and that under the Scientific Societies Act 1843 in *Westminster City Council v. Royal United Service Institution* [1938] 2 All E.R. 545, 549. It may at this point be of relevance to note that Lord Macnaghten's phrase "advancement of education" has consistently been taken to be an *enlargement* of the phrase "advancement of learning" used by Sir Samuel Romilly for his second division of charities in *Morice v. Bishop of Durham* (1805) 10 Ves. 522, 531: in other words, there can be no question but that the latter is included in the former, as is illustrated by the authorities.

Against that background I turn to the question whether the council's purposes are educational. It would be odd indeed and contrary to the trend of judicial decisions if the institution and maintenance of a library for the study of a learned subject or of something rightly called a science did not at least prima facie fall within the phrase "advancement of education," whatever be the age of those frequenting it. The same reasoning must apply to the provision of books forming the raw material for that study, whether they relate to chemical data or to case histories in hospitals: and I can find no good reason for excluding case law as developed in the courts. If that is the correct approach, then when the institution is one whose individual members make no financial gain from the provision of that material and is one which itself can make no use of its profits except to provide further and better material, why is the purpose not charitable?

On behalf of the Attorney-General the only point taken against this conclusion was that the citation of the reports in court cannot be educational—in part, at any rate, because of the theory that the judges are deemed to have complete knowledge of the law. For the Commissioners of Inland Revenue the main contention was that the use by the legal profession of the reports was in general (not merely when in court) a use the purpose of which was to earn professional remuneration—a use for personal profit: and that it followed that the purpose of the council was not charitable.

Taking the latter point first, it is, of course, the fact that one of the main, if not the main, uses to which law reports are put is by members of the legal profession who study their contents so as to advise clients and plead on their behalf. Those reports are as essential to them in their profession as the statutes: without them they would be ill equipped to earn professional fees. Does it follow, as submitted by Mr. Francis, that a main purpose of the reports is the advancement of professional interests and thus not charitable? The argument put thus is attractive, not least to those who, like myself, are anxious not to favour or to seem to favour their one-time profession. But the doctor must study medical research papers to enable him to treat his patients and earn his fees; and it would be difficult indeed to say that because doctors thus earn their emoluments the printing and sale of such papers by a non-profit making institution could not be held to be for the advancement of education in medicine.

Where the purpose of producing a book is to enable a specified subject, and a learned subject at that, to be studied, it is, in my judgment, published for the advancement of education, as this, of course, includes as regards the Statute of Elizabeth I the advancement of learning. That remains its purpose despite the fact that professional men—be they lawyers, doctors or chemists—use the knowledge acquired to earn their

living. One must not confuse the results flowing from the achievement of a purpose with the purpose itself, any more than one should have regard to the motives of those who set that purpose in motion.

As to the point that the citation of reports to the judiciary is fatal to the council's claim, this, if independent of the contention concerning professional user to earn fees, seems to turn on the suggestion that as the judges are supposed to know the law the citations cannot be educative. That, however, is an unrealistic approach. It ignores the fact that citation of authority by the Bar is simply a means by which there is brought to the attention of the judge the material he has to study to decide the matter in hand: in this country he relies on competent counsel to quote the extracts relevant to any necessary study of law on the points in issue, instead of having to embark on the time consuming process of making the necessary researches himself. Indeed, it verges on the absurd to suggest that the courteous facade embodied in the traditional phrase "as, of course, your Lordship knows" can be used to attempt to conceal the fact that no judge can possibly be aware of all the contents of all The Law Reports that show the continuing development of our ever changing laws. The Law Reports (including volume 1 of the Weekly Law Reports) for 1970 alone contain some 5,200 pages: incidentally, if one confined one's views solely to the three volumes of the Weekly Law Reports there would still remain over 4,000 pages. For my part I feel no diffidence in expressing my indebtedness to counsel in the instant case, as I have done in other cases this term dealing with other subjects, for educating me in the law of charitable purposes by the citation of the 41 authorities previously mentioned.

For these reasons I reject the contentions that the user of The Law Reports by the legal profession for earning fees of itself results in the purposes of the council not being charitable and thus return to the question whether they are charitable on the footing that their substantially exclusive purpose is to further the study of the law in the way already discussed. Such a purpose must be charitable unless the submission that the advancement of learning is not an advancement of education within the spirit and intendment of the preamble is upheld: but for the reasons already given that submission plainly fails. Accordingly, having regard to the fact that the members of the council cannot themselves gain from its activities, its purposes in my judgment fall within the second of Lord Macnaghten's divisions.

Despite the above conclusion, it seems desirable to consider as compactly as is practicable whether had the council's purpose not fallen within the second division it would none the less have come within the fourth as being beneficial to the community. The Charity Commissioners, after a year's consideration of the council's application to be registered as a charity, wrote a letter dated December 6, 1967, which contained the following phrase, "the commissioners did not dispute that the advancement of the administration of law was a charitable purpose." The Attorney-General supports that view: the Commissioners of Inland Revenue oppose it. Foster J. [1971] Ch. 626 rejected the contention of the Commissioners of Inland Revenue.

Being myself convinced that the correct approach is that which Foster J., at p. 647, referred to as "Lord Wilberforce's wider test" (see the *Scottish Burial Society* case [1968] A.C. 138, 156)—a test that clearly also attracted Lord Reid (see pp. 146–147) with whom Lord Guest agreed, at p. 148—I do not propose to consider the instant case on the basis of analogies. The analogies or "stepping stones" approach was rightly

A conceded on behalf of the Attorney-General not to be essential: its artificiality has been demonstrated in the course of the consideration of the numerous authorities put before us. On the other hand, the wider test—advancement of purposes beneficial to the community or objects of general public utility—has an admirable breadth and flexibility which enables it to be reasonably applied from generation to generation to meet changing circumstances: it has thus such patent advantages that for my part I B appreciate the wisdom of the legislature in refraining from providing a detailed definition of charitable purposes in the Act of 1960 and preferring to allow the existing law to be applied. Any statutory definition might well merely produce a fresh spate of litigation and provide a set of undesirable artificial distinctions. There is indeed much to be said for flexibility in such matters.

C The first question to be considered in relation to the wider test is whether the advancement of the administration of the law in its broad sense (which would include the elucidation, proper application and betterment of the law) is something beneficial to the community. To pose that question to one whose function it is to administer the law provokes unease and a tendency to lean over backwards to avoid giving an affirmative reply. But such a mental posture is no more conducive to a D balanced view than to elegance. Looking at the issue squarely and attempting to use the eyes of the generality of subjects of either Elizabeth I or Elizabeth II there is, however, manifestly only one answer—of course it is beneficial to the community.

The answer being eminently a matter of first impression derived from an overall view of the preamble coupled with the general trend of some centuries of decisions, no useful purpose can be served by citation of E specific authorities. It is an impression formed without reference to the contents of either of the two previously mentioned charters, to which I will, however, return.

Next comes the question whether the particular purpose of the council's activities sufficiently contribute to that advancement. Does it benefit a sufficiently wide section of the community? As satisfactory F administration of the law in practice depends on there being a proper system of law reporting, it can well be said that the whole community benefits from the purposes of the council: but even if the benefits were confined to those who have to make judicial decisions and to the members of the legal profession advising clients and appearing for them in court, none the less a sufficiently large section of the community would derive the relevant benefits.

G Adopting the test propounded by Russell L.J., I next turn to consider whether there is any reason for excluding these benefits from the range of those that are capable of being classified as charitable, and can find no such reason.

Finally as regards this head comes the question whether the contribution is made in a charitable manner. This point having been fully H discussed in the judgments of my brethren to an effect with which I agree, it is not necessary to go over the ground again. The way in which the council operates qualifies it for inclusion amongst charities as defined by the Act of 1960 once it is shown that its purposes can properly be said to be charitable if operated in a charitable manner.

Accordingly if, contrary to my view, the purposes of the council do not fall within the second division, they are none the less charitable because they would then fall within the fourth.

In conclusion it seems appropriate to return to the contents of the two charters granted within a score of years of the enactment of the Statute of Elizabeth I. On the footing that it is permissible to refer to them—and quite rightly, to my mind, no objection was taken before us to this being done—we are in the same position as was this court in *Smith v. Kerr* [1902] 1 Ch. 774, where Sir Richard Collins M.R. said, at p. 778:

> "we are not left to speculation, nor have we to look for obscure hints from remote times, because it so happens that we have a most authoritative contemporary record"

There he referred to Lord Coke's account of the functions of Clifford's Inn: here we can look at the accounts in two royal charters of what was regarded as beneficial to the "Commonwealth" and "Realm of England."

Rather than merely cull selected extracts from these two charters, it has seemed best to append to this judgment a full note of so much of them as has been set out and discussed in the respective judgments of Collins M.R. in *Smith v. Kerr* and of the deputy judge of the Mayor's and City of London Court in *Thomson v. Trustees of the Honourable Society of the Inner Temple* (unreported), May 30, 1967. The passages in the Clifford's Inn charter sidelined 1, 2 and 4 and the Inner Temple charter 5 and 8 speak for themselves: not least the last mentioned reference to "the welfare of this Realm of England flourishing for so many ages by the administration of the said Laws." Taken as a whole these documents of themselves provide compelling and perhaps conclusive evidence that advancement of the administration of the law was regarded as beneficial to the community in the first quarter of the seventeenth century.

Though the contents of these charters have been cited primarily in relation to Lord Macnaghten's fourth division, they also may be said to provide material touching the second. The references in the Inner Temple charter (sideline 10) to the "Entertainment *and Education* of the Students and Professors of the Laws" when coupled with the earlier passages (sidelines 6 and 7) and phrases in the Clifford's Inn charter such as the "furtherance of the Practisers and Students of the Common Law" (sideline 3) are in point, having regard to the fact that "professors" appears to mean "those who profess the law."

Accordingly I would dismiss this appeal.

APPENDIX

Charters of Clifford's Inn and the Honourable Society of the Inner Temple as set out and discussed in (a) *Smith v. Kerr* [1902] 1 Ch. 774 and (b) *Thomson v. Trustees of the Honourable Society of the Inner Temple* (unreported), May 30, 1967, in the respective judgments of Collins M.R. and the deputy judge of the Mayor's and City of London Court:

(a) *Clifford's Inn.*

In *Smith v. Kerr* [1902] 1 Ch. 774, 776, Sir Richard Collins M.R. said:

"The material words are these. After naming the parties, Lord Cumberland and Lord Clifford being the two grantors, it witnessed that the grantors

> 'having an honourable intent and care that the capital messuage commonly called Clifford's Inn before mentioned, with the appurtenances thereto belonging being the ancient inheritance of the said Earl and Lord Clifford and of their ancestors, and which hath been for many years heretofore by the allowance of the said Earl and his ancestors the Earls of Cumberland and Lord Cliffords used and employed as an Inn of Chancery

A (1) *for the furtherance of the study and practice of the Common Laws of this His Majesty's Realm of England*, and during all that time hath been ordered and governed by the Principal and Rules of the said House for the time being in very good sort and with great

(2) discretion both *to the good of the Commonwealth* and to the honour of the said Earl and Lord Clifford and their ancestors, may now upon the humble suit and earnest desire of the said Principal and Rules and others the Practisers and students of the said Society be assured estated and B settled as'—I think that means 'so as'—'the same shall and may for ever hereafter continue and be employed as an Inn of Chancery for the *furtherance of the*

(3) *Practisers and Students of the Common Laws of this Realm* as aforesaid And that the Principal Rules and other the gentlemen of the said society may from henceforth be assured of a certain estate therein Do principally for that purpose intent and consideration and for and in consideration of C the sum of 600 *l* to them by'—here follow the names of 13 persons—'for and on behalf of themselves and the rest of the gentlemen of the same Society of Clifford's Inn aforesaid at or before the sealing and delivery of these presents well and truly satisfied contented and paid'—

here follows a receipt and a provision for a common recovery to the uses, intents, and purposes thereafter in the deed mentioned, and a grant of the premises, with D certain exceptions, to be held by two trustees who are named and their heirs for ever to the only and proper use and behoof of the trustees named and of their heirs for ever—

> 'To the intent and purpose aforesaid To be holden of the Chief Lord and Lords of the Fee and Fees thereof by the rents and services heretofore due and of right accustomed and yielding and paying therefore yearly for ever unto the said Francis Earl of Cumberland and Henry Lord Clifford their E heirs and assigns the yearly rent of four pounds.'

Then it goes on:

> 'After the said recovery and recoveries fine and fines or any or either of them shall be had acknowledged and suffered executed entered and recorded as aforesaid to the use and behoof of' the 13 gentlemen first named 'and of their heirs for ever according to the intent and true F meaning of the present indenture and to the intent that the said Earl and Lord Clifford their heirs and assigns shall and may for ever hereafter levy-receive perceive and take up the said yearly rent of four pounds.' Then it goes on: 'And it is further agreed by and between the said parties to these presents and the true intent and meaning hereof and of all the said parties is that the said capital messuage now called by the name of Clifford's Inn shall for ever hereafter retain and keep the same usual and G ancient name of Clifford's Inn, and shall for ever hereafter be continued and employed as an Inn of Chancery for

(4) the good of the gentlemen of the Society and for the benefit of the Commonwealth as aforesaid and not otherwise, nor to any other use intent or purpose.'"

(b) *The Honourable Society of the Inner Temple.*

H In *Thomson v. Trustees of the Honourable Society of the Inner Temple* the deputy judge said:

"The recitals and expression of intention of (King James I) contained in the letters patent are important and are as follows:

> 'Whereas *our Realm of England*, having been for so many ages exceedingly prosperous in the arts of peace and war, and having

(5) by the singular providence of God in his own time devolved upon us by hereditary right, is *sensible that great part of its welfare is justly owing to*

the ancient and proper Laws of the Realm tried through a long series of ages, and particularly adapted to that populous and warlike nation, and approved by constant experience And whereas the Inns of the Inner and Middle Temple, London, being two out of those four Colleges the

(6) most famous of all Europe, as always *abounding with persons devoted to the study of the aforesaid Laws and experiences therein*, have been by the free bounty of our progenitors, Kings of England, for a long time *dedicated to the use of the Students and*

(7) *Professors of the said Laws*, to which as to the best seminaries of learning and education very many young men, eminent for rank of family and their endowments of mind and body, have daily resorted from all parts of this Realm, and from which many men in our own times, as well as in the times of our progenitors, have by reason of their very great merits been advanced to discharge the public and arduous functions as well of the state as of justice, in which they have exhibited great examples of prudence and integrity, to the no small honour of the said Profession, and adornment of this Realm, and good of the whole Commonwealth, as is to us so abundantly manifest; Know Ye Therefore, that we, being desirous of perpetuating, as far as in us lies, *the welfare*

(8) *of this Realm of England, flourishing for so many ages by the administration of the said Laws*, and compassing not so much the continuance of the ancient renown of the said Inns as an accession of new honour, and to leave upon record to all posterity a testimony

(9) of our good will and manificence *to the Profession and to the Professors of the said Laws*, have of our special Grace, certain knowledge, and mere motion, given and granted, and by these Presents for ourselves our heirs and successors do give and grant to our well-beloved and faithful Councillor Sir Julius Caesar . . .'

The recitals demonstrate the nature and stature of the Inns at the time and the words 'being desirous of perpetuating, as far as in us lies, the welfare of this Realm of England' are an indication of the purpose of the gift. . . . the property is described, and the words 'Halls, Houses, Edifices, Cloisters, Buildings, Chambers, Gardens, Courts,' further down with the words 'Church, Edifices and Buildings of the Church . . . commonly called the Temple Church' . . . present a picture which is familiar today. The habendum clause after the words appropriate to convey the fee simple proceeds as follows in the translation:

'Which said Inns, Messuages, Houses, Edifices, Chambers and other premises we will, and by these presents for ourselves, our heirs

(10) and successors, *strictly command, shall serve for the Entertainment and Education of the students and Professors of the Laws aforesaid*, residing in the same Inns for ever.'

The Latin words from 'strictly command' onwards are

'mandamus pro hospitacione & educacione studencium & professorum legum predictarum in eisdem hospitiis perpetuis t [sic] temporibus futuris commorantium deservive.'

It has been suggested by counsel on both sides that the word 'hospitacione' would be better translated as 'accommodation,' using that word in its widest sense, rather than 'entertainment,' and that the words 'professorum legum' would be better translated as 'those who profess the laws' rather than 'professor of the laws'; while the word 'commorantium' would be better translated as 'abiding' rather than 'residing.' It appears to me, though I make no pretence of Latin scholarship, that these suggestions are correct and I accept them."

BUCKLEY L.J. The question for determination in this case is whether the Incorporated Council of Law Reporting for England and Wales is a body established for exclusively charitable purposes. If it is, the council is

A entitled to be registered as a charity under the Charities Act 1960: otherwise, it is not so.

The council was incorporated in 1870 under the Companies Acts 1862 and 1867 as a company limited by guarantee, the word "limited" being omitted from the name by licence of the Board of Trade. The first object for which the council was incorporated was and still remains the preparation and publication in a commercial form at a moderate price and
B under gratuitous professional control of reports of judicial decisions of the superior and appellate courts in England. All of the other objects stated in the council's memorandum of association, which have already been read, should as a matter of construction, in my opinion, be regarded as subsidiary to the council's first object, which is, I think, not only a primary purpose but the primary purpose for which the council was established,
C which the other stated purposes subserve. It has therefore been proper that the argument has been concentrated upon the first object.

To ascertain for what purposes the council was established one must refer to its memorandum of association and to that alone. It is irrelevant to inquire what the motives of the founders were, or how they contemplated or intended that the council should operate, or how it has in fact operated: see *Hunter v. Attorney-General* [1899] A.C. 309; *Bowman v.*
D *Secular Society Ltd.* [1917] A.C. 406; *Keren Kayemeth Le Jisroel Ltd. v. Inland Revenue Commissioners* [1931] 2 K.B. 465; [1932] A.C. 650 and *Tennant Plays Ltd. v. Inland Revenue Commissioners* [1948] 1 All E.R. 506. But in order to determine whether an object, the scope of which has been ascertained by due processes of construction, is a charitable purpose it may be necessary to have regard to evidence to discover the consequences
E of pursuing that object. It would be immediately evident that a body established to promote the Christian religion was established for a charitable purpose, whereas in the case of a body established to propagate a particular doctrine it might well be necessary to consider evidence about the nature of the doctrine to decide whether its propagation would be a charitable activity.

In the present case no problem arises about the meaning of the
F council's objects. The question is whether their pursuit should be regarded as charitable. In this respect it is proper to have regard to evidence about the purposes which the pursuit of those objects will serve.

The Commissioners of Inland Revenue contend that the council's objects are not charitable, because, as they say, their purpose is to serve the interests of the legal profession, providing an essential tool of the practising lawyer. They admit that this may be beneficial to the
G community, but they say that it is not a purpose within the "spirit and intendment" of the preamble to the Statute of Elizabeth I.

The Commissioners of Inland Revenue point out that the initiative in setting up the unincorporated Council of Law Reporting, which was the precursor of the council, and in procuring the incorporation of the latter body was that of members of the legal profession; that the incorporated
H council is by the terms of its memorandum of association a body controlled by members of the legal profession; and that its publications constitute an essential part of the professional equipment of every practising lawyer in this country, not merely to enable him to take part in the trial of causes and the administration of justice but to enable him also to advise his clients in non-litigious matters and to provide those expert services, such as draftsmanship, which a practising lawyer offers. They contend that the advancement of the interests of members of the legal

profession per se is not a charitable purpose: see *General Medical Council v. Inland Revenue Commissioners* (1928) 44 T.L.R. 439 and *General Nursing Council for England and Wales v. St. Marylebone Borough Council* [1959] A.C. 540.

On the other hand, if a body is established for a charitable purpose, it will be not the less a charity because the pursuit of that purpose will or may confer incidental benefits upon the members of a profession: see *Royal College of Surgeons of England v. National Provincial Bank Ltd.* [1952] A.C. 631 and *Royal College of Nursing v. St. Marylebone Borough Council* [1959] 1 W.L.R. 1077.

For the council it is argued that its objects are charitable upon the ground that they fall within the scope either of purposes for the advancement of education, using that term in a broad sense, or of the fourth head of Lord Macnaghten's celebrated enumeration of charitable purposes in *Pemsel's* case [1891] A.C. 531, 583 as being purposes beneficial to the community, which fall within the spirit and intendment of the Statute of Elizabeth I. It is emphasised that the members of the council, who are not more than 20 or so in number at any one time are precluded by the council's constitution from obtaining any profit or benefit as members from its activities. The council's publications can be bought by the general public and are, as the evidence shows, bought by a wide variety of users, including academic bodies, commercial and industrial bodies (including public utility undertakings), public authorities, government and public departments and offices, trade unions, and a wide variety of libraries, professional institutes and miscellaneous bodies, as well as a great many bodies and persons concerned with the administration and practice of the law, and all of these not merely in this country but also in many other countries within the Commonwealth and elsewhere. These circumstances, it is said, demonstrate that the council's publications constitute a general public purpose or, to use Sir Samuel Romilly's language in argument in *Morice v. Bishop of Durham* (1805) 10 Ves. 522, 531, an object of general public utility, and that this falls within the spirit of the preamble. In this connection Mr. Walton, for the council, has referred us to *Duke on Charitable Uses*, ed. 1676, p. 109, where it is said that the building of a sessions house for a city or a county has been held to be charitable: see also *Attorney-General v. Heelis* (1824) 2 Sim. & St. 67, 76, *per* Leach V.-C. We were also referred to *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association* [1953] A.C. 380, where Lord Normand, at p. 391, Lord Morton of Henryton, at p. 400, and Lord Reid, at p. 402, all expressed the view that the promotion of the efficiency of the police would be a charitable purpose. By analogy it was contended that the advancement of the administration of justice is a charitable purpose and that the objects of the council are charitable on this ground. Alternatively the council has contended that its objects are educational in that they result in dissemination of information about the latest state of and development in the science of the law and so are educational in a broad sense. In this connection, we were referred to *Smith v. Kerr* [1902] 1 Ch. 774, relating to the funds of Clifford's Inn, and to *In re British School of Egyptian Archaeology* [1954] 1 W.L.R. 546.

Foster J. declined to accept the view that the council's objects are educational, mainly, I think, upon the ground that in many respects they are not used for instructional purposes. He did, however, take the view that they are charitable on the ground that the purpose of the publication of The Law Reports is to enable judge-made law to be properly developed

A and administered by the courts, a purpose beneficial to the community and within the spirit of the preamble.

What then does the evidence establish about the need for reliable law reports and the reasons for publishing them? As the uncontradicted evidence of Professor Goodhart makes clear, in a legal system such as ours, in which judges' decisions are governed by precedents, reported decisions are the means by which legal principles (other than those laid B down by statutes) are developed, established and made known, and by which the application of those legal principles to particular kinds of facts are illustrated and explained. Reported decisions may be said to be the tissue of the body of our non-statutory law. Whoever, therefore, would carry out any anatomical researches upon our non-statutory corpus juris must do so by research amongst, and study of, reported cases.

C Professor Goodhart recalls that Sir Frederick Pollock in his paper entitled *The Science of Case Law* published in 1882 pointed out that the study of law is a science in the same sense as physics or chemistry are sciences, and that the material with which it is concerned consists of individual cases which must be analysed and measured as carefully as is the material in the other sciences. At about the same time the "case D system" of teaching law was introduced at the Harvard Law School, which has since become generally adopted. Accurate and authoritative law reports are thus seen to be essential both for the advancement of legal education and the proper administration of justice. As Professor Goodhart says: "Accuracy in The Law Reports is, therefore, as important for the science of law as is the accuracy of instruments in the physical sciences."

E The legal profession has from times long past been termed a learned profession, and rightly so, for no man can properly practise or apply the law who is not learned in that field of law with which he is concerned. He must have more than an aptitude and more than a skill. He must be learned in a sense importing true scholarship. In a system of law such as we have in this country this scholarship can only be acquired and maintained by a continual study of case law.

F I agree with Foster J. in thinking that, when counsel in court cites a case to a judge, counsel is not in any real sense "educating" the judge, counsel performing the role of a teacher and the judge filling the role of a pupil; but I do not agree with him that the process should not be regarded as falling under the charitable head of "the advancement of education."

In a number of cases learned societies have been held to be charitable. G Sometimes the case has been classified under Lord Macnaghten's fourth head, sometimes under the second. It does not really matter under which head such a case is placed, but for my own part I prefer to treat the present case as falling within the class of purposes for the advancement of education rather than within the final class of other purposes for the benefit of the community. For the present purpose the second head should H be regarded as extending to the improvement of a useful branch of human knowledge and its public dissemination.

In *Beaumont v. Oliveira* (1869) 4 Ch.App. 309, bequests to the Royal Society and the Royal Geographical Society were held to be charitable. The object of the Royal Society is "improving natural knowledge." That of the Royal Geographical Society is "the improvement and diffusion of geographical knowledge." Of these two bequests Selwyn L.J. said, at p. 315:

> "In the case now before us, both the bequests are bequests to corporations, the objects and purposes of which are the diffusion and improvement of particular branches of knowledge. They subsist for these purposes and no others, therefore for public purposes—therefore, for the advancement of objects of general public utility—therefore for purposes analogous and similar to those mentioned in the statute of Elizabeth—therefore for charitable purposes; . . ."

This puts the two bequests squarely under the fourth head of charity.

In *Royal College of Surgeons of England v. National Provincial Bank Ltd.* [1952] A.C. 631 the question arose whether the college was a charity. It was held, at p. 632, that its object was the due promotion and encouragement of the study and practice of the art and science of surgery. Lord Normand said, at p. 641:

> "The words 'the study and practice of the art and science' of surgery do not, in my opinion, mean 'the academic study and professional practice of the art and science of surgery'; they signify rather the acquisition of knowledge and skill in surgery both by abstract study and by the exercise of the art in the dissecting room and the anatomy theatre, and they are capable of covering both the discovery of new knowledge, which is the fruit of research, and the learning of existing knowledge either by students who are qualifying or by qualified surgeons desirous of improving their knowledge and skill. On that construction the professed objects of the college all fall into the categories of the advancement of science or of the advancement of education, and are charitable."

Lord Normand thus classified the college as a charity within Lord Macnaghten's second head. Lord Morton of Henryton, at p. 654, said that the object of the college might be regarded as being directed to the relief of human suffering or to the advancement of education or science or to all these ends.

In *In re Lopes* [1931] 2 Ch. 130, the Zoological Society of London, the objects of which are defined in its charter as being "the advancement of zoology and animal physiology and the introduction of new and curious subjects of the animal kingdom," was held to be a charity. Farwell J. said, at p. 135:

> "Its first object is 'the advancement of zoology and animal physiology.' That is clearly educational, for the advancement of scientific knowledge, and therefore charitable."

This treats the case as falling within the second head.

Finally, in *In re British School of Egyptian Archaeology* [1954] 1 W.L.R. 546, an association the objects of which included conducting excavations, discovering and exhibiting antiques, publishing accounts of its activities and training students, was held by Harman J. to be an educational charity. Harman J. said, at p. 551:

> "I cannot doubt that this was a society for the diffusion of a certain branch of knowledge, namely, knowledge of the ancient past of Egypt; and that it also had a direct educational purpose, namely, to train students in that complicated branch of knowledge known as Egyptology. In my view this is clearly a charity from the educational aspect,"

A The council was established for the purpose of recording in a reliably accurate manner the development and application of judge-made law and of disseminating the knowledge of that law, its development and judicial application, in a way which is essential to the study of the law. The primary object of the council is, I think, confined to this purpose exclusively and is charitable. The subsidiary objects, such as printing and publishing statutes, the provision of a noting-up service and so forth, are B ancillary to this primary object and do not detract from its exclusively charitable character. Indeed, the publication of the statutes of the realm is itself, I think, a charitable purpose for reasons analogous to those applicable to reporting judicial decisions.

The fact that the council's publications can be regarded as a necessary part of a practising lawyer's equipment does not prevent the council from C being established exclusively for charitable purposes. The practising lawyer and the judge must both be lifelong students in that field of scholarship for the study of which The Law Reports provide essential material and a necessary service. The benefit which the council confers upon members of the legal profession in making accurate reports available is that it facilitates the study and ascertainment of the law. It also helps the lawyer to earn his livelihood, but that is incidental to or consequential on the D primary scholastic function of advancing and disseminating knowledge of the law, and does not detract from the exclusively charitable character of the council's objects: compare *Royal College of Surgeons of England v. National Provincial Bank Ltd.* [1952] A.C. 631 and *Royal College of Nursing v. St. Marylebone Borough Council* [1959] 1 W.L.R. 1077.

The service which publication of The Law Reports provides benefits E not only those actively engaged in the practice and administration of the law, but also those whose business it is to study and teach law academically, and many others who need to study the law for the purposes of their trades, businesses, professions or affairs. In all these fields, however, the nature of the service is the same: it enables the reader to study, and by study to acquaint himself with and instruct himself in the F law of this country. There is nothing here which negatives an exclusively charitable purpose.

Although the objects of the council are commercial in the sense that the council exists to publish and sell its publications, they are unself-regarding. The members are prohibited from deriving any profit from the council's activities, and the council itself, although not debarred from making a profit out of its business, can only apply any such profit in the G further pursuit of its objects. The council is consequently not prevented from being a charity by reason of any commercial element in its activities.

I therefore reach the conclusion that the council is a body established exclusively for charitable purposes and is entitled to be registered under the Act of 1960.

It is consequently unnecessary for me to consider whether the judge H was right in his view that enabling judge-made law to be properly developed and administered by the courts is a charitable purpose. It may well be so, but I should, I think, myself find difficulty in reaching the conclusion that the council is a body established exclusively for that purpose. If this ground were to be relied upon, it would, I think, be necessary to consider what other purposes are served by the council's activities besides the administration of law in the courts and whether all those other purposes are charitable. The reasons, however, which I have

stated, for which I would dismiss this appeal, embrace all the council's activities, so that it is unnecessary to consider them individually.

Russell L.J. in the judgment which he has just delivered, has preferred to base himself upon a wider ground, as I understand it, that the publication of accurate reports of judicial decisions is beneficial to the community not merely by assisting the administration and development of the law in the courts but by making the law known, or at least accessible, to all members of the community, including professional lawyers whose advice on legal matters other members of the community are likely to seek, thus making a sound knowledge and understanding of the law more available to all. I agree that on this basis also the council is to be regarded as a body established for charitable purposes and, indeed, for exclusively charitable purposes as falling under Lord Macnaghten's fourth head. Such an activity is clearly properly described as of general public utility and as beneficial to the community. In the absence of any ground for holding that such an activity is not within the spirit of the preamble to the Statute of Elizabeth I, and I think that there is no such ground, it should be held to be charitable.

Appeal dismissed with costs of council.
No order in respect of costs sought by Attorney-General.
Leave to appeal refused.

Solicitors: Solicitor of Inland Revenue; Linklaters & Paines; Treasury Solicitor.

S. S.

[1975] A.C. 396

[HOUSE OF LORDS]

AMERICAN CYANAMID CO. . . . . APPELLANTS

AND

ETHICON LTD. . . . . RESPONDENTS

1974 Nov. 12, 13, 14;
1975 Feb. 5

Lord Diplock, Viscount Dilhorne, Lord Cross of Chelsea, Lord Salmon and Lord Edmund-Davies

Injunction—Interlocutory—Jurisdiction to grant—Principles on which interlocutory injunction to be granted—No need to be satisfied that permanent injunction probable at trial—Protection of parties—Balance of convenience—Criteria—Rule identical in patent cases

The plaintiffs, an American company, owned a patent covering certain sterile absorbable surgical sutures. The defendants, also an American company, manufactured in the United States and were about to launch on the British market a suture which the plaintiffs claimed infringed their patent. The defendants contested its validity on divers grounds and also contended that it did not cover their product. In an action for an injunction the plaintiffs applied for an interlocutory injunction which was granted by the judge at first instance with the usual undertaking in damages by the plaintiffs. The Court of Appeal reversed his decision on the ground that no prima facie case of infringement had been made out. On the plaintiffs' appeal:

Held, allowing the appeal, (1) that in all cases, including patent cases, the court must determine the matter on a balance of convenience, there being no rule that it could not do so unless first satisfied that, if the case went to trial on no other evidence than that available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in the terms of the interlocutory injunction sought; where there was a doubt as to the parties' respective remedies in damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would be prudent to preserve the status quo.

(2) That in the present case there was no ground for interfering with the judge's assessment of the balance of convenience or his exercise of discretion and the injunction should be granted accordingly.

Hubbard v. Vosper [1972] 2 Q.B. 84, C.A. considered.

Decision of the Court of Appeal [1974] F.S.R. 312 reversed.

The following cases are referred to in their Lordships' opinions:

Donmar Productions Ltd. v. Bart (Note) [1967] 1 W.L.R. 740; [1967] 2 All E.R. 338.

Harman Pictures N.V. v. Osborne [1967] 1 W.L.R. 723; [1967] 2 All E.R. 324.

Hubbard v. Vosper [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.

Jones v. Pacaya Rubber and Produce Co. Ltd. [1911] 1 K.B. 455, C.A.

Preston v. Luck (1884) 27 Ch.D. 497, C.A.

Smith v. Grigg Ltd. [1924] 1 K.B. 655, C.A.

Wakefield v. Duke of Buccleugh (1865) 12 L.T. 628.

The following additional cases were cited in argument:

Acetylene Illuminating Co. Ltd. v. United Alkali Co. Ltd. (1904) 22 R.P.C. 145, H.L.(E.).

British Thomson-Houston Co. Ltd. v. Corona Lamp Works Ltd. (1921) 39 R.P.C. 49, H.L.(E.).
Carroll v. Tomado Ltd. [1971] R.P.C. 401.
Challender v. Royle (1887) 36 Ch.D. 425, C.A.
Elwes v. Payne (1879) 12 Ch.D. 468, C.A.
Evans Marshall & Co. Ltd. v. Bertola S.A. [1973] 1 W.L.R. 349; [1973] 1 All E.R. 992, C.A.
Hatmaker v. Joseph Nathan & Co. Ltd. (1919) 36 R.P.C. 231, H.L.(E.).
May & Baker Ltd. and Ciba Ltd.'s Letters Patent, In re (1948) 65 R.P.C. 255; 66 R.P.C. 8, C.A.; sub nom. *May & Baker Ltd. v. Boots Pure Drug Co. Ltd.* (1950) 67 R.P.C. 23, H.L.(E.).
Mitchell v. Henry (1880) 15 Ch.D. 181, C.A.
Mogul Steamship Co. v. M'Gregor. Gow & Co. (1885) 15 Q.B.D. 476.
Natural Colour Kinematograph Co. Ltd. v. Bioschemes Ltd. (1915) 32 R.P.C. 256, H.L.(E.).
Newman v. British & International Proprietaries Ltd. [1962] R.P.C. 90, C.A.
No-Fume Ltd. v. Frank Pitchford & Co. Ltd. (1935) 52 R.P.C. 231, C.A.
R.C.A. Photophone Ltd. v. Gaumont-British Picture Corporation Ltd. (1935) 53 R.P.C. 167, C.A.
Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. [1974] 1 W.L.R. 798; [1974] 2 All E.R. 321.
Zaidener v. Barrisdale Engineers Ltd. [1968] R.P.C. 488, C.A.

APPEAL from the Court of Appeal.

This was an appeal from an order of the Court of Appeal (Russell and Stephenson L.JJ. and Foster J.) dated February 5, 1974, whereby the judgment of Graham J. dated July 30, 1973, was reversed and his order discharged on a motion for an interlocutory injunction in an action for infringement of letters patent No. 1,043,518 in which the respondents, Ethicon Ltd., were defendants and the appellants, American Cyanamid Co., were plaintiffs. The respondents counterclaimed for revocation of the patent. Graham J. granted the appellants' application for an interlocutory injunction until the trial of the action and counterclaim, but the Court of Appeal unanimously held that, on the present evidence, the claims of the patent were not likely to be construed so as to cover the respondents' product, and that a prima facie case of infringement of the patent had therefore not been established. The Court of Appeal therefore discharged the interlocutory injunction ordered by Graham J. The court refrained from expressing any view on any of the other issues raised.

The facts stated in the opinion of Lord Diplock were as follows: This interlocutory appeal concerned a patent for the use as absorbable surgical sutures of filaments made of a particular kind of chain polymer known as "a poly-hydroxyacetic ester" ("PHAE"). These were sutures of a kind that disintegrated and were absorbed by the human body once they had served their purpose. The appellants ("Cyanamid"), an American company, were the registered proprietors of the patent. Its priority date in the United Kingdom was October 2, 1964. At that date the absorbable sutures in use were of natural origin. They were made from animal tissues popularly known as catgut. The respondents ("Ethicon"), a subsidiary of another American company, were the dominant suppliers of catgut sutures in the United Kingdom market.

Cyanamid introduced their patented product in 1970. The chemical substance of which it was made was a homopolymer, i.e. all the units in the chain, except the first and the last ("the end stabilisers"), consisted of glycolide radicals. Glycolide was the radical of glycolic acid, which was another name for hydroxyacetic acid. By 1973 this product had succeeded

A in capturing some 15 per cent. of the United Kingdom market for absorbable surgical sutures. Faced with this competition to catgut, Ethicon, who supplied 80 per cent. of the market, were proposing to introduce their own artificial suture ("XLG"). The chemical substance of which it was made was not a homopolymer but a copolymer, i.e. although 90 per cent. by weight of the units in the chain consisted of glycolide radicals, the remaining 10 per cent. were lactide radicals, which were B similar in chemical properties to glycolide radicals but not identical in chemical composition.

Cyanamid contended that XLG infringed their patent, of which the principal claim was: "A sterile article for the surgical repair or replacement of living tissue, the article being readily absorbable by living tissue and being formed from a polyhydroxyacetic ester." As was disclosed in the C body of the patent, neither the substance PHAE nor the method of making it into filaments was new at the priority date. Processes for manufacturing filaments from PHAE had been the subject of two earlier United States patents in 1953 (Lowe) and 1954 (Higgins). The invention claimed by Cyanamid thus consisted of the discovery of a new use for a known substance.

On March 5, 1973, Cyanamid started a quia timet action against D Ethicon for an injunction to restrain the threatened infringement of their patent by supplying sutures made of XLG to surgeons in the United Kingdom. On the same day they gave notice of motion for an interlocutory injunction. Voluminous affidavits and exhibits were filed on behalf of each party. The hearing of the motion before Graham J. lasted three days. On July 30, 1973, he granted an interlocutory injunction upon E the usual undertaking in damages by Cyanamid.

Ethicon appealed to the Court of Appeal. The hearing there took eight days. On February 5, 1974, the Court of Appeal gave judgment. They allowed the appeal and discharged the judge's order. Leave to appeal from that decision was granted by the House of Lords.

Andrew Bateson Q.C. and *David Young* for the appellant company. The F main issue in this appeal is whether PHAE, construed in the patent in suit, covers more than the homopolymer. In holding that that had not been established prima facie the Court of Appeal was wrong and the trial judge was right in holding that what was meant by comonomer in the patent contemplated copolymers. For the purpose of deciding whether the plaintiffs have established a prima facie case the House must decide whether on the evidence the construction for which they contend is the one G applicable to the patent in suit. On construction the case put forward by the respondents is barely arguable.

The Court of Appeal wrongly construed the claim and specification and its decision was based on a misapprehension of the evidence. It erred in holding that the appellants had not established that prima facie the patent in suit would be infringed by the marketing of the respondents' H suture.

The onus is not on the plaintiffs to establish a prima facie case of infringement before an interlocutory injunction case can be granted. "Prima facie" can have many meanings. Here, if anything, it means that the plaintiff has more than a 50 per cent. chance of success. The general rule that one must establish a probability, or a strong probability, is not correct. One must look at the whole case to see whether there is a question to be tried and, if there is, then look at the balance of convenience between

the parties, bearing in mind that there is good reason why the status quo should be preserved. The relevant authorities are *Preston v. Luck* (1884) 27 Ch.D. 497, 504–505; *Halsbury's Laws of England*, 3rd ed., vol. 21 (1957), pp. 365–366, para. 365 and *Donmar Productions Ltd. v. Bart (Note)* [1967] 1 W.L.R. 740. The shackles of *Harman Pictures N.V. v. Osborne* [1967] 1 W.L.R. 723 have been removed by *Hubbard v. Vosper* [1972] 2 Q.B. 84, 96, 101. See also *Evans Marshall & Co. Ltd. v. Bertola S.A.* [1973] 1 W.L.R. 349, 377, 379–380, 385–386; *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.* [1974] 1 W.L.R. 798, 810; *Terrell on the Law of Patents*, 12th ed. (1971), pp. 319–320, paras. 823, 824, pp. 322–323, para. 833, citing *Newman v. British & International Proprietaries Ltd.* [1962] R.P.C. 90, 93; *Challender v. Royle* (1887) 36 Ch.D. 425, 429–430, 435–436, 443; *Zaidener v. Barrisdale Engineers Ltd.* [1968] R.P.C. 488, 495 (Willmer L.J.) 497; and *Carroll v. Tomado Ltd.* [1971] R.P.C. 401, 405–406.

The appellants adopt the principle laid down in *Hubbard v. Vosper* [1972] 2 Q.B. 84, particularly the judgment of Megaw L.J. at pp. 93H–98B. There is logical reason or justification why the percentages there set out do not equally apply to plaintiffs and defendants. If there is a serious issue to be tried it will lead to a just result and mini-trials on the application for an interlocutory injunction would be prevented. It is undesirable to adopt any other course. When the court is considering whether or not to grant an interlocutory injunction the right approach is to ask first whether or not there is a serious question to be tried. When the court has some idea of the strength of the respective cases that is a factor to be taken into consideration.

In the present case Graham J. placed a heavy onus on the appellants and held that they had discharged it. The differing decisions of the Court of Appeal and the judge on the merits show that there is a serious question to be tried. On the evidence the appellant should succeed. On the question of the balance of convenience reliance is placed on Graham J.'s judgment

Stephen Gratwick Q.C. and *G. D. Paterson* for the respondent company. On an application for an interlocutory injunction the court must look at the respective situations of the two contending parties. The first question to ask is why a plaintiff should not be left to fight his action and get his relief by succeeding. The normal rule of English litigation is that a party gets no relief till he has gone to trial and persuaded the court that he has a right which has been infringed. He is not entitled to an interlocutory injunction just because he has a strong case. He is only so entitled if it is shown that there could be injustice if the defendant is left unfettered and that there is a serious risk of irreparable damage to the plaintiff. In the first place the plaintiff should show that there is some serious need for the defendant to be restrained. The law recognises that there are situations in which the property in dispute has some special quality of its own, e.g., cases where there is the danger of the collapse of a party wall, but in a patent action this is rarely the case and usually the interests of the parties are purely monetary, so that no question of irreparable damage arises. The *Evans Marshall* case [1973] 1 W.L.R. 349, 379–380 illustrates a true application of this principle. See also *Mogul Steamship Co. v. M'Gregor, Gow & Co.* (1885) 15 Q.B.D. 476, 484–486. The question is whether the plaintiff would suffer irreparable injury or only an injury which could be compensated in damages. One must look at the facts of each particular case to see whether irreparable damage would be caused. If there is simply a dispute between traders as to a monopoly there will be no irreparable damage. The grant of a patent is an exception recognised by the Statute of

A Monopolies 1623 which was designed to give everyone freedom to trade. In each case one must ask why damages are not a sufficient remedy. In the present case it could be serious for the defendants to have to put all their work into cold storage. There is no suggestion that they would not be good for any damages which might be awarded against them if they lost the action eventually. In *Preston v. Luck*, 27 Ch.D. 497, 508, the court acted on the basis suggested by the defendants. It should not be the policy
B of the court to preserve the statuts quo in all cases but only to prevent irreparable damage to the plaintiffs: see *Elwes v. Payne* (1879) 12 Ch.D. 468, 476, 479. As to the assessment of damages should the plaintiffs succeed, see *Terrell on the Law of Patents*, 12th ed., p. 372, para. 948. In practical experience, parties in patent litigation rarely find difficulty in reaching an agreement on damages.

C If there is evidence of irreparable damage the next question is: What sort of a case has the plaintiff got? It must also be considered on what basis the defendants will defend the action. The plaintiffs must be able to show that the strength of their case is such that in the circumstances there should be an interlocutory injunction. It is accepted that there may be cases in which the risk of damage to the plaintiffs is such that an injunction should be granted (e.g., where a defendant is erecting a fence
D across the plaintiff's only approach to his house) regardless of the strength of the parties' cases, but in other cases the risk of damage could be very small and the respective cases must be considered.

The House should try this matter to the extent of establishing how much substance there is in the defendants' answer. For the purposes of an interlocutory injunction the case against the specification is so strong that
E relief should not be granted till the rights of the parties have been tested in court.

One may distinguish between a difficult question and a serious question. Problems may arise, not from the difficulty of a question of construction but from the amount of knowledge needed to present the case to the court in an age of increasingly complex technology, and, once this technical problem is mastered, there may be no serious difficulty over the
F construction of the specification. As to the contents of a specification, see *Terrell on the Law of Patents*, p. 416, para. 1134.

Patent specifications must not be ambiguous: *Natural Colour Kinematograph Co. Ltd. v. Bioschemes Ltd.* (1915) 32 R.P.C. 256, 266, 268–269. The plaintiffs are seeking equitable relief and he who comes to equity must do equity, whereas their specification is just the sort which was criticised in the *Natural Colour* case, 32 R.P.C. 256, 266, 268–269. If the
G plaintiffs have made their specification needlessly obscure, they should not be given interlocutory relief and should wait till they have proved their case for a monopoly in court. No sincere attempt was made to make it clear that that copolymers were included.

If, however, the specification bears the wider meaning alleged, it is invalid for inutility, insufficiency, unfair basis and false suggestion, since
H the copolymers will not have, as surgical sutures, the characteristics described in the body of the patent. The specification wholly fails to meet the obligation imposed by statute to tell the reader fairly what is required to make the copolymers.

"Ambiguity" in the present context has not the meaning which it ordinarily has in relation to the construction of documents but refers to the want of clarity which is a ground of objection under section 32 (1) (*i*) of the Patents Act 1949. Such an objection was made in the *Natural Colour*

case, 32 R.P.C. 256, 259–260, and what Lord Loreburn said about it at p. 266 is what the defendants say here, since his observations are very appropriate to the present specification.

The essence of this invention was discovering a material which would make a satisfactory suture. That puts on the inventor the burden of saying what materials serve that purpose; otherwise he is being grossly unfair to the public. It is in this context that the House of Lords should say that the strength of the defendants' case is such that there should be no interlocutory injunction.

Two inventors may solve a problem by different methods. This has happened here, where the chief problem to be solved was that of absorbability. Someone using a copolymer is not doing something covered by this invention and he should not be held to be within the patent. For the plaintiffs there is no stopping point between a claim for a homopolymer and a wide claim for copolymers.

A patent cannot properly be held to cover things which do not operate in the way the inventor says they do: see *Hatmaker v. Joseph Nathan & Co. Ltd.* (1919) 36 R.P.C. 231, 232–233, 236–237, 239, which is applicable to the present case. The observations of the Lords were not confined to claims for processes. If an inventor says that by using his invention certain results are achieved, the patent is invalid if they are not achieved.

As to inutility, see *Terrell on the Law of Patents*, 12th ed., p. 99, para. 246, pp. 101–102, para. 251 and p. 103, para. 253. The trial judge wrongly applied the test of commercial utility. The plaintiffs say that the claim covers copolymers but the defendants' copolymer does not have any of the qualities which they allege. Different inventors may arrive at commercially satisfactory ways of solving a problem by different inventions and by things which behave in different ways. This inventor solved the problem only by using homopolymers and materials which he said have certain characteristics. His patent cannot cover the case of people who solved the problem by methods which do not have those characteristics. The observations in *In re May & Baker Ltd. and Ciba Ltd.'s Letters Patent* (1948) 65 R.P.C. 255, 288–289; 66 R.P.C. 8; sub nom. *May & Baker Ltd. v. Boots Pure Drug Co. Ltd.* (1950) 67 R.P.C. 23 are directly applicable to the claim in the present case. In the medical field it is very wrong of an inventor to cast his claim more widely than is justified by the work he has done. Here the plaintiffs have cast their claim over a range of copolymers, the scope of which one does not know.

It is legitimate to frame a patent widely if the invention has been so described in the body of the specification. But unless the specification is so framed, the claim cannot be made in that way: see *British Thomson-Houston Co. Ltd. v. Corona Lamp Works Ltd.* (1921) 39 R.P.C. 49 quoted in *Terrell on the Law of Patents*, 12th ed., p. 97, para. 242. In the present case any claim would have to be backed up by a description in the specification intimating how other groups and units would affect the properties of the suture. This specification has not been so framed. The approach which the plaintiffs seek to make is one which the specification cannot sustain: see also *No-Fume Ltd. v. Frank Pitchford & Co. Ltd.* (1935) 52 R.P.C. 231, 236 and *R.C.A. Photophone Ltd. v. Gaumont-British Picture Corporation Ltd.* (1935) 53 R.P.C. 167, 205.

Even assuming that the plaintiffs are entitled to claim in this form, the question remains whether there was infringement. The plaintiffs are debarred from maintaining that there has been infringement because a

A copolymer has been used, since they have not discharged the onus of proof on this point.

As to the balance of convenience, see *Mitchell v. Henry* (1880) 15 Ch.D. 181, 191, 195.

As to the evidence on the balance of convenience what is relevant here, so far as regards damage to the plaintiffs, is the possible impact of an interlocutory injunction on domestic sales. This is a trifling amount of the B total sales of a giant corporation and irreparable damage could not conceivably be caused to the plaintiffs. At most there could only be a minor commercial set-back in the development of their business, bearing in mind their resources. The plaintiffs have not adduced any evidence of irreparable damage. Both parties are giant corporations of enormous resources. Such damage as the plaintiffs might suffer, prior to judgment, if C they succeed at the trial, will not have any material effect on their annual profit and loss account and that damage can easily be met by the defendants.

So, if there is no interlocutory injunction and the plaintiffs succeed at the trial, they will recover damages under every relevant head of damage appropriate to infringement of a patent. The basis will be the amount of business done by the defendants, which can easily be ascertained from D their accounts. No other head of damage would arise. The patent will not expire till 1980 and so the perpetual injunction, which will be granted if the plaintiffs succeed ultimately, will protect them in re-establishing a monopoly.

If an interlocutory injunction is granted and the defendants succeed at the trial, the plaintiffs will have to pay them such damages as are E attributable to the injunction. There will be no simple basis on which to assess it since it must depend on an estimate of the amount of business the defendants would have done during the period of the injunction and of the diminution caused by that injunction in the future value of that business when resumed. A further source of damage to the defendants arises out of the great expense involved in developing and preparing to market their products over many years. Any delay in marketing represents a loss in the F return on the investment and a loss in its actual value because it gives more time to other competitors to develop products of their own. These losses are more difficult to assess than any which could arise if an injunction were not granted and the plaintiffs succeeded.

The present case resembles *Zaidener v. Barrisdale Engineers Ltd.* [1968] R.P.C. 488. The balance of convenience is against the granting of an interlocutory injunction. The application can be and should be refused G without the court needing to form any prima facie view as to the respective rights of the parties.

In every patent action money is at stake and there is some question of substance. If it is right to grant an interlocutory injunction in this case, where there is little evidence of the probability of irreparable damage to the plaintiffs, when would it not be right to grant such an injunction?

H *Paterson* following. There are four points of defence: (1) On the proper construction of claim 1 of the specification there has been no infringement. (2) If on the true construction of claim 1 it is broad enough to cover the defendants' sutures, then it is invalid on grounds of inutility, insufficiency, ambiguity, no fair basis and false suggestion: section 32 (1) (*g*) (*h*) (*i*) and (*j*) of the Patents Act 1949. (3) Each claim is invalid on the ground of obviousness: section 32 (1) (*g*). (4) The balance of convenience does not favour the grant of an interlocutory injunction.

One cannot have a patent for a new use of an old product unless there is invention in the adaptation of the old product to the new use: *Acetylene Illuminating Co. Ltd. v. United Alkali Co. Ltd.* (1904) 22 R.P.C. 145, 155–156. The test is whether the new use lies in the track of the old use.

In 1963 three companies independently had the idea of using PHAE as a suture. Graham J. in rejecting the defendants' submissions on this point ignored the evidence of the history of the matter.

[LORD DIPLOCK intimated that their Lordships only required to hear arguments in reply on the question of balance of convenience.]

Bateson Q.C. in reply. Prospective infringers should not "jump the gun." In the light of the defendants' aggressive sales policy and in view of the fact that the case cannot be finished till 1977, there is a danger that the defendants might press the sale of those sutures, not to fill a need, but to get ahead of the plaintiffs. The balance of convenience is primarily a matter for the judge of first instance.

Their Lordships took time for consideration.

February 5, 1975. LORD DIPLOCK stated the facts and continued: My Lords, the question whether the use of XLG as an absorbable surgical suture is an infringement of Cyanamid's patent depends upon the meaning to be given to the three words "a polyhydroxyacetic ester" in the principal claim. Cyanamid's contention is that at the date of publication of the patent those words were used as a term of art in the chemistry of polymerisation not only in the narrower meaning of a homopolymer of which the units in the chain, apart from the end stabilisers, consisted solely of glycolide radicals but also in the broader meaning of a copolymer of which up to 15 per cent. of the units in the chain would be lactide radicals; and that what was said in the body of the patent made it clear that in the claim the words were used in this wider meaning.

Ethicon's first contention is that the words "a polyhydroxyacetic ester" in the principal claim bear the narrower meaning only, viz. that they are restricted to a homopolymer of which all the units in the chain except the end stabilisers consist of glycolide radicals. In the alternative, as commonly happens where the contest is between a narrower and a wider meaning in a patent specification, they attack the validity of the patent, if it bears the wider meaning, on the grounds of inutility, insufficiency, unfair basis and false suggestion. These objections are really the obverse of their argument in favour of the narrower construction. They are all different ways of saying that if the claim is construed widely it includes copolymers which will not have as surgical sutures the characteristics described in the body of the patent. Ethicon also attack the validity of the patent on the ground of obviousness.

Both Graham J. and the Court of Appeal felt constrained by authority to deal with Cyanamid's claim to an interlocutory injunction by considering first whether, upon the whole of the affidavit evidence before them, a prima facie case of infringement had been made out. As Russell L.J. put it in the concluding paragraph of his reasons for judgment with which the other members of the court agreed [1974] F.S.R. 312, 333:

> " . . . if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end of the claim to interlocutory relief."

A "Prima facie case" may in some contexts be an elusive concept, but the sense in which it was being used by Russell L.J. is apparent from an earlier passage in his judgment. After a detailed analysis of the conflicting expert testimony he said, at p. 330:

> "I am not satisfied on the present evidence that on the proper construction of this specification, addressed as it is to persons skilled in the relevant art or science, the claim extends to sterile surgical sutures produced not only from a homopolymer of glycolide but also from a copolymer of glycolide and up to 15 per cent. of lactide. That is to say that I do not consider that a prima facie case of infringement is established."

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In effect what the Court of Appeal was doing was trying the issue of infringement upon the conflicting affidavit evidence as it stood, without the benefit of oral testimony or cross-examination. They were saying:

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> "If we had to give judgment in the action now without any further evidence we should hold that Cyanamid had not satisfied the onus of proving that their patent would be infringed by Ethicon's selling sutures made of XLG."

D The Court of Appeal accordingly did not find it necessary to go into the questions raised by Ethicon as to the validity of the patent or to consider where the balance of convenience lay.

Graham J. had adopted the same approach as the Court of Appeal; but, upon the same evidence he had come to the contrary conclusion on the issue of infringement. He considered (at p. 321) that on the evidence as it stood Cyanamid had made out a "strong prima facie case" that their patent would be infringed by Ethicon's selling sutures made of XLG. He then went on to deal briefly with the attack upon the validity of the patent and came to the conclusion that upon the evidence before him none of the grounds of invalidity advanced by Ethicon was likely to succeed. He therefore felt entitled to consider the balance of convenience. In his opinion it lay in favour of maintaining the status quo until the trial of the action. So he granted Cyanamid an interlocutory injunction restraining Ethicon from infringing the patent until the trial or further order.

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The grant of an interlocutory injunction is a remedy that is both temporary and discretionary. It would be most exceptional for your Lordships to give leave to appeal to this House in a case which turned upon where the balance of convenience lay. In the instant appeal, however, the question of the balance of convenience, although it had been considered by Graham J. and decided in Cyanamid's favour, was never reached by the Court of Appeal. They considered that there was a rule of practice so well established as to constitute a rule of law that precluded them from granting any interim injunction unless upon the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's legal rights. In the view of the Court of Appeal the case which the applicant had to prove before any question of balance of convenience arose was "prima facie" only in the sense that the conclusion of law reached by the court upon that evidence might need to be modified at some later date in the light of further evidence either detracting from the probative value of the evidence on which the court had acted or proving additional facts. It was in order to enable the existence of any such rule of

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law to be considered by your Lordships' House that leave to appeal was granted.

The instant appeal arises in a patent case. Historically there was undoubtedly a time when in an action for infringement of a patent that was not already "well established," whatever that may have meant, an interlocutory injunction to restrain infringement would not be granted if counsel for the defendant stated that it was intended to attack the validity of the patent.

Relics of this reluctance to enforce a monopoly that was challenged, even though the alleged grounds of invalidity were weak, are to be found in the judgment of Scrutton L.J. as late as 1924 in *Smith v. Grigg Ltd.* [1924] 1 K.B. 655; but the elaborate procedure for the examination of patent specifications by expert examiners before a patent is granted, the opportunity for opposition at that stage and the provisions for appeal to the Patent Appeal Tribunal in the person of a patent judge of the High Court, make the grant of a patent nowadays a good prima facie reason, in the true sense of that term, for supposing the patent to be valid, and have rendered obsolete the former rule of practice as respects interlocutory injunctions in infringement actions. In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions. I turn to consider what those principles are.

My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.

In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success

in the action at 50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

The notion that it is incumbent upon the court to undertake what is in effect a preliminary trial of the action upon evidential material different from that upon which the actual trial will be conducted, is, I think, of comparatively recent origin, though it can be supported by references in earlier cases to the need to show "a probability that the plaintiffs are entitled to relief" (*Preston v. Luck* (1884) 27 Ch.D. 497, 506, *per* Cotton L.J.) or "a strong prima facie case that the right which he seeks to protect in fact exists" (*Smith v. Grigg Ltd.* [1924] 1 K.B. 655, 659, *per* Atkin L.J.). These are to be contrasted with expressions in other cases indicating a much less onerous criterion, such as the need to show that there is "certainly a case to be tried" (*Jones v. Pacaya Rubber and Produce Co. Ltd.* [1911] 1 K.B. 455, 457, *per* Buckley L.J.) which corresponds more closely with what judges generally treated as sufficient to justify their considering the balance of convenience upon applications for interlocutory injunctions, at any rate up to the time when I became a member of your Lordships' House.

An attempt had been made to reconcile these apparently differing approaches to the exercise of the discretion by holding that the need to show a probability or a strong prima facie case applied only to the establishment by the plaintiff of his right, and that the lesser burden of showing an arguable case to be tried applied to the alleged violation of that right by the defendant (*Donmar Productions Ltd. v. Bart (Note)* [1967] 1 W.L.R. 740, 742, *per* Ungoed-Thomas J., *Harman Pictures N.V. v. Osborne* [1967] 1 W.L.R. 723, 738, *per* Goff J.). The suggested distinction between what the plaintiff must establish as respects his right and what he must show as respects its violation did not long survive. It was rejected by the Court of Appeal in *Hubbard v. Vosper* [1972] 2 Q.B. 84—a case in which the plaintiff's entitlement to copyright was undisputed but an injunction was refused despite the apparent weakness of the suggested defence. The court, however, expressly deprecated any attempt to fetter the discretion of the court by laying down any rules which would have the effect of limiting the flexibility of the remedy as a means of achieving the objects that I have indicated above. Nevertheless this authority was treated by Graham J. and the Court of Appeal in the instant appeal as leaving intact the supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought.

Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability," "a prima facie case," or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are

matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing": *Wakefield v. Duke of Buccleugh* (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be

A sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit B evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

C I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. The instant appeal affords one example of this.

Returning, therefore, to the instant appeal, it cannot be doubted that the affidavit evidence shows that there are serious questions to be tried. Graham J. and the Court of Appeal have already tried the question of D infringement on such affidavit evidence as was available and have come to contrary conclusions. Graham J. has already also tried the question of invalidity on these affidavits and has come to the conclusion that the defendant's grounds of objection to the patent are unlikely to succeed, so it was clearly incumbent upon him and on the Court of Appeal to consider the balance of convenience.

E Graham J. did so and came to the conclusion that the balance of convenience lay in favour of his exercising his discretion by granting an interlocutory injunction. As patent judge he has unrivalled experience of pharmaceutical patents and the way in which the pharmaceutical industry is carried on. Lacking in this experience, an appellate court should be hesitant to overrule his exercise of his discretion, unless they are satisfied F that he has gone wrong in law.

The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market, so they had no business which would be brought to a stop by the injunction, no factories would be closed and no work-people would be thrown out of work. They held a dominant position in the United Kingdom market for absorbent surgical sutures and adopted an aggressive sales policy. G Cyanamid on the other hand were in the course of establishing a growing market in PHAE surgical sutures which competed with the natural catgut sutures marketed by Ethicon. If Ethicon were entitled also to establish themselves in the market for PHAE absorbable surgical sutures until the action is tried, which may not be for two or three years yet, and possibly thereafter until the case is finally disposed of on appeal, Cyanamid, even H though ultimately successful in proving infringement, would have lost its chance of continuing to increase its share in the total market in absorbent surgical sutures which the continuation of an uninterrupted monopoly of PHAE sutures would have gained for it by the time of the expiry of the patent in 1980. It is notorious that new pharmaceutical products used exclusively by doctors or available only on prescription take a long time to become established in the market, that much of the benefit of the monopoly granted by the patent derives from the fact that the patented

product is given the opportunity of becoming established and this benefit continues to be reaped after the patent has expired.

In addition there was a special factor to which Graham J. attached importance. This was that, once doctors and patients had got used to Ethicon's product XLG in the period prior to the trial, it might well be commercially impracticable for Cyanamid to deprive the public of it by insisting on a permanent injunction at the trial, owing to the damaging effect which this would have upon its goodwill in this specialised market and thus upon the sale of its other pharmaceutical products.

I can see no ground for interfering in the learned judge's assessment of the balance of convenience or for interfering with the discretion that he exercised by granting the injunction. In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case. The likelihood of such embarrassment provides an additional reason for not adopting the course that both Graham J. and the Court of Appeal thought they were bound to follow, of dealing with the existing evidence in detail and giving reasoned assessments of their views as to the relative strengths of each party's cases.

I would allow the appeal and restore the order of Graham J.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Diplock. I agree with it and that this appeal should be allowed and the order of Graham J. restored.

LORD CROSS OF CHELSEA. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, in his speech, which I have had the advantage of reading in draft, I would allow this appeal.

LORD SALMON. My Lords, I agree with the opinion of my noble and learned friend, Lord Diplock, and for the reasons he gives I would allow the appeal and restore the order of Graham J.

LORD EDMUND-DAVIES. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, I would also allow this appeal.

Appeal allowed.

Solicitors: Allen & Overy; Lovell, White & King.

F. C.

[EUROPEAN COURT OF JUSTICE]

VAN DUYN v. HOME OFFICE

[Case 41/74]

1974 Dec. 4

Judge R. Lecourt (President), Judges C. Ó. Dálaigh, Mackenzie Stuart, A. M. Donner, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher and M. Sørensen. Henri Mayras (Advocate-General).

European Economic Community — Free movement of workers — Public policy — Organisation contrary to public good — Lawful for United Kingdom nationals to work in organisation — Whether other community workers free to enter United Kingdom and work for organisation — Scientology — Difference between regulation and directive — E.E.C. Treaty (Cmnd. 5179-II), arts. 48, 177, 189 — Directive 64/221/EEC, art. 3 (1)

By article 48 of the E.E.C. Treaty:

> "1. Freedom of movement for workers shall be secured within the community . . . 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states, as regards employment, . . . 3. It shall entail the right, subject to limitations justified on grounds of public policy, public safety or security . . . ; (a) to accept offers of employment actually made, . . . (c) to stay in a member state for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law, . . ."

By article 3 (1) of the Directive 64/221/EEC of February 25, 1964:

> "Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned."

The plaintiff, a Dutch national, was refused leave to enter the United Kingdom because she intended to work at a scientology establishment in Sussex. Although the practice of scientology was lawful in the United Kingdom, the government considered that its activities were contrary to public policy and aliens, who intended to work at a scientology establishment, were not admitted into the country. The plaintiff brought an action against the Home Office for declarations that she was entitled under article 48 of the Treaty to enter and remain in the United Kingdom for the purpose of her intended employment.

On a reference by the High Court to the European Court of Justice of the questions (1) whether article 48 of the Treaty and (2) Directive 64/221, were directly applicable so as to confer on individuals rights enforceable by them in the courts of a member state; and (3) whether, upon the proper interpretation of article 48 of the Treaty and article 3 of the Directive, a member state in the performance of its duty to base a measure taken on the grounds of public policy exclusively on the personal conduct of the individual concerned was entitled to take into account as matters of personal conduct (a) the fact that the individual was or had been associated with some body or organisation the activities of which the member state considered contrary to the public good but which were not unlawful in that state, (b) the fact that the individual intended to take employment in the member state with such a body or organisation when no restriction was placed on the

nationals of the member state who wished to take similar employment with such a body or organisation:—

Held, (1) that article 48 of the Treaty was directly applicable so as to confer on individuals rights enforceable by them in the courts of a member state; the provisions of article 48 (1) and (2) imposed a precise obligation which did not require the adoption of any further measure on the part either of the community institutions or of the member states and which left them, in relation to its implemention, no discretionary power.

(2) That, although by article 189[1] a directive, unlike a regulation, did not necessarily take direct action in each member state, since in the present case article 3 (1) of the Directive was intended to limit the discretionary power which national laws generally conferred on the authorities responsible for the entry and expulsion of foreign nationals, and individuals should be able to rely on that obligation even though it had been laid down in a legislative act which had no automatic direct effect in its entirety, article 3 (1) of the Directive conferred on individuals rights which were enforceable by them in the courts of a member state and which the national courts must protect.

(3) That, although a person's past association with a body or organisation could not, in general, justify a decision refusing him the right to move freely within the community on the ground that such association constituted personal conduct within the meaning of article 3 of Directive 64/221, present association, which reflected participation in the activities of the body or organisation, might be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct within the meaning of article 3; that, where the competent authorities of a member state had clearly defined their standpoint, considering particular activities to be socially harmful, and had taken administrative measures to counteract those activities, the member state could not be required, before it could rely on the concept of public policy, to make such activities unlawful; further, that it was a principle of international law, which the Treaty could not be assumed to disregard, that a state was precluded from refusing its own nationals entry; that a member state, for reasons of public policy, could refuse the benefit of the principle of freedom of movement for workers where a national of another member state proposed to take up a particular offer of employment, even though the member state did not place a similar restriction on its own nationals; and that, accordingly, the reply to the third question must be that article 48 of the Treaty and article 3 (1) of the Directive were to be interpreted as meaning that a member state, in imposing restrictions justified on grounds of public policy, was entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual was associated with some body or organisation the activities of which the member state considered socially harmful but which were not unlawful in that state, although no restriction was placed upon nationals of that state who wished to take similar employments with those same bodies or organisations.

The following cases are referred to in the judgment:

Corvelyn (Belgian Conseil d'Etat), October 7, 1968; [1968] Bull.Arr. 710.

French Merchant Seamen, In re; E.C. Commission v. France (Case 167/73) [1974] E.C.R. 359; [1974] 2 C.M.L.R. 216.

Grad v. Finanzamt Traunstein (Case 9/70) (1970) XVI (2) Recueil 825; [1971] C.M.L.R. 1.

[1] E.E.C. Treaty, art. 189: " . . . A regulation shall apply generally. It shall be binding in its entirety and take direct action in each member state. A directive shall be binding, as to the result to be achieved, upon each member state to which it is directed, while leaving to national authorities the choice of form and methods."

A *Lütticke (Alfons) G.m.b.H. v. Hauptzollamt Sarrelouis* (Case 57/65) (1966) XII Recueil 293; [1971] C.M.L.R. 674.
Reyners v. Belgian State (Case 2/74) [1974] 2 C.M.L.R. 305.
Salgoil S.p.A. v. Italian Ministry of Foreign Trade (Case 13/68) (1968) XIV Recueil 661; [1969] C.M.L.R. 181.
S.A.C.E. v. Italian Ministry of Finance (Case 33/70) (1970) XVI (2) Recueil 1213; [1971] C.M.L.R. 123.

B The following additional cases were cited in the opinion of Mr. Advocate-General (Henri Mayras):

Haselhorst v. Finanzamt Düsseldorf-Altstadt (Case 23/70) (1970) XVI (2) Recueil 881; [1971] C.M.L.R. 1.
Transports Lesage et Cie v. Hauptzollamt Freiburg (Case 20/70) (1970) XVI (2) Recueil 861; [1971] C.M.L.R. 1.
C *Württembergische Milchverwertung-Süd-milch A.G. v. Ugliola* (Case 15/69) (1969) XV Recueil 363; [1970] C.M.L.R. 194.

REFERENCE by High Court of Justice

The plaintiff, Yvonne Van Duyn, a Dutch national, brought an action against the Home Office in the Chancery Division of the High Court for declarations that she was entitled to accept an offer of employment as a
D secretary by the Church of Scientology in East Grinstead, Sussex, and that she was entitled to enter and stay in the United Kingdom for the purpose of employment. On March 1, 1974, Pennycuick V.-C., pursuant to article 177 of the E.E.C. Treaty, ordered a reference to the European Court of Justice for a preliminary ruling in the action on the interpretation of article 48 of the Treaty and article 3 of Directive 64/221/EEC concerning
E the movement of nationals of member states within the community: see [1974] 1 W.L.R. 1107.

The order of the High Court was registered at the European Court of Justice on June 13, 1974.

The facts are stated in the judgment of the court.

Alan Newman for Miss Van Duyn.
F *Peter Gibson* for the United Kingdom.
Anthony McClellan for the Commission.

OPINION of Mr. Advocate-General Henri Mayras.

Introduction. This preliminary reference is of special interest for two reasons. It is the first time that a court of the United Kingdom, the High Court of Justice in London, has made a reference to the Court of Justice
G for interpretation of community rules under article 177 of the Treaty of Rome. This is also the first time that the court has been called upon to decide the important problem raised by the limitations, expressed in article 48 of the Treaty, to the principle of freedom of movement for workers within the community imposed by considerations of public policy and public security.

H Consequently, the court will have to examine, in this connection, the extent to which the power of the member states to assess the essential requirements of national public policy can be reconciled with a uniform application of community law and in particular with the application of the principle of non-discrimination between migrant and national workers.

The court will also have to make a ruling as to the direct effect of a directive of the Council, or at least of a particular provision of a directive.

The case law of this court does however already indicate the reply to be given to this question.

I. *The facts.* The facts giving rise to the main action are straightforward. Miss Yvonne Van Duyn, a Dutch national, arrived at Gatwick Airport in England on May 9, 1973. She declared that her purpose in coming to the United Kingdom was to take up an offer of employment as a secretary, made to her a few days earlier by the Church of Scientology of California, the headquarters of which are at Saint Hill Manor, East Grinstead, in the County of Sussex. After an interview with the immigration authorities, she was returned to the Netherlands that same day.

The ground of refusal of leave to enter the United Kingdom is stated in the document handed to her by the immigration officer. It reads:

> "You have asked for leave to enter the United Kingdom in order to take employment with the Church of Scientology but the Secretary of State considers it undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of that organisation."

This decision was taken in accordance with the policy adopted, in 1968, by the Government of the United Kingdom which considered—and still considers—the activities of the Church of Scientology to be socially harmful.

The grounds of the decision to exclude Miss Van Duyn must be re-examined when one comes to consider the question of whether the decision taken by the immigration authorities is based on the "*personal conduct*" of the plaintiff, within the meaning of article 3 (1) of Council Directive 64/221.

In her action in the High Court (Chancery Division) against the Home Office, Miss Van Duyn sought to rely on article 48 of the Treaty and on article 3 of Directive 64/221, adopted for the purpose of co-ordinating special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. After examining the motion made by the plaintiff in the main action and upon hearing counsel for the Home Office, Pennycuick V.-C. decided to stay the proceedings and to refer three preliminary questions to the court.

The first question concerns the direct effect of article 48 of the Treaty. Under the second, the court is asked whether Council Directive 64/221 is also directly applicable so as to confer on individuals rights enforceable by them in the courts of the member states. The third question concerns the interpretation of article 48 of the Treaty and of article 3 of the Directive. The High Court asks whether, when the competent authorities of a member state decide, on grounds of public policy, to refuse a community national leave to enter that state on the basis of the personal conduct of the individual concerned, those authorities are entitled to take into account, as being matters of personal conduct: (a) the fact that the individual is or has been associated with an organisation the activities of which the government of the member state considers to be contrary to the public good but which are not unlawful in that state; (b) the fact that the individual intends to take up employment in a member state with such an organisation, it being the case however that no restrictions are placed upon nationals of the member state who take up similar employment. These three questions are clearly framed and follow a logical order.

A II. *Discussion.* (1) *Direct effect of article 48 of the Treaty establishing the European Economic Community.* The criteria which the court has evolved over the past years for the purpose of determining whether a provision of community law and, in particular, a rule set out in the Treaty of Rome, is directly applicable so as to confer on individuals rights enforceable by them in the national courts, are clearly laid down: the provision must impose a clear and precise obligation on member states; it B must be unconditional, in other words subject to no limitation; if, however, a provision is subject to certain limitations, their nature and extent must be exactly defined; finally, the implementation of a community rule must not be subject to the adoption of any subsequent rules or regulations on the part either of the community institutions or of the member states, so that, in particular, member states must not be left any C real discretion with regard to the application of the rule in question.

These criteria, which Mr. Advocate-General Gand proposed in 1966 in his opinion in *Alfons Lütticke G.m.b.H. v. Hauptzollamt Sarrelouis* (Case 57/65) (1966) XII Recueil 293, 311, and which the court has adopted in several judgments, have been confirmed and refined in particular by the judgments of September 12, 1972, *International Fruit Co. N.V. v. Produktschap voor Groenten en Fruit* (Cases 21 to 24/72) XVIII Recueil D 1219, 1227, and October 24, 1973, *Schlüter v. Hauptzollamt Lörrach* (Case 9/73) [1973] E.C.R. 1135 and, more recently still, by the judgment of June 21, 1974, *Reyners v. Belgian State* (Case 2/74) [1974] 2 C.M.L.R. 305 in connection with article 53, on the right of establishment.

The fact that the provisions of article 48, which are among the most important in the Treaty in that their purpose is to establish freedom of movement within the community for employed persons, satisfy these E criteria can no longer be open to doubt following the Judgment, also very recent, of April 4, 1974, *In re French Merchant Seamen; E.C. Commission v. France* (Case 167/73) [1974] E.C.R. 359. By that decision, the court stated that the provisions of article 48 and of Regulation 1612/68 of the Council on employment of migrant workers are directly applicable in the legal system of every member state and give rise, on the part of those F concerned, to rights which the national authorities must respect and safeguard.

If the High Court of England had had knowledge of that judgment when it decided to make this reference for a preliminary ruling, it is probable that it would not have put its first question to the court. It is understandable that it considered it necessary to do so because it made its order for reference on March 1, in other words before the court delivered G its decision on the direct effect of article 48. The problem is now resolved for the future and it suffices for the court to confirm, with regard to this matter, its judgment of April 4, 1974.

(2) *Direct effect of Council Directive 64/221.* There is less certainty regarding the solution of the second question which is concerned with the direct applicability of the Council Directive of February 25, 1964.

H Article 189 of the Treaty distinguishes between regulations, which are not only binding but also directly applicable in the member states, and directives, which are also binding on the states but which have, in principle, no direct effect inasmuch as they leave to the states the choice of methods for their implementation. Nevertheless, looking beyond formal legal categories, the court declared in its judgments of October 6 and 21, 1970, *Grad v. Finanzamt Traunstein* (Case 9/70) (1970) XVI (2) Recueil 825, 838; *Transports Lesage et Cie v. Hauptzollamt Freiburg* (Case 20/70) (1970)

XVI (2) Recueil 861, 874; *Haselhorst v. Finanzamt Düsseldorf-Altstadt* (Case 23/70) (1970) XVI (2) Recueil 881, that, apart from regulations, other community acts mentioned in article 189 may have direct effect, particularly in cases where the community authorities have imposed on member states the obligation to adopt a particular course of conduct.

The statement contained in the judgment of December 17, 1970, *S.A.C.E. v. Italian Ministry of Finance* (Case 33/70) (1970) XVI (2) Recueil 1213, 1224, is even clearer:

> "a *directive,* the purpose of which is to set a final date for the implementation by a member state of a community obligation, concerns not only the relations between the commission and that state, but also entails legal consequences on which individuals may in particular rely whenever, *by its very nature,* the provision enacting that obligation is directly applicable."

When faced with a directive, it is therefore necessary to examine, in each case, whether the wording, nature and general scheme of the provisions in question are capable of producing direct effects between the member states to which the directive is addressed and their subjects.

The purpose of Council Directive 64/221 is to co-ordinate, in the member states, measures concerning the movement and residence of foreign nationals which are justified on the grounds of public policy, public security or public health. It was adopted on the basis of article 48—and it in fact refers expressly to the rules applicable at that time to freedom of movement for workers—and of article 56, on the right of establishment. The Directive is intended to limit the powers which the states have undeniably retained to ensure, within the area of their competence, the safeguarding of their public policy and, in particular, of public security within their territory. Article 3 (1) of the Directive lays down: "measures taken on ground of public policy or public security shall be based exclusively on the personal conduct of the person concerned." For the purpose of giving a practical answer to the question put by the High Court there is in fact no need to examine whether all the rules fixed by the Directive have direct effect or not. Only article 3 (1) is relevant in this case. However, in order to judge whether article 3 (1) is directly applicable, it is necessary to approach the matter of its interpretation and therefore to encroach a little on the third preliminary question.

As to the scope of article 3 (1), there is no doubt that it covers both employed persons, dealt with under article 48, and those pursuing activities as self-employed persons, dealt with under articles 52 et seq. With regard to employed migrants, the Council had the power under article 48 to adopt a regulation, and this is what it did as regards the conditions of their employment in a member state. For persons who are self-employed, article 56 (2) limits the possibility to the use of directives. Without doubt the Commission considered it desirable to unify, by means of the same legal instrument, the rules concerning freedom of movement for the employed and those concerning the right of establishment of the self-employed, at least as regards measures relating to public policy in the member states. But recourse to that procedure does not preclude article 3 of the Directive from having direct effect. What other aim could the Council have had in enacting this provision than to limit the discretionary power of member states and subject restrictions on freedom of movement, such as refusal of leave to enter, exclusion or expulsion, to the condition that these measures should be based *exclusively* on the personal conduct of

A the persons concerned? It seems that the Council thereby wished to prevent member states from taking general measures relating to whole categories of persons and were seeking, in particular, to prohibit collective exclusions and expulsions.

The Council has, in any case, imposed on member states a clear and precise obligation. The first condition for direct effect is satisfied. The second is also. The rule is sufficient in itself. It is not subject either to the B adoption of subsequent acts on the part either of the community authorities or of member states. The fact that the latter have, in accordance with the principle relating to directives, the choice of form and methods which accord with their national law does not imply that the community rule is not directly applicable. On the contrary, it is so closely linked to the implementation of article 48, as regards employed persons, C that it seems to be inseparable from and is of the same nature as that provision of the Treaty.

Finally, it is clear that even though the states have retained their competence in the field of public security, article 3 (1) of the Directive imposes a specific limitation on that competence, in the exercise of which they cannot act in a discretionary manner towards community nationals.

These considerations lead to the conclusion that the provision in D question confers on community nationals rights which are enforceable by them in the national courts and which the latter must protect.

(3) *Public security and the concept of personal conduct.* What is meant by "personal conduct" which is such as to justify refusal of leave to enter a member state? How should this concept be defined? Looking beyond a commentary on the words themselves, the solution seems to be governed by two prime considerations. E

First, freedom of movement for workers is one of the fundamental principles of the Treaty and the prohibition on any discrimination on grounds of nationality between workers of the member states is not subject to any other limitations than those provided for, in restrictive terms, in article 48 (3), relating to public policy, public security and public health: judgment of October 15, 1969, *Württembergische Milchverwertung-Südmilch A.G. v. Ugliola* (Case 15/69) (1969) XV Recueil 363, 368. Secondly, if F a "community public policy" exists in areas where the Treaty has the aim or the effect of transferring directly to community institutions powers previously exercised by member states, it can only be an economic public policy relating for example to community organisations of the agricultural market, to trade, to the common customs tariff or to the rules on competition. G

On the other hand, it seems that, under present conditions and given the present position of the law, member states have sole power, given the exceptions expressed in certain community provisions such as Directive 64/221 to take measures for the safeguarding of public security within their territory and to decide the circumstances under which that security may be endangered. In other words, even though the general proviso relating to H public policy, which is found both in article 48 and in article 56, is a limited exception to the principles of the Treaty concerning freedom of movement and freedom of establishment, and one which must be restrictively construed, it does not seem, contrary to the opinion of the Commission, that it is possible to deduce a community concept of public security. This concept remains, at least for the present, national, and this conforms with reality inasmuch as the requirements of public security vary, in time and in space, from one state to another.

The third question must, it would seem, be decided in accordance with the above considerations.

First of all, to what extent can the concept "personal conduct" be applied to the facts provided by the national court, namely, that a community national is associated with an organisation the activities of which are considered to be contrary to public policy, without however being illegal, and that she intends to take up employment with that organisation, it being the case that nationals are not subject, in similar circumstances, to any restriction?

The question, expressed in those terms, led to the examination of the file received from the High Court for evidence permitting a clearer understanding of the facts which warranted the exclusion of the plaintiff in the main action.

It is clear from the file that not only did the plaintiff go to England with the avowed intention of taking up employment as a secretary with the Church of Scientology, but that she had already worked in a scientology establishment in the Netherlands for six months prior to her arrival in England and that she had taken a course in scientology and was a practising scientologist. It is clearly on the basis of these facts as a whole, the accuracy of which it is obviously not for the court to judge, that the British immigration authorities decided to refuse her leave to enter. It also emerges from the file that in 1968 the United Kingdom Minister of Health made a statement in Parliament in which he expressed the opinion that: "Scientology is a pseudo-philosophical cult" of which the principles and practice are, in the opinion of the British Government, a danger both to public security and to the health of those who submit to it. The Minister announced, on that occasion, the decision of the government to take all steps within its powers to curb the activity of the organisation. He stated that although there was no power under national law to prohibit the practice of scientology, the government could at least refuse entry to foreign nationals intending to work at the headquarters of the Church of Scientology in England.

It is, it seems, on the basis of this policy that Miss Van Duyn was refused leave to enter the United Kingdom by reason as much of the links which she had already had in the past with the said "Church" in the Netherlands as of the fact that she was herself a practising scientologist and, finally, by reason of her intention to take up employment at Saint Hill Manor.

Given this information, there is no doubt that these facts fall within the concept of "personal conduct" within the meaning of article 3 (1) of the Directive and that mere association, albeit only through a contract of employment, with the Church of Scientology, is an element of a person's conduct.

Moreover, the provision in question was essentially inspired by the concern of the community institutions to prohibit member states from taking collective measures in relation to community nationals. It requires that an examination be made of the particular circumstances of each individual affected by a decision based on the safeguarding of public policy. The provision implies without any doubt that the grounds of such a decision should be subject to review by the national courts which, as is the case here, have the power—or sometimes even the duty—to consult this court on the interpretation of the community law applicable. It is in relation to this point, and only this point, that the competence of the member states in this area is limited by the Directive.

A It is necessary to examine, finally, whether, by prohibiting the entry of a community national on the grounds which I have rehearsed, the Government of the United Kingdom has not violated the principle of non-discrimination, in other words, that of equality of treatment with nationals, which is the necessary corollary of freedom of movement for individuals, and which, based principally upon article 7 of the Treaty, is expressly applicable to employed persons by virtue of article 48. It is an B established fact that, although the Church of Scientology is, in the eyes of the British Government, socially harmful, and although, in consequence, its activities are considered to be contrary to public policy, they are not unlawful in the United Kingdom and nationals are free to study and practise scientology and also to work at the organisation's establishment. At first sight, there is therefore discrimination in the treatment inflicted on C nationals of other states of the community, in the fact that they are refused entry to Britain solely on the ground of their coming to practise scientology at Saint Hill Manor and to take up employment at that establishment.

This discrimination however does not appear to be contrary to the Treaty. The proviso relating to public policy and particularly to public security has the effect of maintaining the competence of the member states D in this area, subject to the obligation that measures of public security must be justified by the personal conduct of those concerned. But member states retain, as regards both assessment of the threat to their security and the choice of measures to counteract such a threat, a power the exercise of which does not cast doubt upon the principle of equality of treatment, unless, of course, they misuse this power by exercising it for an improper purpose, such as economic protection.

E According to the statements of the British Government, there is no power under past or existing national law to take measures prohibiting the establishment of scientology. That is one consequence of a particularly liberal form of government. It would doubtless be quite different in other member states, the governments of which regard the activities of the said organisation as being contrary to public policy. But, in so far as the F United Kingdom Government has the legal means to prevent foreign nationals, and even community nationals, from coming to expand, within the United Kingdom, the band of followers of scientology, it appears that it can act in the way it does without creating discrimination within the meaning of article 48 of the Treaty. The action it has taken lies within the powers which the proviso relating to public policy contained in that article confers upon every member state.

G In conclusion, the court is advised to rule:

1. The provisions of article 48 of the Treaty and those of article 3 (1) of the Council Directive 64/221 are directly applicable in the legal order of every member state and confer on individuals concerned rights which the national authorities must protect.

2. The fact that a person has been or is associated with an organisation H the activities of which are considered by a member state to be contrary to public policy even though those activities are not, within the territory of that state, prohibited by national law, is a matter which comes within the concept of "personal conduct" and which may justify a measure taken on the ground of public policy or public security within the meaning of the aforementioned provision of Directive 64/221.

3. The fact that a person enters the member state concerned with the intention of taking up employment with an organisation the activities of

which are considered to be contrary to public policy and public security, it being the case that no restriction is placed upon nationals of that member state who wish to take up similar employment with that organisation, is likewise a matter falling within the concept of "personal conduct."

December 4, 1974. The following judgment was delivered in open court in Luxembourg.

FACTS

The order for reference and the written observations submitted pursuant to article 20 of the Protocol on the Statute of the Court of Justice of the E.E.C. may be summarised as follows:

I. *Facts and procedure*

1. The Church of Scientology is a body established in the United States of America, which functions in the United Kingdom through a college at East Grinstead, Sussex. The British Government regards the activities of the Church of Scientology as contrary to public policy. On July 25, 1968, the Minister of Health stated in the House of Commons that the government was satisfied that scientology was socially harmful. The statement included the following remarks:

> "Scientology is a pseudo-philosophical cult. . . . The government are satisfied having reviewed all the available evidence that scientology is socially harmful. It alienates members of families from each other and attributes squalid and disgraceful motives to all who oppose it; its authoritarian principles and practice are a potential menace to the personality and well being of those so deluded as to become its followers; above all its methods can be a serious danger to the health of those who submit to them. There is evidence that children are now being indoctrinated. There is no power under existing law to prohibit the practice of scientology; but the government have concluded that it is so objectionable that it would be right to take all steps within their power to curb its growth . . . . Foreign nationals come here to study scientology and to work at the so-called 'college' in East Grinstead. The government can prevent this under existing law . . . and have decided to do so. The following steps are being taken with immediate effect . . . (e) Work permits and employment vouchers will not be issued to foreign nationals . . . for work at a scientology establishment."

No legal restrictions are placed upon the practice of scientology in the United Kingdom nor upon British nationals (with certain immaterial exceptions) wishing to become members of or take employment with the Church of Scientology.

2. Miss Van Duyn is a Dutch national. By a letter dated May 4, 1973, she was offered employment as a secretary with the Church of Scientology at its college at East Grinstead. With the intention of taking up that offer she arrived at Gatwick Airport on May 9, 1973, where she was interviewed by an immigration officer and refused leave to enter the United Kingdom. It emerged in the course of the interview that she had worked in a scientology establishment in Amsterdam for six months, that she had taken a course in the subject of scientology, that she was a practising

A scientologist and that she was intending to work at a scientology establishment in the United Kingdom.

The ground of refusal of leave to enter which is stated in the document entitled "Refusal of leave to enter" handed by the immigration officer to Miss Van Duyn reads:

> "You have asked for leave to enter the United Kingdom in order to
B take employment with the Church of Scientology but the Secretary of State considers it undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of that organisation. . . ."

The power to refuse entry into the United Kingdom is vested in immigration officers by virtue of section 4 (1) of the Immigration Act
C 1971. Leave to enter was refused by the immigration officer acting in accordance with the policy of the government and with rule 65 of the relevant Immigration Rules for Control of Entry which Rules have legislative force. Rule 65 reads:

> "Any passenger except the wife or child under 18 of a person settled in the United Kingdom may be refused leave to enter on the ground
D that his exclusion is conducive to the public good, where—(*a*) the Secretary of State has personally so directed, or (*b*) from information available to the immigration officer it seems right to refuse leave to enter on that ground—if, for example, in the light of the passenger's character, conduct or associations it is undesirable to give him leave to enter."

E 3. Relying on the community rules on freedom of movement of workers and especially on article 48 of the E.E.C. Treaty, Regulation 1612/68 and article 3 of Directive 64/221, Miss Van Duyn claims that the refusal of leave to enter was unlawful and seeks a declaration from the High Court that she is entitled to stay in the United Kingdom for the purpose of employment and to be given leave to enter the United Kingdom.

F Before deciding further, the High Court has stayed the proceedings and requested the Court of Justice, pursuant to article 177 of the E.E.C. Treaty, to give a preliminary ruling on the following questions. 1. Whether article 48 of the Treaty establishing the European Economic Community is directly applicable so as to confer on individuals rights enforceable by them in the court of a member state. 2. Whether Directive 64/221 adopted
G on February 25, 1964, in accordance with the Treaty establishing the European Economic Community is directly applicable so as to confer on individuals rights enforceable by them in the courts of a member state. 3. Whether upon the proper interpretation of article 48 of the Treaty establishing the European Economic Community and article 3 of Directive 64/221/EEC a member state in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal
H conduct of the individual concerned is entitled to take into account as matters of personal conduct (a) the fact that the individual is or has been associated with some body or organisation the activities of which the member state considers contrary to the public good but which are not unlawful in that state, (b) the fact that the individual intends to take employment in the member state with such a body or organisation, it being the case that no restrictions are placed upon nationals of the member state who wish to take similar employment with such a body or organisation.

4. The order of the High Court of March 1, 1974, was registered at the court on June 13, 1974. Written observations have been submitted on behalf of Miss Van Duyn by Alan Newman, on behalf of the United Kingdom by W. H. Godwin and on behalf of the Commission by its legal adviser, A. McClellan. Having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General, the court decided to open the oral procedure without any preparatory inquiry.

II. *Written observations submitted to the court*

On the first question

Miss Van duyn and the Commission submit that article 48 of the E.E.C. Treaty is directly applicable. They rely in particular on the judgments of the court of April 4, 1974, in *In re French Merchant Seamen; E.C. Commission v. France* (Case 167/73) [1974] E.C.R. 359 and of June 21. 1974, in *Reyners v. Belgian State* (Case 2/74) [1974] 2 C.M.L.R. 305.

In the light of the judgment in *In re French Merchant Seamen* (Case 167/73), the United Kingdom makes no submission on this question.

On the second question

Miss Van Duyn submits that article 3 of Directive 64/221 is directly applicable. She observes that the court has already held that, in principle directives are susceptible of direct application. She refers to the judgments of the court of October 6, 1970, in *Grad v. Finanzamt Traunstein* (Case 9/70) (1970) XVL Recueil 825 and of December 17, 1970, in *S.A.C.E. v. Italian Ministry of Finance* (Case 33/70) (1970) XVI Recueil 1213; [1971] C.M.L.R. 123. She submits that the criterion as to whether a directive is directly applicable is identical with the criterion adopted in the case of articles in the Treaty itself, and she observes that the court has not felt itself constrained to hold that a given article in the Treaty is not directly applicable merely because in its formal wording it imposes an obligation on a member state. She refers to the judgments of the court of December 19, 1968, in *Salgoil S.p.A. v. Italian Ministry of Foreign Trade* (Case 13/68) (1968) XIV Recueil 661 and of June 16, 1966, in *Alfons Lütticke G.m.b.H. v. Hauptzollamt Sarrelouis* (Case 57/65) (1966) XII Recueil 293. Miss Van Duyn further submits that a directive which directly affects an individual is capable of creating direct rights for that individual where its provisions are clear and unconditional and where, as to the result to be achieved, it leaves no substantial measure of discretion to the member state. Provided that these criteria are fulfilled it does not matter (a) whether the provision in the directive consists of a positive obligation to act or of a negative prohibition, or (b) that the member state has a choice of form and methods to be adopted in order to achieve the stated result. As to (a), it is implicit in the court's judgments in the cases of *Lütticke* and *Salgoil* (already cited) that an article of the Treaty which imposes a positive obligation on a member state to act is capable of direct applicability and the same reasoning is valid in relation to directives. As to (b), she notes that article 189 of the Treaty expressly draws a distinction in relation to directives between the binding effect of the result to be achieved and the discretionary nature of the methods to be adopted.

She contends that the provisions of article 3 fulfil the criteria for direct applicability. She refers to the preamble to the Directive which envisages a direct applicability when it states:

A "whereas, in each member state, nationals of other member states should have adequate legal remedies available to them in respect of the administration in such matters . . ."

(i.e. when a member state invokes grounds of public policy, public security or public health in matters connected with the movement or residence of foreign nationals).

B The only "adequate legal remedy" available to an individual is the right to invoke the provisions of the Directive before the national courts. A decision to this effect would undoubtedly strengthen the legal protection of individual citizens in the national courts.

The Commission submits that a provision in a directive is directly applicable when it is clear and unambiguous. It refers to the judgments in the *Grad* and *S.A.C.E.* cases (already cited).

C The Commission observes that a community regulation has the same weight with immediate effect as national legislation whereas the effect of a directive is similar to that of those provisions of the Treaty which create obligations for the member states. If provisions of a directive are legally clear and unambiguous, leaving only a discretion to the national authorities for their implementation, they must have an effect similar to

D those Treaty provisions which the court has recognised as directly applicable.

It therefore submits that (a) the executive of a member state is bound to respect community law; (b) if a provision in a directive is not covered by an identical provision in national law, but left, as to the result to be achieved, to the discretion of the national authority, the discretionary power of that authority is reduced by the community provision, (c) in

E these circumstances and given that to comply with a directive it is not always indispensable to amend national legislation it is clear that the private individual must have the right to prevent the national authority concerned from exceeding its powers under community law to the detriment of that individual.

According to the Commission, article 3 is one of the provisions of

F Directive 64/221 having all the characteristics necessary to have direct effect in the member state to which it is addressed. And it further recalls that the difficulty of applying the rules in a particular case does not derogate from their general application. In this context the Commission examines the judgment of October 7, 1968, of the Belgian Conseil d'Etat in the *Corveleyn* case (CE 1968, no. 13.146 arrêt 7.10.1968, p. 710).

As the British authorities have not adopted the wording of article 3 of

G the Directive to achieve the required result, the Commission submits, by virtue of article 189 of the Treaty and in the light of the case law of the court, that article 3 is a directly applicable obligation which limits the wide discretion given to immigration officers under rule 65 in the "Statement of Immigration Rules." The Commission proposes the following answer to the question: where a provision is legally clear and unambiguous as is

H article 3 of Directive 64/221, such a provision is directly applicable so as to confer on individuals rights enforceable by them in the courts of a member state.

The United Kingdom recalls that article 189 of the E.E.C. Treaty draws a clear distinction between regulations and directives, and that different effects are ascribed to each type of provision. It therefore submits that prima facie the Council in not issuing a regulation must have intended that the Directive should have an effect other than that of a regulation and

accordingly should not be binding in its entirety and not be directly applicable in all member states.

The United Kingdom submits that neither the *Grad* nor the *S.A.C.E.* decision is authority for the proposition that it is immaterial whether or not a provision is contained in a regulation, directive or decision. In both cases the purpose of the directive in question was merely to fix a date for the implementation of clear and binding obligations contained in the Treaty and instruments made under it. Those cases show that in special circumstances a limited provision in a directive could be directly applicable. The provisions of the Directive in the present case are wholly different. Directive 64/221 is far broader in scope. It gives comprehensive guidance to member states as to all measures taken by them affecting freedom of movement for workers and it was expressly contemplated in article 10 that member states would put into force the measures necessary to comply with the provisions of the Directive. Indeed the very terms of article 3 (1) itself contemplate the taking of measures.

The United Kingdom examines the only four cases in which national courts to its knowledge have considered the question of the direct applicability of the Directive. It submits that little assistance can be obtained from these cases. Inter alia it points out that the true effect of the *Corveleyn* case (already cited) has been the subject of considerable debate among Belgian jurists and the better view appears to be that the Conseil d'Etat did not decide that the Directive was directly applicable but applied the Belgian concept of public order which itself required international obligations of Belgium to be taken into account.

On the third question

Miss Van Duyn points out that the first part of the question assumes a situation where an organisation engages in activities which are lawful in the state. The question does not necessarily assume that the individual concerned intends to continue this association. It is sufficient that he has in the past been associated. In this respect Miss Van Duyn recalls that even if the individual had been associated with an illegal organisation and, by virtue of his activities therein, had been convicted of a crime, that circumstance would not, by virtue of the provisions of article 3, paragraph 2, of Directive 64/221, in itself be sufficient grounds for the member state to take measures based on public policy to exclude the individual.

Merely belonging to a lawful organisation, without necessarily taking part in its activities, cannot, in her submission, amount to "conduct." Conduct implies "activity." Moreover, the activities of the organisation in question are not, merely because the individual is or has been a passive member, "personal" to the individual concerned. To hold otherwise would mean that a member state could exclude an individual merely because, in the distant past, he had for a brief period perfectly lawfully belonged to a somewhat extreme political or religious organisation in his own member state.

In regard to the second part of the question, Miss Van Duyn recalls that freedom of movement of persons is one of the fundamental principles established by the Treaty and that discrimination on grounds of nationality is prohibited in article 7. Exemptions to these fundamental principles must be interpreted restrictively.

She points out that the question assumes discrimination on grounds of nationality and that it assumes a situation where an individual whose past

A activity has been blameless seeks entry into a member state in order to work for an organisation in whose employment the nationals of the member state are perfectly free to engage. She submits that if an organisation is deemed contrary to the public good the member state is faced with a simple choice: either to ban everyone, including its own nationals, from engaging in employment with that organisation, or to tolerate nationals of other member states as it tolerates its own nationals B engaging in such employment.

The Commission asserts that the concepts "public policy" and "personal conduct" contained in article 48, paragraph 3, of the Treaty and article 3 of Directive 64/221 are concepts of community law. They must first be interpreted in the context of community law and national criteria are only relevant to its application.

C In practice, if each member state could set limits to the interpretation of public policy the obligations deriving from the principle of freedom of movement of workers would take a variety of forms in different member states. It is only possible for this freedom to be maintained throughout the community on the basis of uniform application in all the member states. It would be inconsistent with the Treaty if one member state accepted workers from another member state while its own workers did not receive D uniform treatment as regards the application of the rules in respect of public order in that other state.

The Commission submits that the discrimination by a member state on grounds of public policy against nationals of another member state for being employed by an organisation the activities of which it considers contrary to the public good when it does not make it unlawful for its own nationals to be employed by such organisation is contrary to article 48, E paragraph 2, of the Treaty. Article 3 (1) of the Directive is precise in stating that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned. Personal conduct which is acceptable when exercised by a national of one member state cannot be unacceptable, under community law, when exercised by a national of another member state.

F It is for consideration that article 3 precludes a member state, as a general contingency against some potential harm to society, from invoking public policy as a ground for refusing entry when the personal conduct of the individual is or was not contrary to public policy in the member states concerned. It is not denied that membership of a militant organisation proscribed in the host member state would be an element to be taken into account in assessing personal conduct for the purpose of justifying a G refusal of entry on grounds of public policy or public security.

As to the first part of the question the United Kingdom deals with three problems.

The first problem is whether an individual's past or present association with an organisation can be regarded as an aspect of his personal conduct. The United Kingdom asserts that it is of importance that a member state H in relation to public policy should be entitled to consider a person's associations with a body or organisation. The member state should be entitled to exclude that person in appropriate cases, i.e. if the organisation is considered sufficiently undesirable from the viewpoint of public policy and the association by that person with that organisation is sufficiently close.

Secondly the United Kingdom submits that a measure which is taken on grounds of public policy and which provides for the exclusion from a

member state of an individual on the ground of that individual's association with an organisation is compatible with the requirement of article 3 (1). It accepts that the intention underlying that article must have been to exclude collective expulsions and to require the consideration by the national authorities of the personal circumstances of each individual in each case. Nevertheless it is not inconsistent with that intention for a member state to take into account an individual's association with an organisation and, in appropriate cases, to exclude the individual by reason of that association. Whether, in any case, such exclusion is justified will depend on the view that the member state takes of the organisation.

As a practical matter the processes of admitting persons to enter a member state must be administered by a large number of officials. Such officials cannot be expected to know all that the government may know about a particular organisation and it is inevitable that such officials must act in accordance with directions given by the government and laying down broad principles on which the officials are to act. It is inevitable also that such directions may relate to particular organisations which a government may consider contrary to the public good.

Thirdly the United Kingdom submits that the fact that the activities of the organisation are not unlawful in a member state though considered by the member state to be contrary to the public good does not disentitle the member state from taking into account the individual's association with the organisation. It must be a matter for each state to decide whether it should make activities of an organisation, or the organisation itself, illegal. Only that state is competent to make such evaluation and it will do so in the light of the particular circumstances of that state. Thus, as is common knowledge, the United Kingdom practises a considerable degree of tolerance in relation to organisations within the United Kingdom. In the case of scientology the reasons why the United Kingdom regards the activities of the scientologists as contrary to public policy were explained in the statement made in Parliament on July 25, 1968. The scientologists still have their world headquarters in the United Kingdom so that scientology is of particular concern to the United Kingdom.

The United Kingdom notes that two problems arise in connection with the matter referred to in sub-paragraph (b) of the question.

The first problem is whether the fact that an individual intends to take employment with such an organisation is an aspect of that individual's personal conduct. It is submitted that such an intention is a very material aspect of the individual's personal conduct.

The second problem is whether the fact that no restrictions are placed upon nationals of the member state who wish to take similar employment with such an organisation disentitles the member state from taking this intention into account.

The United Kingdom points out that it is inevitable that in respect of the entry into a state of persons, there must be some discrimination in favour of the nationals of that state. For a national, however undesirable and potentially harmful his entry may be, cannot be refused admission into his own state. A state has a duty under international law to receive back its own nationals. The United Kingdom refers, inter alia, to article 5 (b) (ii) of the Universal Declaration of Human Rights which states: "Everyone has the right to leave any country, including his own, and to return to his country." It observes that, for example, a member state would be justified in refusing to admit a drug addict who is a

national of another state even though it would be obliged to admit a drug addict who was one of its own nationals.

Miss Van Duyn, represented by Alan Newman, the United Kingdom, represented by Peter Gibson, and the Commission represented by Anthony McClellan, submitted oral observations at the hearing on October 23, 1974.

The Advocate-General delivered his opinion at the hearing on November 13, 1974.

LAW

1. By order of Pennycuick V.-C., of March 1, 1974, lodged at the court on June 13, the Chancery Division of the High Court of Justice of England, referred to the court, under article 177 of the E.E.C. Treaty, three questions relating to the interpretation of certain provisions of community law concerning freedom of movement for workers.

2. These questions arise out of an action brought against the Home Office by a woman of Dutch nationality who was refused leave to enter the United Kingdom to take up employment as a secretary with the "Church of Scientology."

3. Leave to enter was refused in accordance with the policy of the Government of the United Kingdom in relation to the said organisation, the activities of which it considers to be socially harmful.

First question

4. By the first question, the court is asked to say whether article 48 of the E.E.C. Treaty is directly applicable so as to confer on individuals rights enforceable by them in the courts of a member state.

5. It is provided, in article 48 (1) and (2), that freedom of movement for workers shall be secured by the end of the transitional period and that such freedom shall entail:

> "the abolition of any discrimination based on nationality between workers of member states as regards employment, remuneration and other conditions of work and employment."

6. These provisions impose on member states a precise obligation which does not require the adoption of any further measure on the part either of the community institutions or of the member states and which leaves them, in relation to its implementation, no discretionary power.

7. Paragraph 3, which defines the rights implied by the principle of freedom of movement for workers, subjects them to limitations justified on grounds of public policy, public security or public health. The application of these limitations is, however, subject to judicial control, so that a member state's right to invoke the limitations does not prevent the provisions of article 48, which enshrine the principle of freedom of movement for workers, from conferring on individuals rights which are enforceable by them and which the national courts must protect.

8. The reply to the first question must therefore be in the affirmative.

Second question

9. The second question asks the court to say whether Council Directive 64/221 of February 25, 1964, on the co-ordination of special measures

concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health is directly applicable so as to confer on individuals rights enforceable by them in the courts of a member state.

10. It emerges from the order making the reference that the only provision of the Directive which is relevant is that contained in article 3 (1) which provides:

> "Measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned."

11. The United Kingdom observes that, since article 189 of the Treaty distinguishes between the effects ascribed to regulations, directives and decisions, it must therefore be presumed that the Council, in issuing a directive rather than making a regulation, must have intended that the directive should have an effect other than that of a regulation and accordingly that the former should not be directly applicable.

12. If, however, by virtue of the provisions of article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the community authorities have, by directive, imposed on member states the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of community law. Article 177, which empowers national courts to refer to the court questions concerning the validity and interpretation of all acts of the community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between member states and individuals.

13. By providing that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned, article 3 (1) of Directive 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals. First, the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the community or of member states. Secondly, because member states are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.

14. If the meaning and exact scope of the provision raise questions of interpretation, these questions can be resolved by the courts, taking into account also the procedure under article 177 of the Treaty.

A 15. Accordingly, in reply to the second question, article 3 (1) of Council Directive 64/221 of February 25, 1964, confers on individuals rights which are enforceable by them in the courts of a member state and which the national courts must protect.

Third question

B 16. By the third question the court is asked to rule whether article 48 of the Treaty and article 3 of Directive 64/221 must be interpreted as meaning:

> "a member state, in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned, is entitled to take into account as matters
C of personal conduct: (a) the fact that the individual is or has been associated with some body or organisation the activities of which the member state considers contrary to the public good but which are not unlawful in that state; (b) the fact that the individual intends to take employment in the member state with such a body or organisation it being the case that no restrictions are placed upon nationals of the member state who wish to take similar employment with such a body
D or organisation."

17. It is necessary, first, to consider whether association with a body or an organisation can in itself constitute personal conduct within the meaning of article 3 of Directive 64/221. Although a person's past association cannot, in general, justify a decision refusing him the right to move freely within the community, it is nevertheless the case that present
E association, which reflects participation in the activities of the body or of the organisation as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct within the meaning of the provision cited.

18. This third question further raises the problem of what importance must be attributed to the fact that the activities of the organisation in
F question, which are considered by the member state as contrary to the public good, are not however prohibited by national law. It should be emphasised that the concept of public policy in the context of the community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be
G determined unilaterally by each member state without being subject to control by the institutions of the community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

19. It follows from the above that where the competent authorities of a
H member state have clearly defined their standpoint as regards the activities of a particular organisation and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, the member state cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances.

20. The question raises finally the problem whether a member state is entitled, on grounds of public policy, to prevent a national of another

member state from taking gainful employment within its territory with a body or organisation, it being the case that no similar restriction is placed upon its own nationals.

21. In this connection, the Treaty, while enshrining the principle of freedom of movement for workers without any discrimination on grounds of nationality, admits, in article 48 (3), limitations justified on grounds of public policy, public security or public health to the rights deriving from this principle. Under the terms of the provision cited above, the right to accept offers of employment actually made, the right to move freely within the territory of member states for this purpose, and the right to stay in a member state for the purpose of employment are, among others all subject to such limitations. Consequently, the effect of such limitations, when they apply, is that leave to enter the territory of a member state and the right to reside there may be refused to a national of another member state.

22. Furthermore, it is a principle of international law, which the E.E.C. Treaty cannot be assumed to disregard in the relations between member states, that a state is precluded from refusing its own nationals the right of entry or residence.

23. It follows that a member state, for reasons of public policy, can, where it deems necessary, refuse a national of another member state the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the member state does not place a similar restriction upon its own nationals.

24. Accordingly, the reply to the third question must be that article 48 of the E.E.C. Treaty and article 3 (1) of Directive 64/221 are to be interpreted as meaning that a member state, in imposing restrictions justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organisation the activities of which the member state considers socially harmful but which are not unlawful in that state, despite the fact that no restriction is placed upon nationals of the said member state who wish to take similar employment with these same bodies or organisations.

Costs

25. The costs incurred by the United Kingdom and by the Commission of the European Communities, which have submitted observations to the court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, costs are a matter for that court.

On those grounds, the court in answer to the questions referred to it by the High Court of Justice, by order of that court, dated March 1, 1974, hereby rules:

(1) Article 48 of the E.E.C. Treaty has a direct effect in the legal orders of the member states and confers on individuals rights which the national courts must protect.

(2) Article 3 (1) of Council Directive No. 64/221 of February 25, 1964, on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health confers on individuals rights which are enforceable by them in the national courts of a member state and which the national courts must protect.

A (3) Article 48 of the E.E.C. Treaty and article 3 (1) of Directive 64/221 must be interpreted as meaning that a member state, in imposing restrictions justified on grounds of public policy, is entitled to take into account as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organisation the activities of which the member state considers socially harmful but which are not unlawful in that state, despite the fact that no restriction is placed B upon nationals of the said member state who wish to take similar employment with the same body or organisation.

H. J.

Solicitors: Stephen M. Bird, East Grinstead; Treasury Solicitor.

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[SUPREME COURT]

PRACTICE DIRECTION (JUDGMENTS: FORM AND CITATION)

Practice—Supreme Court—Judgments—Standard form of judgments in High Court and Court of Appeal—Neutral citation to be adopted in Court of Appeal and Administrative Court—Law Reports to be cited in preference to all other series—Citation of reproductions of reports in electronic form

This practice direction is made with the concurrence of the Lord Phillips of Worth Matravers M.R., Sir Andrew Morritt V.-C. and Dame Elizabeth Butler-Sloss P. It represents the next stage in the process of modernising the arrangements for the preparation, distribution and citation of judgments given in every division of the High Court, whether in London or in courts outside London.

Form of judgments

1.1 With effect from 11 January 2001, all judgments in every division of the High Court and the Court of Appeal will be prepared for delivery, or issued as approved judgments, with single spacing, paragraph numbering (in the margins) but no page numbers. In courts with more than one judge, the paragraph numbering will continue sequentially through each judgment, and will not start again at the beginning of the second judgment. Indented paragraphs will not be given a number.

1.2 The main reason of these changes is to facilitate the publication of judgments on the World Wide Web and their subsequent use by the increasing numbers of those who have access to the Web. The changes should also assist those who use and wish to search judgments stored on electronic databases.

1.3 It is desirable in the interests of consistency that all judgments prepared for delivery, (or issued as approved judgments) in county courts, should also contain paragraph numbering (in the margins).

Neutral citation of judgments

2.1 With effect from 11 January 2001 a form of neutral citation will be introduced in both divisions of the Court of Appeal and in the Administrative Court. A unique number will be given by the official shorthand writers to each approved judgment issued out of these courts. The judgments will be numbered in the following way:

Court of Appeal (Civil Division)	[2000] EWCA Civ 1, 2, 3 etc.
Court of Appeal (Criminal Division)	[2000] EWCA Crim 1, 2, 3 etc.
High Court (Administrative Court)	[2000] EWHC Admin 1, 2, 3 etc.

2.2 Under these new arrangements, paragraph 59 in *Smith v Jones*, the tenth numbered judgment of the year in the Civil Division of the Court of Appeal, would be cited: *Smith v. Jones* [2001] EWCA Civ 10 at [59].

2.3 The neutral citation will be the official number attributed to the judgment by the court and must always be used on at least one occasion when the judgment is cited in a later judgment. Once the judgment is reported, the neutral citation will appear in front of the familiar citation

from the law report series. Thus: *Smith v. Jones* [2001] EWCA Civ 10 at [30], [2001] Q.B. 124, [2001] 2 All E.R. 364, etc. The paragraph number must be the number allotted by the court in all future versions of the judgment.

2.4 If a judgment is cited on more than one occasion in a later judgment, it will be of the greatest assistance if only one abbreviation (if desired) is used. Thus *Smith v. Jones* [2001] EWCA Civ 10 could be abbreviated on subsequent occasions to *Smith v. Jones*, or *Smith's* case, but preferably not both (in the same judgment).

2.5 If it is desired to cite more than one paragraph of a judgment each numbered paragraph should be enclosed with a square bracket. Thus: *Smith v. Jones* [2001] EWCA Civ 10 at [30]–[35], or *Smith v. Jones* [2001] EWCA Civ 10 at [30], [35], and [40]–[43].

2.6 The neutral citation arrangements will be extended to include other parts of the High Court as soon as the necessary administrative arrangements can be made.

2.7 The Administrative Court citation will be given to all judgments in the Administrative Court, whether they are delivered by a Divisional Court or by a single judge.

Citation of judgments in court

3.1 For the avoidance of doubt, it should be emphasised that both the High Court and the Court of Appeal require that where a case has been reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales it must be cited from that source. Other series of reports may only be used when a case is not reported in the Law Reports.

3.2 It will in future be permissible to cite a judgment reported in a series of reports, including those of the Incorporated Council of Law Reporting, by means of a copy of a reproduction of the judgment in electronic form that has been authorised by the publisher of the relevant series, provided that (1) the report is presented to the court in an easily legible form (a 12-point font is preferred but a 10 or 11-point font is acceptable) and (2) the advocate presenting the report is satisfied that it has not been reproduced in a garbled form from the data source. In any case of doubt the court will rely on the printed text of the report (unless the editor of the report has certified that an electronic version is more accurate because it corrects an error contained in an earlier printed text of the report).

Concluding comments

4.1 The changes described in this practice direction follow what is becoming accepted international practice. They are intended to make it easier to distribute, store and search judgments, and less expensive and time-consuming to reproduce them for use in court. Brooke L.J. is still responsible for advising the Judges' Council on these matters, and any comments on these new arrangements, or suggestions about ways in which they could be improved still further, should be addressed to him at the Royal Courts of Justice, WC2A 2LL.

LORD WOOLF C.J.

11 January 2001