Robert Alderson WRIGHT, Baron Wright of Durley (1869 – 1964)

Marjorie Avis WRIGHT, Lady Wright (née BULLOWS).

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

9th Jan 1935.

Dear Goodhart,

I have not yet words to thank you for so kindly sending me the copy of Politis's paper: I read it with great interest & propose sometime to have in the ordinary course off my copy of the Jubilee number, what seems to me most excellent. There all the articles are so good it seems invidious to select, but I found especially interesting the articles on Administrative Law, Private International Law, Local Government & Constitutional Law.

I spoke to Tomlin who is Chairman of the Athenaeum Club Committee

about you. He said he would look until
I hear from the members of the
Committee that you have each
put in the list of charities under r. 2.
The declaration by. I hope you will
be elected.

Kind regards
Yours sincerely
Wright

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

July 4th, 1936.

Dear Professor Goodhart,

Anything that Sir Frederick Pollock says ought to go, but I cannot help wondering whether much help is likely to be got from the business world. My experience is that they take their Law ready made, and from their legal advisers, (who are always at hand) and are not likely to have any independent views of their own. Otherwise, I am not qualified to speak on the proposals.

It is very kind of you and him to take so much interest in my little article. I had promised the young Editor at the Jubilee dinner to do an article for him, and he did not let me forget, so I had no alternative. It is very difficult with all the work I have to do to find time for a thing like that, and it was necessarily a very rough production. I am having great difficulty in finding odd moments to prepare the address for Harvard.

I should very much like to meet Professor Frankfurter. I had the pleasure of meeting him a few years ago, and I know his work.

13th

I am dis-engaged on the 14th and 15th, but Lady Wright, I am afraid, will not be in Town either day. The 13th she will be free, but we have our Cocktail party at the Record Office, for which, I expect, you have an invitation. We could manage to get home and change by 8.30. I am sorry we have so little free time at the moment. We have to be in the country for the week-end, and on the 11th I go from here to Oxford for a meeting. Will you please let me know, replying to 48, Hornton Street, W.8..

& come to dinner

There is one thing more I want to say. I have recently become officially Chairman of the Law Reform Committee. I wondered if you would see your way to become a Member? I have spoken to the Chancellor, who agrees with me that you would be a great help if you could spare the time. If you feel able to join, I will get Schuster to write to you formally. It is a Committee on which you can do as much or as little as you like, but I should hope for the former.

Yours truly,

Wright

TELEPHONE WESTERN 3010.

48, HORNTON STREET,
W.

Dec 1. 36.

Dear Professor Goodhart,

Many thanks for your letter &
Congratulations
I have read with great interest
what you write. I think it is very
important. Please take your time. The
last thing I should believe is that you
are wasting time.
What you say about wanes & conditions & options strike me
as very sound. As to pro quem tertio
I think I can manage Romer.
Could you some time look in to No. 7.
Report? I might look through at Christie

Yours sincerely,
Wright

I might run over at Christmas & see you at Oxford - only I know
from you Savernake.

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

January 8th, 1937.

Dear Professor Goodhart,

Thanks for your letter, quotation, and the reference to R v Christie. If anyone complains about our altering the Law, we may, in addition to your retort, say that that is our métier, we are a Law Revision Committee. I cannot understand why some of the Oxford lawyers seem to regard rules of the Law as being as immutable as the ten commandments.

As you refered the other day to my Harvard article I am sending you a typescript in case you care to look through it. Please return it to me at the Law Courts. There are several typing and other errors, some of which I corrected in the copy I sent to Roscoe Pound. He has undertaken to see that everything is right and put it through the Press.

Yours sincerely, Wright

5

ROYAL COURTS OF JUSTICE,
W.C.

~~Feb~~ Mar 3 1937.

Dear Goodhart, I have tinkered up the typescript till it is almost illegible. If I can be printed from the script, perhaps it would be better (reserve proofs alterations (if any) to the first proof.

I am afraid I have made it a little longer, but if it is too long we can cut some footnotes out. I expect a good many proof alterations will still need checking & correcting.

Yours sincerely
Wright.

6

ROYAL COURTS OF JUSTICE,
W.C.2.

Mar 12. 37.

Dear Professor Goodhart,
Would it be better to put
Lord Wright. Master of
the Rolls?
I am rather a
transient Rolls &
hope soon to get back

permanently to the Lords
& I am better known
especially abroad
as Lord Wright. People
would say who is the
Master of the Rolls?

Yours sincerely
W Wright

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

Oct 5. 37.

Dear Professor Goodhart,

Thanks for Frankfurter's letter which I return.

It is much in the line of what we discussed on Sunday. My only fear is that the same thing may happen again. Atkin is Senior Law Lord & will always preside, if the L.C. is not sitting. He will always dissent, write the judgment & resist criticism. That is why I dislike the P.C. Of course Atkin has great merits, but he was never deficient in

self Confidence, & can be very niggling in outlook.

There are some more Canadian cases in November. I have no confidence in my ability to change the position, though I may risk some plain speaking — with I suppose no practical result.

I am so glad you enjoyed the visit on Sunday. It gave us much pleasure to see you all. We send our regards. Yours very

Wright

Phillip, I am told, is a promising horseman

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
NR MARLBOROUGH,
WILTS.

13 Oct. 37

Dear Professor Goodhart,

Thanks for your letter. My wife is obliged for what you tell her about Juliet & is writing to your brother & sister.

I shall be proud to see the address in the L.Q.R. if it is found to be worth publication. I don't think it is so at present, but it may be revised. It is rather impressionist than comprehensive.

I like very much your first draft on Chandler. I've generally begun a brief historical sketch & worked out opinions criticising the doctrine. I suppose Dworkin & Van Rocco said something - did Mark? I can't remember. Doesn't the doctrine go back to some old apprenticeship cases? I don't like the

Innocent Misstatement in Insurance Proposal as implied contract as coming under the law of Contracts. Does it bear some relationship to failure of Consideration. Is that case implied contract or quasi contract. Comes in because the actual contract is rescinded & finally gone (I didn't Pollock say this). The mere promise to imply Contractual term. And didn't Denning explain frustration as the attempt of the court to combine parties with the absolute contract?

What about advance freight? can we interfere with this old rule Common (law). I suppose that comes to be an actual implied contract at Common (law) Insurances raise different questions from mere money payments.

Here are more by young & scraggy hands.

Yours sincerely

Cutter v Powell a good case where the parties made their own bargain which excludes the event in fact, if not expressly.

[c 1938] 10

13, CRANMER ROAD,
TEL. 4301. CAMBRIDGE.

With P.H. Winfield's
compliments & thanks.

Winfield has found all the references I gave on the subject for the A.B. After [illegible] I returned them with many thanks. I am completely ravished by your kindness & I am afraid I am becoming a pest

"THE RISE AND FALL OF SWIFT v. TYSON"

Overruled by S.C. in Erie Railroad Co. v. Tompkins (1938) 304 U.S. 333. (1842) 16 Pet. 1.

Overruling of *Swift v. Tyson*, One of the Most Dramatic Episodes in the History of the Supreme Court and One Not Fully Appreciated by the Profession or the Public—The Beginnings of Its Expansive Doctrine—Logical Inconsistencies Marking the Application of the Rule—Climax Perhaps Reached in Court's Treatment of a State Constitution in *Rowan v. Runnels*—Doctrine of the Celebrated Case of *Gelpcke v. Dubuque* Realistically a Logical Extension of Rule—Extent to Which Rule Tended to Promote Uniformity not Susceptible of Statistical Proof—How the Court Might Have Avoided a Resort to Constitutional or Statutory Grounds in Its Decision.

By Hon. Robert H. Jackson
Solicitor General of the United States

I

On April 25 of this year there occurred one of the most dramatic episodes in the history of the Supreme Court, with the overruling of the 96-year old doctrine of *Swift v. Tyson* (16 Pet. 1). This change was not impelled by "supervening economic events," nor was it a part of the program of any political party. It was a change of a legal doctrine, the very existence of which was but little known outside of our profession. The change was made on the initiative of a majority of the Court itself, without even demand by a litigant or argument of the point at the bar. It involved a volunteered confession that the Federal judiciary almost from the foundation of our government has pursued a course now clearly unconstitutional, has all these years been exercising a power not conferred by the Constitution, and in so doing has invaded rights reserved by the Constitution to the several states. The consequences to litigants are not yet clearly apparent, but the importance of this event to our developing jurisprudence has seemed to make the rise and fall of *Swift v. Tyson* an appropriate subject for my paper today.

The drama of this reversal of doctrine has not, I think, been fully appreciated by the public and the profession; but it must have been evident enough to the litigants in *Erie Railroad Co. v. Tompkins*, which was the instrument by which *Swift v. Tyson* received its official execution.

Harry Tompkins received severe injuries upon being struck by a swinging door of an Erie Railroad train while he was walking along the railroad's right-of-way beside its main track in Pennsylvania. Tompkins brought suit in the Federal court for Southern New York, where the railroad was incorporated. The jury brought in a verdict of $30,000 and the Circuit Court of Appeals for the Second Circuit affirmed the judgment. Both courts ruled that the liability of the railroad did not depend upon the law of Pennsylvania, where the accident occurred, as laid down in the decisions of the Pennsylvania courts. Since the case was one of tort liability, it was clear that the doctrine of *Swift v. Tyson* applied and that the Federal courts were not bound by the common law rules of the state but were free to apply the so-called Federal common law as developed by the Federal courts in the exercise of their independent judgment. All this seemed clear enough, and doubtless Tompkins felt secure in the prospect of receiving his $30,000.

The first intimation that all was not well must have come when the Supreme Court granted certiorari. But even then there could hardly have been any fear that the 96-year-old bulwark of Tompkins' case would be destroyed, for the railroad company in its brief was careful to avoid any suggestion that its argument involved a repudiation of *Swift v. Tyson*. "We do not question the finality of the holding of this Court in *Swift v. Tyson*," the company stated (p. 27), and the argument proceeded on the basis of an attempt to show that the decisions of the Pennsylvania courts on the question were so settled that they had become a local usage and so within an exception to the rule of *Swift v. Tyson*. After making such an argument, the brief continued: "If the foregoing statement is correct, the Circuit Court of Appeals has misconceived the doctrine of this Court and, it may be added, the persistent criticisms of *Swift v. Tyson* and succeeding cases have been largely misdirected" (p. 25). In view of the rule followed in the first minimum wage case from New York, the *Tipaldo* case (298 U. S. 587), that the Court would not reconsider a precedent unless asked to do so by the petitioner, Tompkins seemed to run little risk of losing his judgment. He reckoned, however, without the Court, for its opinion opened with the statement: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved." The Court disapproved by a vote of six to two. Presumably Harry Tompkins was unfamiliar with the deep and stormy currents of political and legal controversy in which he had unhappily been caught. He probably does not appreciate the honor of giving his name to a leading case, at a cost of $30,000. And he probably has little understanding of the nature of the judicial process which destined our jurisprudence to take a violent swing on the hinges of that loose car door.

II

As lawyers we can perhaps understand a little better than the litigant can the forces which served so

*Address delivered before the Section of Real Property, Probate and Trust Law, at Cleveland on Monday, July 25.

Note to ref. to Y.L.J. may procure the reprint. 17 Ohio Rep. in (1938) 304 U.S. 333

dramatically to defeat his claim. Let us go back to the beginning, to *Swift v. Tyson* itself.

That case was an action on a bill of exchange, brought by the holder against the acceptor; the defense was a fraud of the drawer of the bill. The question for decision was whether the holder, who had taken the bill as payment for an antecedent debt, was free from this defense of fraud as a *bona fide* purchaser for value. The law of New York, where the bill had been accepted and endorsed, was not yet reduced to statute, and the decisions of the New York courts were in some confusion on the subject. Mr. Justice Story, however, who delivered the opinion of the Supreme Court in the case, assumed for purposes of the decision that under the New York authorities the holder was not a purchaser for value. Making that assumption, Justice Story proceeded to disregard the New York rule and to lay down the rule that on questions of general commercial law the decisions of the courts of the state where the transaction occurred were not binding on the Federal courts, and that the Federal courts were free to apply the rules of the common law in accordance with their judgment of what those rules were. Quoting Cicero, that the law is not one thing at Rome and another at Athens, Justice Story in effect concluded that the same must be true of New York and Boston. As for Section 34 of the Judiciary Act of 1789, which provided that "The laws of the several States . . . shall be regarded as rules of decision in trials of common law, in the courts of the United States, in cases were they apply," Justice Story ruled that the concept of laws as there used was limited to statute laws and perhaps also to well-settled local usages in matters of purely local concern such as title to real property. Accordingly, Justice Story felt free to announce for the Federal courts the rule that one who takes a bill of exchange, whether as payment or as security for an antecedent debt, takes free of defenses as between the original parties.

It will be seen at the very outset that the doctrine of *Swift v. Tyson* was uncalled for by the case itself, since there was no question in the case of the taking of a bill as mere security, and on the question actually presented the decisions of New York might well have been deemed to support the holding of the Court. The undue expansiveness of the decision did not pass unquestioned. Mr. Justice Catron dissented from the dictum in the case regarding the effect of taking a bill as security for an antecedent debt, stating: "I never heard this question spoken of as belonging to the case, until the principal opinion was presented last evening" (16 Pet. at 23). This complaint in the dissent curiously resembles the complaint in the dissent in the Tompkins case itself.

How is the decision in *Swift v. Tyson* to be explained? It is not enough to regard it as turning merely upon a construction of Section 34 of the Judiciary Act. For even if the term "laws" in that section meant only the statute laws of the state, the consequence was that in the absence of statute law the Federal courts were free, so far as Congress was concerned, to establish a rule either requiring conformity to the decisions of the state or proclaiming the independence of the Federal courts from those decisions. In adopting the latter alternative, the Court was undoubtedly influenced by a desire to promote uniformity of decision in the states through the persuasive example of Federal courts' decisions. But prior to 1842, when *Swift v. Tyson* was decided, this consideration did not seem to be of controlling weight. In the earlier years the Court seemed to be more apprehensive of the danger of creating a conflict of decisions between State and Federal courts deciding similar questions, questions which were presented to a Federal court not because they involved any issue of Federal statutory or constitutional law, but solely because they arose in a controversy between citizens of different States. In 1814 Justice Bushrod Washington, sitting at circuit, pointed out the danger of this conflict. "The injustice as well as the absurdity of the former [Federal courts] deciding by one rule, and the latter [state courts] by another, would be too monstrous to find a place in any system of government."[1] What seemed absurd and monstrous in 1814 seemed sound and wise in 1842. As late as 1834, the Supreme Court appeared to set its face sternly against any notion of a Federal common law distinct from the common law of a state. The question was discussed in *Wheaton v. Peters* (8 Pet. 591), which was a suit by the former Reporter of the Court against the then Reporter for publishing in an abridged form the Court's opinions which had been reported theretofore. In those days it can be seen that the storm center of controversy extended beyond the Court itself to include its Reporter.[2] In disposing of an argument by the former Reporter Wheaton that a common-law right of authors apart from the copyright existed in this country, the Court said (p. 658):

"It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system, only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the state in which the controversy originated."

In the face of these expressions, the expansive doctrine of *Swift v. Tyson* seems almost inexplicable. An explanation was ventured, however, by John Chipman Gray, in his *Nature and Sources of the Law* (2d ed., p. 253):

"Among the causes which led to the decision in *Swift v. Tyson*, the chief seems to have been the character and position of Judge Story. He was then by far the oldest judge in commission on the bench; he was a man of great learning, and of reputation for learning greater even than the learning itself; he was occupied at the time in writing a book on bills of exchange, which would, of itself, lead him to dogmatize on the subject; he had had great success in extending the jurisdiction of the admiralty; he was fond of glittering generalities; and he was possessed by a restless vanity. All these things conspired to produce the result."

It may be thought that in this catalogue of Professor Gray's nothing has been omitted. But nevertheless there is an additional factor which perhaps had some importance. At the time of *Swift v. Tyson*, and indeed until 1875, the jurisdiction of the lower Federal courts had not been extended by Congress to include cases arising under the laws or Constitution of the United States. Apart from special subjects such as admiralty, the jurisdiction of the lower Federal courts was confined to cases based on diversity of citizenship. In such cases there was obviously little opportunity for a Federal judge to exercise the legal talents which

1. 3 Wash. 313.

2. Peters was later removed from office as Reporter by a divided Court, with much bitterness of feeling among the Justices. See 2 Warren, *Supreme Court in U. S. History*, 106-107.

he might possess unless he was free to do more than echo the "last breath" of a state judge. It is interesting also to recall that Justice Story went so far as to maintain that there was a Federal common law of crimes enforcible in the Federal courts apart from Federal criminal statutes. This, however, did not receive the acceptance of his brethern.[3] But with respect to a Federal common law in civil matters, Justice Story's view prevailed.

III

Thus was launched the rule of *Swift v. Tyson*. From the beginning the rule was marked by certain logical inconsistencies. For example, while the "laws" of the several States meant the statute laws, they were said to include also decisions construing state statutes, and also decisions which might be regarded as having the force of local usage in local matters. On purely linguistic grounds it is hard to understand why decisions of a certain class should be included within the term "laws" while decisions of another class should not.

The aftermath of the rule was, however, even more remarkable than its origin. The newly announced power of the Federal courts to disregard the decisions of a state grew by what it fed on. One field which might have been thought to be typically local, and so exempt from the rule of *Swift v. Tyson*, was the construction of wills and the determination of title to real property. Even here, however, the Federal courts asserted their independence. In *Lane v. Vick*, 3 How. 464 (1845), the Supreme Court had before it a question of the construction of a will dealing with real estate. "It is insisted," the Court said, "that the construction of this will has been conclusively settled by the Supreme Court of Mississippi" (p. 476). The Court then declared: "With the greatest respect, it may be proper to say, that this court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes" (*ibid.*).

Suppose, however, that there was in fact a state statute affecting title to real estate. Even in this situation the Court for a time declined to follow state decisions. In *Williamson v. Berry*, 8 How. 495 (1850), an action in ejectment, the question was presented of the validity of a conveyance by a trustee of real property which had been approved by Chancellor Kent pursuant to a series of private acts of the New York Legislature authorizing conveyances of the property with the approval of the chancellor. The legislation and the conveyance took place in 1816-1817. The highest courts of New York, in proceedings involving this land, had sustained the validity of the conveyance as being in accordance with the private acts, and these decisions were concurred in by Chancellor Walworth, Kent's successor, who had presided as chancellor for almost twenty years. These decisions were rendered in 1836 and 1838. Then in 1850 the case of *Williamson v. Berry*, involving the same land, reached the Supreme Court of the United States. That Court held that Chancellor Kent had misconstrued and exceeded the authority granted by the private acts, and that the decisions of the New York courts should not be followed. Mr. Justice Wayne, speaking for the Court, said (p. 543):

". . . we cannot admit that the rule hitherto observed in the court, of recognizing the judicial decisions of the highest courts of the states upon state statutes relative to real property as a part of local law, comprehends private statutes or statutes giving special jurisdiction to a states court for the alienation of private estates."

Thereafter the New York courts adhered to their former decisions and the conflict in the state of titles to the land was intensified. Finally, in 1860, forty-four years after the conveyances in question, the Supreme Court was again presented with the question in *Suydam v. Williamson*, 24 How. 427, and at this juncture the Supreme Court receded from its former views and decided to follow the views of the New York Courts.

Where the question was not one of the construction of wills or title to real estate, the Federal courts felt even freer to disregard state decisions, and to do so even though there was a state statute on the subject. In *Watson v. Tarpley*, 18 How. 517 (1855), an action on a bill of exchange, the Supreme Court held that the payee was entitled to immediate recourse against the drawer of a bill upon non-acceptance by the drawee, despite a *statute* of Mississippi which provided that there could be no recovery on a bill against the drawer upon mere non-acceptance but only after payment had been refused at maturity. With respect to the state statute the Court said (p. 521): "a requisition [i.e., requirement] like this would be a violation of the general commercial law, which a State would have no power to impose, and which the courts of the United States would be bound to disregard."

Perhaps the climax was reached in the Court's treatment of a *state constitution*. In *Rowan v. Runnels*, 5 How. 134 (1847), the Court considered whether a constitutional provision of Mississippi, prohibiting the introduction of slaves for sale, served in itself to render unenforcible a contract for the purchase of slaves in Mississippi. In *Graves v. Slaughter*, 15 Pet. 449, the Court had held that this provision did not make the contract unenforcible and that executory legislation was necessary. The Supreme Court of Mississippi then held the contrary. Faced with the same question in the *Rowan* case, the Supreme Court refused to alter its construction of the Mississippi Constitution, saying (p. 139):

"Acting under the opinion thus deliberately given by this court, we can hardly be required, by any comity or respect for the State courts, to surrender our judgment to decisions since made in the State, and declare contracts to be void which upon full consideration we have pronounced to be invalid."

Where a state court changed its decision on the construction of a state constitution and overruled prior decisions, a new field was opened up for the independence of the Federal courts in passing upon the same questions. Instead of following the latest decision of the state court, which would be controlling in the state, the Federal courts decided to follow the earlier and overruled decisions, if the transaction in question had been entered into before the overruling took place. This is the doctrine of the celebrated case of *Gelpcke v. Dubuque*, 1 Wall. 175.

This case, together with its sequels, deserves special attention. The facts in the case are well known. Certain Iowa cities and counties had issued bonds for the purchase of stock in railroad companies which were extending their lines westward. The validity of the bonds under the Constitution of Iowa was challenged,

3. In *United States v. Coolidge*, 1 Wheat. 415 (1816) the Attorney General declined to argue the point, stating that it had been settled against the Government in *United States v. Hudson*, 7 Cranch 32. Justice Story interposed, "I do not take the question to be settled by that case." Justice Johnson then said, "I consider it to be settled, by the authority of that case." The Attorney General agreed with Justice Johnson, and the Court adhered to its prior decision.

and the Iowa court, before the bonds were issued and thereafter, in a series of divided decisions, had sustained the power of the municipalities to issue the bonds and take the railroads' stock. The question, however, appeared not to be regarded as settled, and finally the Supreme Court of Iowa in a unanimous decision overruled the former cases and held the bonds to be invalid and the municipalities not liable to the bondholders. But when non-resident bondholders brought suit in the Federal court and carried the case to the Supreme Court of the United States a contrary judgment was rendered, holding the bondholders entitled to recover. It is important to bear in mind that the case involved no Federal constitutional question, no question of the impairment of the obligation of contract by a law of the state. It is clear that the overruling of the prior decisions by the Iowa court did not contravene the impairment of obligation clause.[4] It is also important to bear in mind that the case did not involve the power or wisdom of the Court's giving the overruling of its own prior decisions prospective application alone;[5] the case involved the wholly different question of the treatment which a Federal court should give to the latest decision of a state court where the state court imposed no such limitation on the application of its decision.

The case of *Gelpcke v. Dubuque* has frequently been stated to involve a fundamental conflict with the philosophy of law underlying *Swift v. Tyson*.[6] The conflict involves the age-old question whether judges make the law or simply find and announce the law. *Swift v. Tyson* rests on the philosophic premise that a court—specifically a state court—does not *make* the law but merely *finds* or declares the law, and so its decisions simply constitute evidence of what the law is, which another court is free to reject in favor of better evidence to be found elsewhere. If this conception had been followed in *Gelpcke v. Dubuque* the result would have been that the latest decision would have been controlling, since it did not create a new law for the future, but instead constituted evidence of what the law had always been in the past.

It is true that this juristic or philosophical inconsistency exists, but I venture to think that in a more realistic sense the case of *Gelpcke v. Dubuque* marked a logical extension of the doctrine of *Swift v. Tyson*, enlarging the field of discretion for the Federal courts with respect to the effect to be given to state decisions. As a matter of fact, there is no evidence that philosophical considerations weighed heavily with the Court in deciding *Gelpcke v. Dubuque*. The evidence is that more practical considerations were controlling. Chief among these was undoubtedly the Court's feeling that an injustice had been done to the bondholders by the state court. This feeling moved Mr. Justice Swayne, writing the majority opinion, to an outburst of rhetoric (pp. 206-207): "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." This language drew from Mr. Justice Miller an equally strong dissent. With a good deal of sagacity he suggested that the Iowa court was not likely to be persuaded to amend its ways by any such rebuke (p. 209):

"Is it supposed for a moment that this treatment of its decision, accompanied by language as unsuited to the dispassionate dignity of this court, as it is disrespectful to another court of at least concurrent jurisdiction over the matter in question, will induce the Supreme Court of Iowa to conform its rulings to suit our dictation, in a matter which the very frame and organization of our Government places entirely under its control?"

This was only the beginning of a most unseemly conflict between the Iowa courts and the Federal courts on the question of municipal bonds. The result was that, whether a bondholder could recover against a municipality depended upon whether he could get into a Federal court by reason of citizenship outside of Iowa. The Iowa courts, as Mr. Justice Miller had prophesied, stood firm in their conviction. They enjoined the taxing authorities of the municipalities from assessing a tax to pay the amount of the bonds. Thereupon suit was brought by non-resident bondholders in the Federal court for a writ of mandamus against local officers to require them to assess a tax sufficient to satisfy prior judgments of the Federal court on these bonds. The Supreme Court of the United States ordered a writ of mandamus to issue. *Riggs v. Johnson County*, 6 Wall. 166 (1867). More than that, the Supreme Court ordered mandamus to issue to compel the levy of a tax to pay Federal judgments on the bonds even though a statute of Iowa limited the amount of taxes to be levied annually and even though that limitation had already been reached. *Butz v. City of Muscatine*, 8 Wall. 575 (1869). It was in the latter case that Justice Miller gave vent to the personal suffering which these decisions occasioned him, particularly when he was called upon, sitting at circuit, to enforce the Federal decrees in his own State of Iowa. He said (p. 587):

"These frequent dissents in this class of subjects are as distasteful to me as they can be to any one else. But when I am compelled, as I was last spring, by the decisions of this court, to enter an order to commit to jail at one time over a hundred of the best citizens of Iowa, for obeying as they thought their oath of office required them to do, an injunction issued by a competent court of their own State, founded, as these gentlemen conscientiously believed, on the true interpretation of their own statute, an injunction which, in my own private judgment, they were legally bound to obey, I must be excused if, when sitting here, I give expression to convictions which my duty compels me to disregard in the Circuit Court."

Some new and interesting light has recently been cast on this series of municipal bond cases through the publication of the letters of Mr. Justice Miller (Fairman, *Justice Samuel F. Miller*, 50 Political Science Quarterly 15 (1935)). Miller knew from his own experience in Iowa before his appointment to the bench that justice was not wholly on the side of the bondholders in these cases, for the securities were of questionable validity from the outset; their issuance was often induced by ways that were dark, and frequently they came into the hands of financial speculators. While he was on the bench Justice Miller wrote to his brother-in-law who was coming to Washington to argue a municipal bond case from Texas (January 13, 1878, quoted in Fairman, p. 32):

"On what I consider the strongest point in your case, the limitation of the power of the city to issue the bonds

4. This was expressly held in *Railroad Co. v. McClure*, 10 Wall. 511, in which the Court dismissed for want of a Federal question an appeal from the state court which had held the bonds invalid. See also, to the same effect, *Tidal Oil Co. v. Flanagan*, 263 U. S. 444.

5. This question will be before the Court on the petition for rehearing in the Port of New York Authority case, *Helvering v. Gerhardt*, No. 779, 1937 Term.

6. E. G. Holmes, J., dissenting, in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370-372; Gray, *Nature and Sources of the Law*, secs. 535-550; Rand, *Swift v. Tyson versus Gelpcke v. Dubuque*, 8 Harv. L. Rev. 328.

or to contract the debt, no member of the court hesitates a moment except Field and myself. And the feeling which has [two words illegible] the court against all municipalities who contract any asserted obligation in them amounts to a mania. If I were a practicing lawyer today, my self respect, knowing what I do of the force of that feeling, would forbid me to argue in this court any case whatever against the validity of a contract with a county, city or town under any circumstances whatever. It is the most painful matter connected with my judicial life that [I] am compelled to take part in a farce whose result is invariably the same, namely to give more to those who have already, and to take away from those who have little, the little that they have."

After the argument of the case Miller again wrote to his brother-in-law (February 3, 1878, Fairman, pp. 32-33):

"Our court or a majority of it are, if not monomaniacs, as much bigots and fanatics on the subject as is the most unhesitating Mahemodan [sic] in regard to his religion. In four cases out of five the case is decided when it is seen by the pleadings that it is a suit to enforce a contract against a city, or town, or a county. If there is a written instrument its validity is a for[e]gone conclusion."

These letters, to put it mildly, strengthen the inference that in deciding these cases the Court was moved less by philosophic considerations of the nature of law and of judicial decisions than by views of practical justice and notions of the rightful power of Federal courts.

One more notable instance of the conflict created by *Swift v. Tyson*, even where state statutes were involved, is the well-known decision in *Burgess v. Seligman*, 107 U. S. 20. That case was an action by a judgment creditor of a dissolved Missouri railroad corporation against J. and W. Seligman & Co. as stockholders. A Missouri statute provided that stockholders of dissolved corporations were liable for corporate debts, except that persons holding stock as trustees, pledgees or executors should not be liable, in which case the pledgor, grantor or estate should be liable. The Seligmans held $6,000,000 worth of stock pledged to them by the railroad corporation itself, and they voted the shares as stockholders. The question arose whether they were entitled to exemption under the Missouri statute as pledgees, in view of the fact that the corporation as pledgor was not in the position of an outside pledgor who would be liable on his stock for the debts of the dissolved corporation. When the case was tried in the lower Federal court no Missouri decision had construed the statute in this regard. But before the case reached the Supreme Court on appeal, the Missouri Supreme Court had held that the Seligmans were liable to the creditors, the statute being construed not to exempt pledgees of the corporation itself. The United States Supreme Court declined to follow the state decision on the ground that as it had not been rendered when the case was decided by the lower Federal court it was not controlling.

It is evident, of course, that in these matters of commercial law, involving the validity of bonds and the liability of stockholders, the independence of the Federal courts created conflict in the name of uniformity. The same was true in the field of tort liability. The doctrine of *Swift v. Tyson* assumed dominion here, too. The result depended in any case on whether the action could be brought in a Federal court, if the rule there was more favorable to the plaintiff, or could be removed to a Federal court if the rule there was more favorable to the defendant. Characterizing this state of affairs, George Wharton Pepper observed, writing in 1889, that:

"Of two persons sitting in the same seat in a train, and injured in the same accident, one can recover in damages and the other cannot. Surely this state of things approaches very nearly to that which has excited much comment among eminent jurists, who tell us that so great was the mingling of nations and national laws after the downfall of the Roman Empire, that of four men sitting on the same bench each was presumably governed by a different law." (Pepper, *The Border Land of Federal and State Decisions*, p. 65.)

IV

To what extent, despite these conflicts, the rule of *Swift v. Tyson* did tend to promote uniformity is a problem that is hardly susceptible of statistical proof. It is clear, at any rate, that the doctrine promoted a good deal of litigation.[7] The Federal Digest, through the 1937 volume, contains over 300 columns of notations on the general subject of "State laws as rules of decision in Federal courts." As far back as 1888 Judge George C. Holt of New York published a volume entitled *Concurrent Jurisdiction of the Federal and State Courts*, in which one chapter, dealing with more than twenty-five subjects, was devoted to the topic "Grounds of Preference Between United States Circuit Courts and State Courts, Growing Out of Diversity of Decisions."

Perhaps the chief beneficiaries of the doctrine of *Swift v. Tyson* were corporations doing business in a number of states. Such corporations could claim to be citizens of the state of their charter alone, and so when sued could remove cases freely to the federal courts on the ground of diversity of citizenship.[8] Where the corporation was the plaintiff, it likewise had an advantage. A Delaware corporation suing a New York citizen with respect to a transaction in New York could bring suit there in either the federal or state court; even though diversity of citizenship existed, the defendant could not remove, being a citizen and resident of the state where suit was brought.

Some interesting figures concerning the recourse of insurance companies to the Federal courts were presented in March, 1932, at the Hearings before a Sub-Committee of the Senate Committee on Judiciary, dealing with proposed bills to limit the jurisdiction of the Federal courts. The Association of Life Insurance Presidents submitted a memorandum showing the extent to which legal reserve life insurance companies were engaged in litigation in the Federal courts from

7. Charles Warren states (*Supreme Court in United States History*, II p. 533) that in the thirty years following *Gelpcke v. Dubuque* approximately 300 municipal bond cases came before the Supreme Court—a larger number than on any other subject. Of these cases 65 arose in Illinois, 50 in Missouri, 25 in Iowa, 22 in Kansas, 18 in Wisconsin, 14 in New York, 11 in Indiana, 9 each in Kentucky and Tennessee, the others being scattered over 18 States.

8. Cf. Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 Cornell L. Q. 499, 524. If the rule of the federal courts appeared to be more favorable to the plaintiff, he was obliged, because of the venue requirements, to sue in the federal district court at the place where the corporation was chartered. This was done in the *Tompkins* case.

In 1932 Attorney General Mitchell sponsored a bill which would have taken away diversity jurisdiction in suits between a resident of a state and a corporation, which were brought within that state and arose out of the business carried on therein. See Hearings before a Sub-Committee of the Senate Judiciary Committee, 72d Cong., 1st Sess., on S. 937, p. 3. Both this bill and a bill to eliminate diversity jurisdiction entirely were disapproved by this Association's Committee on Jurisprudence and Law Reform, two members dissenting. 57 A. B. A. Rep. 100, *et seq.* (1932).

1927 through 1931. The figures show that of a total of 17,777 cases for the period 1,119 were litigated in the Federal courts. Of the latter, 99 were originally brought in the Federal courts against the companies, 488 were originally brought in the Federal courts by the companies and 542 were removed to the Federal courts by the companies.[9] While the percentage of Federal litigation is comparatively small, the actual number of cases in the Federal courts as shown by these figures is fairly impressive. Moreover, the figures do not show to what extent the cases in the state courts were not susceptible of removal to the Federal court either because of lack of diversity jurisdiction or because the amount claimed was less than $3,000. The figures do not show to what extent claimants voluntarily reduced their claim to $2,999 to escape removal. Nor do the figures show the number of claims settled out of court on the basis of the probability that the case would be removed to a Federal court where the decision would be unfavorable to the claimant.

In considering the extent to which uniformity may have been promoted, account must be taken of other factors than the rule of *Swift v. Tyson*. State courts may be brought into harmony with one another by recourse to exposition of the law in semi-authoritative treatises; or by common training of lawyers and judges in modern law schools; or by the work of organizations like the American Law Institute and the Commissioners on Uniform State Laws.[10]

But even if it could be shown that uniformity in rules of law was promoted by the practice of the Federal courts, that conclusion would not establish that *Swift v. Tyson* was a sound or wise doctrine. There remains the further and fundamental question whether the making of uniform rules of law should be entrusted to the Federal judiciary in the fields where the national legislature is powerless to act.[11] It is not merely that the legislature is entitled to share at least equally in the law-making process. The most serious objection is that the national legislature was powerless to alter rules of law after they were declared by the Federal courts in such matters as ordinary commercial law and torts. Many of those who praised the rule of *Swift v. Tyson* failed to appreciate this anomaly. Consider, for example, the statement of John Bassett Moore (*International Law and Some Current Illusions*, p. 333):

". . . There are subjects in respect of which, in spite of the fact that national legislation does not deal with them, the general convenience calls loudly for uniformity. This is particularly the case in regard to the law relating to commercial matters. For this reason, I confess I have always considered the conception of the Supreme Court of the United States in *Swift v. Tyson* as essentially sound."

The need for uniformity has never been allowed to operate as a basis of power in Congress, which was not granted in the Constitution, and it is hard to see why it should supply power, otherwise not granted, to the Federal judiciary.

The anomaly was particularly striking in the case of the law of insurance. At the very time when the Federal courts were announcing or making rules of law with respect to the construction and enforcement of insurance contracts, the Supreme Court refused to reconsider its long-standing decision that insurance is not commerce. *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495. Thus the making of insurance law was held to be within Federal judicial power, but not within Federal congressional power.

The anomaly was also striking in the field of torts. When Congress attempted in the First Employers' Liability Act to modify the common law rules of liability of carriers, particularly with respect to the fellow-servant doctrine, the legislation was held unconstitutional because it failed to limit its application to carriers and employees engaged in interstate commerce at the time of the injury. *First Employers' Liability Cases*, 207 U. S. 463. Subsequently a new statute was enacted which made the required distinction and which was upheld. 223 U. S. 1. The result has been a ceaseless flow of litigation under the statute to determine whether particular employees were or were not engaged in interstate commerce at the moment of injury, a question which frequently depends on almost fantastic distinctions. At the time that these legislative efforts were thus drawn in question the Federal courts were establishing their own rules regarding the scope of the fellow-servant doctrine in tort cases, including cases involving railroads. The authority of the Federal courts to establish these rules did not, of course, depend on any showing that interstate commerce was involved; diversity of citizenship was sufficient. It was in one of these fellow-servant cases, *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, 403, that Mr. Justice Field delivered a trenchant dissent from the whole doctrine of *Swift v. Tyson*, declaring:

"I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this Court. I have an abiding faith that this, like other errors, will, in the end 'die among its worshipers.'"

There is a certain measure of poetic justice in the fact that it was in another case involving the liability of a carrier for negligence that the doctrine of *Swift v. Tyson* did indeed "die among its worshipers."

V

The considerations which have been outlined seem ample justification for the overruling of *Swift v. Tyson* as a matter of wise judicial judgment. The Court, however, relied on a reconsideration of the meaning of Section 34 of the Judiciary Act of 1789, and a reconsideration of the constitutional basis for the doctrine.

As to the statutory question, attention was called by the Court to the researches of Mr. Warren on the origin of Section 34 and its revision by Ellsworth prior to passage. See Warren, *New Light on the History of the Federal Judiciary Act* of 1789, 37 Harv. L. Rev. 49, 85-88. The discovery by Mr. Warren of the history of this section had, however, been brought to the attention of the Court in the *Black and White Taxicab* case (276 U. S. 518) and was not then regarded as sufficient to overturn the construction of Section 34 which had been given by Justice Story.[12]

With respect to the constitutional argument, it may be observed that the question was not argued to

9. These figures are cited in Yntema, *Jurisdiction of Federal Courts in Controversies Between Citizens of Different States*, 19 A. B. A. J. 149, 151, note. The slight discrepancy in the total appears in the report of the hearings.

10. Cf. Shulman, *The Demise of Swift v. Tyson*, 47 Yale L. J. 1336, 1349 (June 1938).

11. Cf. Dobie, *Seven Implications of Swift v. Tyson*, 16 Va. L. Rev. 225, 234; Hornblower, *Conflict Between Federal and State Decisions*, 14 Am. L. Rev. 211, 226.

12. Instead of the phrase "the laws of the several States," contained in Section 34, the original draft employed the phrase "the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England,

(*Continued on Page* 644)

the splendid action of Arthur T. Vanderbilt, President of the American Bar Association, in undertaking the suits of Norman Thomas to vindicate his constitutional rights in New Jersey. However, so far as I know, the organized profession has taken no part or position in any of these instances. Is not this at least partly due to the fact that the profession has not adequately prepared itself for the consideration of the constantly recurring issues concerning civil liberty?

We have our committees on many subjects, such as federal legislation, taxation, the revision of the state constitution in New York and on many other public matters. But, so far as I am informed, it has not been the practice in our various Bar Associations to have committees exclusively concerned with watching for violations of civil liberty and in proper cases taking a position on behalf of the organized Bar in defense of basic civil rights, however endangered. Has not the time come when the Bar generally throughout the country should recognize that we are in a period in which the maintenance of civil liberty has become a constant and crucial problem and that, in consequence, the Bar should be prepared through the operation of competent and active committees to bring to bear the influence of the Bar on at least the more serious of these questions? In so organizing the profession would be doing no more than to equip itself to be "prompt in attack, ready in defense, full of resources" as it was in 1775.

I have not come to exhort you to be zealous for civil rights. That would be superfluous, for he who runs may read the signs of the times and there can hardly be one of us who can fail to recognize that the coming years will furnish a crucial test as to whether our traditional liberties can be reconciled with necessary governmental authority and with the changes of a rapidly moving age. More than zeal, a full understanding of the subject is necessary. Beyond that, there must be organized vigilance and preparation for considered and prompt action. In acting as the intelligent, enlightened guardians of our civil rights against the influence that in the years to come will tend to wear them away, the Bar, I suggest to you, has a vast responsibility. But at the same time the Bar has a great opportunity, which the country has a right to expect it to fulfill,—an opportunity that is in harmony with the best and finest of its traditions.

THE RISE AND FALL OF SWIFT v. TYSON

(*Continued from Page* 614)

the Court and no new discoveries had been made which explain the reversal, on constitutional grounds, of a century of practice. If the constitutional issue had been argued, the Court would have had to consider the interesting question whether its decision undermines the foundations of the rule of uniformity in maritime law, which also depends on a simple grant of jurisdiction to the Federal courts in the Constitution.[13]

All of which suggests that the Court might well have avoided resort to statutory or constitutional grounds, and placed its decision solely on grounds of sound practice for the Federal courts. The Court might have adhered to the century-old view that the term "laws" in Section 34 meant only statute laws; but the way was still open to establish a consistent practice of following state decisions even though Congress did not compel the Federal courts to do so. This would have been similar to what the Court did in 1923, when it decided of its own accord to follow state laws in equity cases, even though the requirement in Section 34 referred only to actions at common law. *Mason v. United States*, 260 U. S. 545.[14] And the view might have been retained that the course of practice pursued for a hundred years was not unconstitutional; but the way was still open to hold that it had been proved unwise. In short, a rule might have been announced comparable to the rule of judicial practice that constitutional questions will not be decided unless necessary to a disposition of the case. As *Swift v. Tyson* and its descendants were a product of judicial self-government, so their extinction could have been accomplished appropriately by an exercise of the same power. Instead, the Court chose to confer the role of executioner on the Constitution, holding that the result was compelled by our fundamental charter itself.

In so doing the Court in effect has declared that thousands of decisions of Federal courts, no longer subject to correction, have done what, in the case of legislative action, is called usurping the powers of the states and taking the property of A and giving it to B without constitutional authority. The Court in effect has declared that hundreds of judges have done daily what, in the case of administrative officers, is called exercising an unlawful discretion, having no regard to the standards which must confine their judgment. In the face of an acknowledgment so bold in its frankness and so breath-taking in its implications, perhaps the highest tribute that can be paid to the overruling of *Swift v. Tyson* is that which was offered up by the usually sedate Harvard Law Review, which saluted "the gratuitous courage of the Court and the fluidity of the Constitution."[15]

the ancient statutes of the same or otherwise." The inference has been drawn that the condensation of the phrase was a matter of form only, and that the original draft expressed the legislative intent. It is arguable, however, that the change was one of substance, intended to eliminate the unwritten law from the scope of the section, and to substitute "laws" for "statute law" in order to include state constitutions. The latter explanation of the term "laws" was in fact advanced by counsel for the plaintiff in *Swift v. Tyson* (16 Pet. at 5).

13. *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Washington v. Dawson & Co.*, 264 U. S. 219.

Some practical consequences of the decision have already emerged. The Supreme Court on May 31, 1938, was obliged to amend its Rules to eliminate as a ground for granting certiorari the fact that a decision of a Circuit Court of Appeals is in conflict with the weight of authority on a question of "general law." In an opinion by Mr. Justice Reed, the Court has pointed out that counsel and Federal courts "must now search for and apply the entire body of substantive law governing an identical action in the state courts." *Ruhlin v. New York Life Ins. Co.*, decided May 2, 1938. It is not settled whether the Federal courts may apply their own rules of conflict of laws to determine what state law governs a transaction. Distinctions between substance and procedure will be of fundamental importance in the Federal courts.

14. In recent years the Court had in fact shown a tendency to follow state decisions rather than the rule of *Swift v. Tyson*. See *Willing v. Binenstock*, 302 U. S. 272, 275. See also *Hawks v. Hamill*, 288 U. S. 52; *Burns Mortgage Co. v. Fried*, 292 U. S. 487; *Marine Bank v. Kalt-Zimmers Co.*, 293 U. S. 357; *Mutual Life Ins. Co. v. Johnson*, 293 U. S. 335 (in the first three of which the decisions of the Circuit Courts of Appeals were reversed). Compare, however, *Baseman v. Insurance Co.*, 301 U. S. 196, 203-204; *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489.

15. May, 1938, p. 1215.

majority of us conform to my definition of the conservative as a moderate man "who wishes to have reforms come gradually and with a minimum of friction." Thus, as a profession, we form part of that great body of moderate or middle opinion, upon which, as I have said, the maintenance of civil liberty will, in the long run, depend. But we are more than merely a section of truly conservative opinion. I make bold to say that we not only ought to be but that we, as a profession, *are*, if we wish to be, the leaders of that opinion.

Moreover, in the particular field which I am discussing, we have a special position and duty, resting upon a long tradition. For centuries, both in England and America, the legal profession has been in the vanguard in defense of civil liberties. During the great period in England when the rights of Englishmen were wrought out in controversy and struggle, it was the lawyers who took the lead. In the crucial decades of the seventeenth century under James I and Charles I, the legal profession led the first great effort to assert the independence of the courts from the domination of the Crown and took a large part in drafting the Petition of Right in 1628. It was the same at the end of the seventeenth century and the beginning of the eighteenth, when the Habeas Corpus Act was enacted (in 1679) and the Act of Settlement was adopted (in 1701); and it was the same at the end of the eighteenth century, when the resistance was made to general warrants and when the right of the jury to pass upon the truth of alleged libels was vindicated. In our own country, it was our lawyers who both before and after the Revolution, took the lead in the struggle for independence and for civil rights. And, as we all know, the Constitution itself was the work of a convention of which a majority was composed of lawyers.

You all recall the famous phrase of Edmund Burke in his speech on conciliation with America, describing the fiercely independent spirit of the Americans of 1775, when he said that they "snuff the approach of tyranny in every tainted breeze." But you may not all remember the context and that he so largely attributed this spirit to the lawyers of America. Let me read you an abbreviation of that great passage, because I believe it has a strong bearing today:

"Permit me, Sir," Burke said, "to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the Congress are lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. * * * The smartness of debate will say, that this knowledge ought to teach them more clearly the rights of legislators, their obligation to obedience and the penalties of rebellion. But my honorable and learned friend, the Attorney General, who condescends to mark what I say, will disdain that ground. He has heard, as well as I, that when great honors and great emoluments do not win over this knowledge to the service of the state, it is a formidable adversary to government. * * * This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources. In other countries, the people, more simple, and of less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze."

It has been the fashion of late to assert that the influence and leadership of the Bar in public opinion have declined. In fact, some of us have been in danger of an "inferiority complex" in this regard. But I wonder if the assertion is true. Certainly there was no evidence of it a year ago when the vast majority of the Bar in every State in the Union rallied in a solid phalanx to oppose the effort to compromise the independence of the Supreme Court under the guise of a so-called "reorganization." It can fairly be said that when American lawyers fully grasped the implications of that proposal, and when, through referenda and discussion, their views were matured and formulated, their resolute action was decisive of that controversy.

What was the secret of that united and powerful movement on the part of the Bar. I suggest to you that it was their conviction, arrived at both by reason and instinct, that the proposal to add six justices at one time to our highest court for the avowed purpose of changing the course of decision, was fundamentally a threat to our civil liberties. It was not merely, as most of us thought, that the immediate effect would be to impair the independence of the courts. It was also, and more importantly, the consequence of such impairment upon our basic civil rights that produced the spontaneous uprising on the part of the Bar. Most of us thought, and correctly thought I believe, that if the proposal were to be effectuated, the result would be to create a precedent that could be employed at some future date to validate, in times of strain, laws restricting freedom of discussion and laws penalizing criticism of government. It was only this deep, underlying conviction, expressed or not expressed, that could explain that general and determined resistance of the Bar. It had nothing to do with party. In proof, I know myself of a committee, of which I was a member, organized in nearly every State to resist the proposal, whose membership was restricted wholly to men who had voted for the President in 1936. Their conviction was no less deep and earnest than that of lawyers who had consistently opposed the Administration.

I suggest to you that the great movement of the Bar in 1937 was evidence not only of the controlling influence of the profession on a basic issue when the profession is thoroughly aroused, but is also a proof that the profession has not lost the spirit that prevailed when Burke said 163 years ago that, when by "honors" and "emoluments" the knowledge of the profession has not been won over to the service of the regime in power, the profession is a formidable adversary if civil liberty is endangered.

I wish, however, to make the suggestion that this zeal and power that manifested itself in the crisis of a year ago ought not to be permitted to lapse but should be better organized for opposition to other attacks on civil liberty that are constantly occurring. Within a few months, there have been at least three important instances in which civil liberties have been or might have been imperiled. These are the already mentioned brazen suppressions of free speech and assembly that have occurred in New Jersey; the activities of the Senate Lobby Committee designed to harass and intimidate citizens in the exercise of their right of petition concerning legislation; and thirdly, the proposals in Congress, now happily postponed, to establish governmental radio broadcasting. On all of these questions, it would have been eminently proper that the Bar, through its duly constituted organizations, should have made itself heard.

In some of these matters, individual lawyers have rendered effective service, of which the most notable is

TELEPHONE WESTERN 3010.

48, HORNTON STREET,
W.

Jan 31. 39.

Dear Goodhart.

Of course I had no idea
of your coming up specially to-day.
What I wanted was to be sure
that I would not object to Winfield's
idea of taking the notice into the
book & bringing it out — a spring —
book I suppose at a decent — interval
after the L Q R appears. I can
judge that better if I see your
proofs perhaps. But you can work that
as you feel. I can come to Oxford
this Saturday, but I hope I shall have
work we working.

I have both (through the typescript) made a few small alterations which you think should be recorded, & can now send it to the printer. I should rewrite it, but I suppose I did it would always be unsatisfactory, so I expect you are right

I am glad Norton has produced a draft report. Stallybrass did quite a good one, but lacking in propaganda. Could I have a copy of Norton's draft? And we really must discuss the other matter, about which I am not very pleased.

Yours

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

16

14 Sept. 39.

Dear Goodhart,

Thanks for your letter. Your ideas about Soldiers (& other) write seem excellent.

I wrote to Macmillan & asked he could give us some job, and I have had a reply. He must be very full of his existing functions at present. There are many people seeking work, but a little later there will be a real demand for good men.

I am wondering if the Press intend to publish my little book. If they do not, I should like to get it

touch such an American publisher like the Harvard Press / or a Canadian publisher if the book has any circulation, it is more likely to be in the U.S. Colonies than in the U.K.

Yours sincerely
Graves

TELEGRAMS: BURBAGE,
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

5 Jan. 40.

Dear Goodhart. I want to read a diss on to

Gary Méthode d'interprétation et sources en droit privé.

Do you know any bookseller who could find me a new or second hand copy?

There is another book I want to read, I am not sure of the name but I think 'Modern Theories of Law'. It wrote one essay. Would you ask your bookseller to send me a copy & I shall about the amount.

If the Redmonds are staying with you will you please ask them to lunch with me at Trinity on ~~Tuesday~~ Thursday at 1? No

need to write a reply. I can be told as before.

We didn't know you were having a party last week or we should have come more dressy (my wife especially) & would ventured to bring in your Taylor. But you are always welcome as you are.

Best wishes to you both

Yours

Goodhart

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
NR MARLBOROUGH,
WILTS.

January 27th, 1940.

Dear Goodhart,

I duly got this tome from the United University Club. It was extremely kind of you to take so much trouble about it, but you are always very helpful and I fear I impose upon you, but when I got home on Friday night I found that Blackwell's had sent me a copy, so I must return this. I have been looking through it as I cut the pages and I am sure it will be most instructive for me to read and possibly even for you, and I agree it is a book one ought to have in one's library.

If I may trouble you further are there any English translations of any of the smaller, but perhaps not less instructive works of Ihering, or of any other of the German writers? I can read French easily but not German.

With kind regards.

Yours sincerely,

Goodhart.

A.

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

19

22 Aug. 40.

Dear Goodhart, I wonder if you are at Oxford. If so could I come & see you some day next week? I might get my wife to drive me out in the morning. We could get lunch somewhere & she could get her back to me. In the afternoon you & I could have a good long gossip. There is much to discuss.

I like your letter in the Times about the food blockade. It

is by far the best & most influential I have seen.

The House of Lords have delivered their opinions in the Anderson Rushcliffe case (wanted last). I wonder if yr have seen it. As I was prevented from sitting in the appeal I may be tempted to write a little paper on the decisions. I have copies.

Remember us to Mrs Goodhart. who, I presume, is in England. And to you

Yours

Dwight

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

4 Oct. 40.

Dear Goodhart.

I duly received the proofs of speeches in Hubert Australia. Yr made no comment.

I am a little worried about how to deal with Mr Bro's opinion. It seems to me very long headed, but I need not hurt her feelings.

I want to print nearly the charge on procedure made by the C.L. Act 1852. I stated I agreed first in Todd's Practice, & I agreed at the debates just before & just after it. Do yr think you & Edw agreed first at such

TELEGRAMS: BURBAGE
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

9 Dec. 19. 41

Dear Goodhart.

I am glad you think Hart Porter will do me. It was very nice of you to write. I hope it is not "back scratching" as to say such where are likely to be.

I shall try & run over to Oxford before I start work in London, but I am not unconformed when that is to be. I cancelled my trip to Cambridge. I had to forbear it. It looks as if we should be snowed up here

Kind regards Yrs Wrenbury

are procurable?

I am staying here next week & may run over to Oxford to get my hair cut &c. Are you likely to be about at lunch time & could you lunch with me at the Ferry? If we choose a day convenient to us I can telephone later

Give my regard to Mrs Goodhart

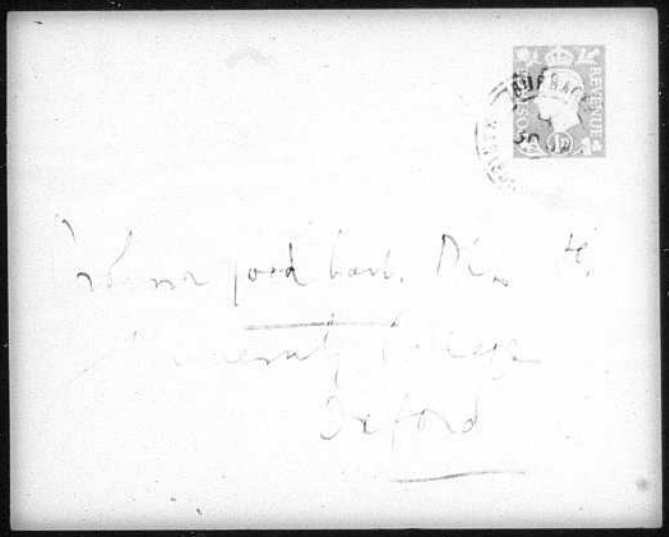
Yrs sincerely
Wrenbury

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

29 Jan. 41.

Dear Cockerell, Thanks for the reference
which I shall check in some where.
I got 1 on 4th & now we start
the H.C. Ships here are coming
in very fast. I shall send my torsos
later & Winifred & I have typed letters
both yrs & Head'd. You call is splendid!
W

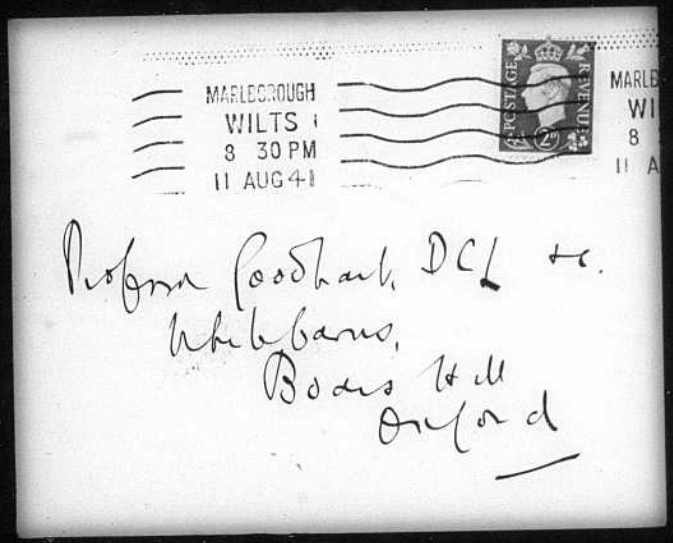


Durley House,
Burbage,
Nr Marlborough,
Wilts

Aug 19. 41

Dear Lord Lindsay,

Many thanks. I expect to be in Tuesday by train, due Oxford 11.25. I shall take my bag to Univ & return to Univ for lunch between 12.30 & 1. My wife is away but will be back Saturday so perhaps I may stay to Tuesday with you & shall bring some victuals. Many items are changing with the weather. I hear on record ed wonderful work in U.S.


MARLBOROUGH
WILTS
8 30 PM
11 AUG 41

Professor Goodhart, D.C.L. &c.
Whitehouse,
Boars Hill
Oxford

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

Oct 21. 41.

Dear Goodhart.

Seaborne Davies

I asked him whether he would be entitled to be a reader in Roman Law - Lord on University.

If yr & Cuthbert also agree our joint recommendation might be sent in. Perhaps then we will prepare it for me to sign.

I hope yr are well. I may run up to Oxford some Tuesday night until Wednesday. Kind regards

Yrs
W. Temple

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

Nov. 2. 41.

Dear Goodhart,

Thanks for your letter. I shall be there a talk with you again [illegible] Oxford. I do not think it possible at the moment, but perhaps in the Vacation I may run over for a couple of nights or even for lunch.

I am very interested about the Attorney-General v Sharkey, 1940 1 KB. 853 & C.A.R. 1940, 1. 384. Is there any recent decision about arrests of aliens [illegible] cases? Dean v Davies, 1935, 1 KB. ~~585~~ 282.

Langton has sent me the enclosed and I look at it & see if it is fit for the L.Q.R. Discussion with the editor is welcome I do not object — provided he guides

Conducting — The way. If not he encouraged, the battle is that so few are qualified, & are willing to take the trouble.

No doubt Langdon would welcome any testing to improve

Kind regard

Yr Wright

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

Nov. 22. 41.

Dear Professor, I received your letter. I know how busy you are.

I am not likely to come up until the Xmas vacation when I may be able to find relief from a morning's lunch, I can for a day by telephone.

I am glad you will publish Langdon's article, but I think you should suggest his incorporating your suggestion about amending the law, which I heartily agree with & had formulated myself. I rather think it would bring us into line with some other countries. He might also include a protest against the pedantic & behavioural contraction of the Act, & plead for a more adventurous flavour & a good version.

I am also obliged for your note about Brandenburgh. I was fagged for some time, but came to the conclusion that

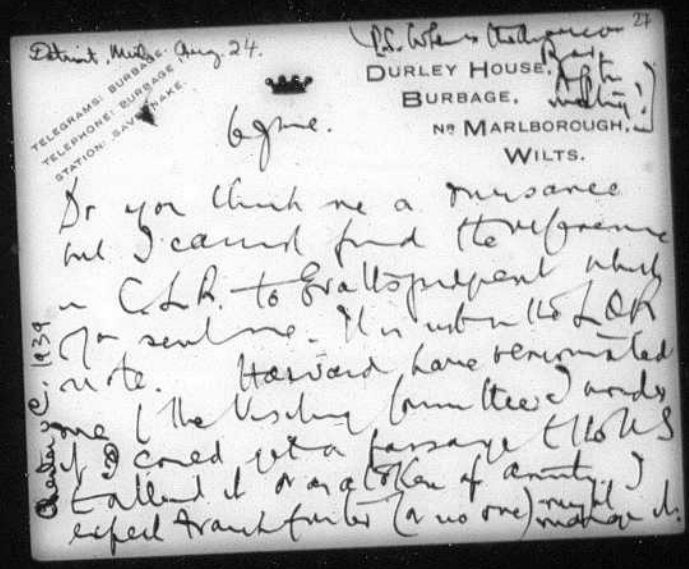
the Criminal Court may be called to order on the ground of negligence. That was hardly a case but was there any negligence on their part as against the window, or the farmer? I think on the whole not. I am just starting to write my judgment.

I am sending a print of the speech in the Reg 18B case. I think Alken was completely in error; I do not think his attacks on us & the judges who dared to differ from him often I have never known anything like it. M was a pity Maugham wrote to the Times. He shed at least some credit on the L.C., but his foolish vindictive [illegible] not to do that.

I am glad that the P.M. means to back this game.

Kind regards

Yrs Sincerely


Detroit, Mich. Aug. 24. 27

Ld. Wks. Chancellor

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

TELEGRAMS: BURBAGE
TELEPHONE: BURBAGE
STATION: SAVERNAKE

Dear Lord Chancellor

Do you think me a nuisance but I cannot find the reference in C.L.R. to Gallagher's appeal which you sent me. I remember the L.C.J. (or someone) referred to it in his judgment as a case of arrest in error. Howard Lane recommended some of the Visiting Committee's words. Quarter Sessions I cried out a passage & the L.C.J. called it a case of arrest in error. I expect Frankfurter (or no one) might have it.

Professor Goodhart, K.B.E., K.C.
Magdalen College
Oxford

Derby House
Burbage Wilts.
19 Jan 43

Dear Goodhart.

Under your tyrannical orders I have scribbled a bit about Winfield's Tortfeasors & it will not do. Regret it is told or alter it.

There is a passage marked — three pencil strokes — that puzzled me. Have I got it all wrong? Should we ask

Wurfeld about it?
I may run over to
Oxford but should next week
the week after I am still
be there any day.
all good wishes for the
New Year
Yours
J Boswell

A.

BROOKS'S,
ST. JAMES'S STREET, S.W.1.
TEL. REGENT 3745.

June 23. 45.
[actually 1943]

Dear Goodhart,

I hesitated in writing to you because I know how busy you are & also because the K.C. seemed so small a matter to one of your distinction. But I feel you may be pleased to receive the degree. Benjamin was an American, but at the moment I do not remember any other who received a degree [that I am sure there were many & some at least. But certainly no American academic lawyer has ever made a K.C. in

England. Indeed few English Professors have been so honoured. The dignity that [illegible] your case is something out of the common. You are justified in feeling a peculiar satisfaction.

I knew a little time ago that Simon was going before you silk but he was so compld that the information was confidential, that I did not feel able to mention it to you. I saw Masey this morning Has [illegible] Canada with him the idea is that I shd start about the middle of August. He is writing to the Air Minister about transport. The meeting at Winnipeg commences on August 24. I return (d.v.) about the end of September

With congratulations & kind regards.

Yrs Wright

Tel.: VICTORIA 4486
Ext. 302

UNITED NATIONS WAR CRIMES COMMISSION
CHURCH HOUSE,
GT. SMITH STREET, S.W.1.

6th November, 1945.

Dear Goodhart,

I am sending you the typescript of an article which I wrote in the hope of getting it published if possible before the end of this year or at least some time early next year.

I want you to read it with as much care as your limited leisure permits. Some of the points are rather commonplace but it may be useful to put the different points together. You will no doubt be able to judge whether it is suitable for publication in the I.J.R. or whether it would be more suitable to a periodical like the American Bar Association Journal. I suggest this because, being an honorary member of the Association, it might be possible that they could take it and have it published early in January. There may, however, be more suitable papers.

I was hoping to meet you at the C and C this week, but I send it to you by post.

Yrs Wright

Professor Goodhart.
University College,
Oxford.

Tel. : GROSVENOR 4060
Ext.

UNITED NATIONS WAR CRIMES COMMISSION
LANSDOWNE HOUSE,
BERKELEY SQUARE,
LONDON, W.1.

September 5th, 1946.

Dear Goodhart,

I have received in due course your letter of the 25th August. I am having a spell in England and I am not going 'galivanting to Nuremberg' until the charges are given about the 23rd instant. That will be a very interesting occasion.

I agree with you that it would be better to defer for the moment the publication of the article which I gave you and which you hoped might be published in ~~January~~ October. I think now, what I should like to do is to write a much more elaborate article when I have had an opportunity of studying the judgements. It may not be ready for you in time for the January number though probably it will be. It may however be at least twice as long as the article you published last January and if that is too great a burden on your space please tell me and I will try and plant it out elsewhere.

I am looking forward very much to having a good long talk with you. I have got masses of law reports which must be bound and I shall have to make a journey over to Oxford with them and I hope I may come one day when it will be convenient for you to give me lunch at Boars Hill. However all these things can be discussed if we meet somewhere, sometime soon, after the end of the judgement and that will be about the end of September.

Tel. : GROSVENOR 4060
Ext.

UNITED NATIONS WAR CRIMES COMMISSION
LANSDOWNE HOUSE,
BERKELEY SQUARE,
LONDON, W.1.

- 2 -

Drop me a card when you get back from Wales. I am hoping that you will have a very delightful holiday there. I am trying to get as much time as I can at Durley but it is very difficult - I am too near London and I am constantly being called upon by this Commission to come up and attend to various small matters which are constantly arising.

It has been a terrible summer but the weather looks a good deal better to-day and we are hoping for the best and hoping to rescue our wheat and oats which are standing out in the fields being destroyed by the wind and the rain.

I must not forget the wonderful parcel of varied eatables which arrived at Durley when I was last there. I do not know which to anticipate with the greatest pleasure, the tinned boned turkey or the chicken or the mixed dried fruits or the fois gras.

My wife joins with me in kindest regards to you and Mrs. Goodhart.

Yours ever,
Lauterpacht.

Prof. A.L.Goodhart,
Plas Haulfryu,
Abersoch,
Carnarvonshire.Wales.

TEL.:
BURBAGE 17.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

28th Apl. 47.

Dear Goodhart.

Would you please send me your brothers address, as my wife & I want to thank Mrs Brooks for sending the onions & have carried it c/o your brother.

I hope that you are right at the O & C for perhaps you would Oxford as my Report for Law & Ho need binding.

I find quite a number of small things I do before I can settle down to departmental things, like

sending you a list of my papers

Geoffrey Bumell, a scientist, whom I have known since I first came to London, assisted me by writing the brief note on my biography in the D.N.B. He has probably known a good deal of my life at the Bar, but I cannot attribute to his familiar with my various new ideas developed in my prosperous or unlucky state less acute War Crimes. You should be my literary executor if there is no one else. Do you know William Teppe?

Wishful as my knowledge seeing about the publication of my essays like those for Stevens Knot required.

Yours, Loreburn

DURLEY HOUSE,
BURBAGE,
Nr. MARLBOROUGH.

June 1. 47

Dear Goodhart,

I am very glad to read you like with the enclosed. I started it today & wrote a few lines as you asked, but found the task a trouble. I had however written a introductory note. The whole may only seem to you useless & the moment a it like silver, & perhaps capable of I could put here after

I hope to see you on Sunday

If you want more any [illegible] like, can you get [illegible] filled in by a Secretary before?

TEL.:
BURBAGE 17.

DURLEY HOUSE,
BURBAGE.
NR. MARLBOROUGH.

24 June. [1947]

Dear Goodhart,

I wrote to Silkin about the Canadian case. I enclose his reply which is "not pretty". I am glad he has an excuse, because I like the L.R. I have told him I have sent on his letter to you.

I am asked to sit in the H. of L. in the Ocean Spill case. I mentioned the case of Cleveland in which people still harped on the cause last in time. I pointed out we were dealing with

I want to deal shortly with the ancient fallacy. If you have pre-heard a witness' 'Cause it never be very helpful to me, as all my notes are. I will then ...

T. Knight

Telephone
CENTRAL
6772 & 6773
5510 & 4304

11 KING'S BENCH WALK,
TEMPLE, E.C.4

June 23, 1947.

Dear Lord Wright:

Many thanks for your letter of June 21 - assistance of this kind from a member of the Bench is very welcome and much appreciated. The case in fact has already been before me and is being reported in the L.R. - for I quite agree that it is a case of importance. What is exasperating in the delay, and I am very driven frantic by it, but the position declare that they cannot do better and as far as appears from their accounts they are pretty well in the hands of their Trade Unions. But for this, you would

have been spared the trouble of writing: but again I thank you for having taken that trouble.

Yours sincerely
Ralph Sutton

TEL.: BURBAGE 17.

DURLEY HOUSE.
BURBAGE.
Nr. MARLBOROUGH.

Oct 7th [1947]

Dear Professor.

How awfully nice of you to send us such a lovely parcel. I had no idea it was coming when I saw you at Oxford or I might of said half of my thank yous then. Florence & I unpacked it like two silly children gloating over each packet. My trip to South Africa is arranged & think for the 24th Dec so I shall have time to have things let down or up as the case may be

Yours very Sincerely
Ralph Sutton

Tel.: GROSVENOR 4060
Ext. 2956.

UNITED NATIONS WAR CRIMES COMMISSION
LANSDOWNE HOUSE,
BERKELEY SQUARE,
LONDON, W.1.

2nd March, 1948.

Dear Goodhart,

I may see you at the Club but I do want you to help to advertise the Law Reports of War Crimes Trials. A good deal depends on our selling, as far as possible, enough copies to pay for the printing and publishing. I have not seen in the LQR any notice of these valuable productions. Two have now been published, two more are on the point of publication and we expect to do a fifth by the end of the month when this Commission is down to be wound up, but we also hope that we can manage the difficulties of finance and other matters to go on for the rest of the year and bring out about twenty volumes. I wish you would notice them in the next number of the LQR and do anything you can in legal circles to get people to buy them.

Yours ever,
Wright.

Professor A. Goodhart, K.B.E., D.C.L. &c
University College,
Oxford.

TEL.: BURBAGE 17.

DURLEY HOUSE.
BURBAGE.
Nr. MARLBOROUGH.

April 22. 48.

Dear Professor Goodhart,

I have heard from Mrs Brooks that she will be in London on May 14 until May 21. Needless to say I will be seeing her & we also hope to do so. We shall be there all the time & are glad of the chance of a night or more with you & Mrs Goodhart. The cats of course will be very occupied all the time.

Will you be in Oxford next week? I could come over any day you mention. I know you are still always full & busy with things. Let me know by post or telephone.

TRINITY COLLEGE,
CAMBRIDGE.

to reply to the request to
send a statement; this is
not time. I took to
Hawtrey & said I aimed
to [illegible] for him
to [illegible] give my
views on a reference
to Oxford. I may add that
as between Hawtrey &
Fisher who I am now
told is a candidate I
feel that Hawtrey is the
stronger vote. Yours sincerely
to you. Yours
Roy Harrod

DURLEY HOUSE, BURBAGE, NR. MARLBOROUGH, WILTS.
TELEPHONE: BURBAGE 217.
STATION: SAVERNAKE.

41

June 10. 50.

Dear Gottfried.

May I trouble you on a little matter. I have just received the enclosed from Vanderbilt University. I have in mind to write 5 or 6 articles, including one for L.Q.R. on Wedgwood, I am doubtful whether I should do this & will refrain / Keynes / that aspect for a later article which might include a further discussion about Corporation Law. I know nothing about the Vanderbilt Univ. or Law Review. I do not know where I could find the Chi. L.R. I have never aimed at reading all the Quarterlies of the U.S. universities. All I could do would be to

17 U. of Chi. L. R. 379

discuss the questions of principle, taking my illustrations from Australian family life.

What had I better do - bearing in mind that I do not know the University or the Law Review & the other circumstances affecting myself

I am sending a small present for my wife & myself - I am not sure that I can attend the wedding on the 21st as I had promised some time ago to attend the Marlboro Coll. Prize Day - I being one of the Senior Governors. But I shall come if I can... My wife never attends weddings - but our good wishes will go to you all.

We shall send the little parcel to Broadstairs while you are there & perhaps

Many thanks for your kind letter of [illegible]

We had a good day at Cambridge C.I.H.K. Rogers

Yours Allen.

42

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

Aug 19.

Dear Goodhart,

As it happened, I was a little late in getting the proofs L.Q.R. I instantly read your admirable article on Taxation &c. It gave me great satisfaction. When I read your observations to the H.L. I said to myself "in this what our law is coming to." Salmond's case was obviously wrong. As you say why should the landlord be the insurer merely - why should he not be the insurer as well, especially with the [illegible] tenant. Your discussion of the distinction & also the idea of material interest as the test - as you say that is a survival of the same fallacy as was exposed in Donoghue v.

Stevenson which was decided before Jacobs but after Fairman. Fairman was a poor decision to rank as a final judgment on an important principle. If not I imagine one of those unfortunate cases which go through the Court (Chancery) to the end. It was really a general decision instead degree: Maxim ought was defined Mary Cassaup [1936] seq. I wonder all these cases if they could all be solved by applying the rule in Dorothea Stevenson. This was partly recognised in the important case of Horton 1950 [K.B. 421, & will be interesting to see what the H.L. make of it, if it goes there - but however no learnt effect.

As a point of, I therefore noticed difference between Jacob & Thomas, & also it is difficult, if not impossible to define precisely what principle of law was decided in the latter. infallibility

Incidentally, it was unfortunate by a

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.
WILTS.

majority. I much prefer also Buttrworth & Carson, who exhibit realism & common sense.

But I cannot fully believe these cases true. I did mean to write a letter to Jacobs & Horton but really you have taken the wind from my sails. I do not want to repeat what you have said so well. Also you are very cautious in authoritative construing the H.L. & the principle of ratio decidendi precedent. I suppose in a few years, the Courts will do little more than see whether the case is covered by authority & then refer to the dotted line; regardless of Convenience justice & Common sense. With so many rationes decidendi, obiter dicta

The same w in
reform — Concurring judgment too or, there
may be little room for choice, especially if
Court do not investigate carefully, on a definition
of the principle supported & handed down.

I should be glad to express assent to
your article if I could do so — a few words. On
the other hand I do not wish to appear as
constantly criticising My colleagues

Perhaps if I live a few years longer (many
of my Contemporaries have now departed) I may
produce a book — which I proposed a theory of
what Law is & then discussed under heads
the need for Anglo American Law, such as
precedent, construction, reference, damages, &c,
in that way I tried recently to recommend
judges best practices. But that is uncertain.

I shall be in London on Friday &
Wednesday next.

Yours sincerely
Arthur Goodhart

Professor
Arthur Goodhart KBE, LittD, DCL
The Knoll House
Studland
Dorset

19/9/50

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

RLG — Have asked him to send Dr script to me to you.

Dear Megarry,

I expect Goodhart is still away, so I am sending you a note which I have handed on to Hodson & Linda Quarmby back to me.

It is badly written but you may get it typed clean. I have no secretary here.

I wanted to express my concurrence with Goodhart's excellent article with as little delay as possible.

Please send it back

It is not acceptable.
Judiciary
Wrights

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

Dec 29. 50

Dear Goodhart. It gave me great pleasure
to hear of your Fellowship
at Trinity. I am glad he has
achieved honor along Cheyne.
I wish him every success.

I am glad you decided
to take my note for the L.Q.R. Mc-
Gadney said it must be short, &
I was a little puzzled what line
to take. I respectfully bow to the
editor's judgment as to precision.
His word is law. But I regret
the omission of the words "and

OTO

as distinguished" in the last line.

Kind regards to you & to Lady Goddard who must be pleased at her boy's success

Yrs Wright

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

Jan 29. 57.

Dear Goddard,

I think your new version is most excellent, — except that the final note is scarcely adequate to the theme.

I have written a short essay on Polonius which I typed for the Modern L.R. I shall have it revised when I get the script.

I am a little disgusted at the development of Berryman. It is some consolation that Goddard is so far round. But Berryman was a poor show — perhaps worst of all was Simon's personal reference to Faulkner's which was hopelessly explic

Suppose all the Law Lords when they do Read
wrestled each other!

I am tempted to write a letter to Middleton
Murry & tell him I read his book & find
it an "appro" Though I do dislike always
finding fault. But it does seem as if
a rod were getting in.

I am tempted to write an essay on
Journalism going through all the cases of
importance & considering how they can be
equated with Douglas & Bourchill. Such
work would - I feel sure - be considered for
the L.Q.R. tone of voice one step Substitute
for the wastepaper basket

I expect to be in London at the
O & C on Tuesday Wednesday.

Yours Douglas

Would Simonds have
a dog at the L.S.
or me or both.
One precludes approval only in favour of the underdog.

TEL.: BURBAGE, WILTS. 217
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH
WILTS.

11 Nov. 57

Dear Murry,

~~Dorothy~~ wife + I are departing on
20th inst
Tuesday week by s.s. Orsova for
Australia & we are returning (D.V.) by
New Zealand & Panama, due London early April
a few days ago we had our final
embarcation notice - we were told
uncertain until then

I am not making any special
plans for Australia or New Zealand. We
shall stay a few days at first at
Sidney & then Melbourne where to

see a bit of Australian Mfg. Country. I have made no personal ~~Contacts~~ Contacts but trust to meeting people I know. It will be like to long Vacation & I am not sure I am a 'persona grata' with Australian lawyers. I shall look about when I get there. I am in land with Baily S.G.

Will you be in Oxford any day next week except Thursday & Friday, as about days I shall be in London at O & C. Club.

Suppose anything happen (one before I get back), would you ~~and~~ or Mr Carey act as my literary executor? A new Legal Essays sold out. I contemplate issuing a second series & Cambridge Press will take them. Since my last lot, there are a few

TEL.: BURBAGE. WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

11

articles & notes in the L.Q.R. which I might be working ~~in~~ including some in the Modern Law Review. I am trying also reviews of a new book on Ulpian commissioned for the Pennsylvania Law Review; there is an article in 1948 or 9 in the Polish Year Book of International law which might be included. There are also an Article on Liberty in the Encyclopedia (perhaps 14 years ago), a paper on the Common Law Way of life which I read at the Canadian Bar after meeting 1943, an Introduction I wrote

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DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

11

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Letter by Wright published in The Times on 5 Aug 1952 as apparently amended by Goodhart

to Thayer's Casebook on the Law Merchant (Harvard 1939

my article in Essays in the Modern Legal Philosophy (in honour of Roscoe Pound). If I live a little longer I have about 6 other papers floating about in my mind, besides MSS to which I may be tempted to write for L.Q.R. I am a little afraid about the Reading v R case in C.A. + in H.L. I thought better of Argentine, but that is another matter -

I hope I shall come back safely & among my best friends still further.

Now my rough list I have probably missed some papers.

Delme Karslake is coming to see me next week before I go.

Yrs Wright

50

Sir,

The letters you have published under the heading of Trials for war crimes, have emboldened me to add few words on the basic question of principle ~~which seems to be underlying some of these letters.~~ I do not here desire to deal with the political or practical issues which are discussed, but only with the defense of superior orders which lies at the root of the whole question ~~, or almost the whole question,~~ of the trial and punishment for war crimes. ~~I must say something on this principle.~~

I was in fact the Chairman of the United Nations War Crimes Commission for several years and I was responsible for a volume on "The History of the United Nations War Crimes Commission and the Development of the Laws of War" and also for a series of reports of the most important trials that were held, excluding for special reasons the great trial at Nuremberg. ~~I also study the principle literature on the subject as well as observing the matter from the practical standard of the very numerous cases which came under my notice.~~ I think I am entitled to say quite specifically that the view propounded by ~~Your~~ Sir James Edmonds and others correspondents, or some of them, is to the effect that the plea of superior orders is a complete defence is ~~completely~~ opposed to the true doctrine ~~on the point~~ of International Law; ~~and that is a very basic because if what is proposed as the true view would be so described~~ it would be fatal to the whole practical efficacy of ~~war crimes trials and of~~ the enforcement of responsibility for offences this the law and to ~~of officers~~ against the laws of war. [To take as an illustration the case of the Nazi rule, practically every individual accused of that terrible mass of atrocious crime which was perpetrated under the Nazi regime would be able to plead that he was acting under

Letter by Wright published in The Times on 5 Aug. 1952 as apparently amended by Goodhart

superior orders and therefore could not be held responsible. There was throughout a constant associated pyramid of criminality from the subordinate ranks right up to the Fuhrer and his immediate entourage. It would be very doubtful whether, if the Fuhrer had survived, he would have been indicted and punished and on that footing this incredible mass of villainy and crime would carry with it an immunity. That, in my judgement, is obviously opposed to the whole course of law both in civil matters and in military matters. It is grossly contrary to the great scheme of International Law which aims at giving effect to the rule of law on these questions.

I have been a little puzzled how this strange view first came to be advanced seriously contended. The confusion seems to have arisen from the unfortunate error contained in some of the Manuals of Military Law which were issued first before 1944 in the years before the outbreak of the Great War in 1912. In the English and in the United States manuals of military law, it was stated that the defence of superior orders would carry with it the complete immunity, of the criminal. When the International War Crimes Commission had to investigate the law and were confronted with this statement in the Manuals of Military law or in some of them, they, like the other legal authorities, had to consider it and they came to the conclusion that it was completely contrary to the rule of law and to the principles of military Law. The true rule of law, as has often been stated, and is

now, I think, universally recognised in responsible legal circles, is that a soldier is only bound to obey lawful orders, with the result that obviously illegal orders do not constitute a defence. ~~a rule of warfare has been violated in pursuance of an order of a belligerent government or of individual commanders, does not deprive the act of its character as a war crime.~~ This general principle has been recognised not only in the civilian law of England but in that ~~of all communal countries in general and in particular~~ of the British Commonwealth and of the United States of America and practically all other civilised nations. The civilian law of England is ~~extremely clear and~~ precise on this point. From early days such a defence as a plea that the act was done under the special order of the Sovereign was not admitted as a good plea, and so it has always been held. ~~On the civilian aspect of the law, Professor Dicey is extremely~~ clear and it has been much discussed in the question of soldiers firing on the people. Dicey says, "If an officer orders his soldiers in a time of political conflict then and there to shoot without trial a popular leader against whome no crime has been proved and who is suspect of treasonable designs, in such a case there is conceivably no doubt that the soldiers who obey, no less than the officer who gives the order, are guilty of murder and liable to be hanged for it when in due course of law. In such an extreme instance as this the duty of the soldiers is, even at the risk of their is to obey the law of the land." Professor Dicy quotes a long passage from that great authority on English Criminal Law, the late Mr. Justice Steven, which may be summed up in a very inadequate quotation, as follows:

Letter by Wright published in The Times on 5 Aug. 1952 as apparently amended by Goodhart

"The only line that presents to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds".

~~And more recently the rule has been established and was applied~~ In all the war trials in the two world wars, it was recognised that a plea of superior orders is not in itself a defence if the order was manifestly contrary to the laws or customs of war and humanity, ~~that taking into account his rank or position and the circumstances surrounding the command, an individual of ordinary understanding should have known that such an order was illegal~~. As an American judge in one of the cases that were tried at Nuremburg, after the great Nuremburg Trial, said, "the obedience of a soldier is not an automaton. A soldier is a reasoning agent..... ~~an officer may not demand of a soldier that he act criminally~~ A subordinate is bound only to obey lawful orders of his superior." I should be ashamed to take up time in explaining this proposition, ~~and in copious illustrations~~. I will only observe that ~~it was recognised by the Germans themselves. is contrary even to German enunciation of a principle.~~ For instance, the German Supreme Court in 1921 in a case known as the Llandovery Castle, ~~said a statement of principle according to which~~ the superior's orders ~~did~~ not ~~necessarily~~ free the accused from guilt..... ~~if such an order is universally known to be against the law, with say, a case where a submarine, having sunk a hospital ship, went on to follow and sink by gun fire the boats in which the nurses and patients were and thereby drowned them, the plea of superior orders was rejected even by the German Court; and~~ Even Goebels, no doubt for his own purpose at the moment, in an article published in the German Press on 28 May 1944, said, "no international law of warfare is in existence which provides

that ~~the~~ a soldier who has committed a mean crime can by pleading ~~orders~~ as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all humane ethics and opposed to the well-established international usage of warfare."

If, as I say, the fact that the Manual of Military Law in its uncorrected form did state that obedience to superior orders was a defence to a charge, the Manual was completely wrong. ~~Shall I say the Manual before it was amended in April 1944~~ Perhaps the critics may be mollified if they are made to understand that the Military Court, or any Court, though it rejected as an absolute defence the plea of superior orders, may still take into account the defence of a subordinate who is faced with an unlawful order. Every consideration must be given to his defence.

I do not know exactly, nor is it today material to consider how the erroneous paragraph no. 443 of the British Manual of Military Law ever got into the manual. A consensus has been practically universal in condemning it in that form as contrary to International Law and the rules of Law. I need not refer to the clear statement of the true rule in the judgement of the Tribunal in the Nuremberg case. The curious reader should refer to the famous judgement of the Court and he may well do well to consider, if he has time, the arguments delivered for the prosecution by, among others, Sir Hartley Shawcross, then Attorney General, and Sir David Maxwell Fyfe who was with him, and Justice Robert Jackson of the United States Supreme Court who was allowed to appear for the prosecution as the leader of the United States Advocates. It is, I think, sufficiently clear

Letter by Wright published in The Times on 5 Aug. 1952 as apparently amended by Goodhart

that to condemn the plea of superior orders as a clear and unqualified rebuttal of criminality, shall I say in proper would amount to putting an end to for war crimes and would be the death blow to the rule of law in these matters.

Such a doctrine would put an end to very nearly all responsibility for ~~all~~ war crimes, and would be the death blow to the rule of law in these matters.

Yours faithfully,

The House of Lords

TEL: BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

5 Aug. 52.

Dear Goodhart,

The Times has been as good as its words, to publish with the least possible delay. At least we have got a fair, lucid statement of the case. I was tired of the casual & scrappy assertions. I shall not reply further. Nothing we can say or do will control either the enemy powers if they want to deny the true character of the defence of superior orders. All we can use

present — Maugham (Maugham) & Co from their reckless distortions.

I am going on the 23rd to Arundel for 10 days or so. I hope to write my article on section 92 of the Commonwealth Constitution, a task of some complexity. Then I shall have promised to do the article on Australia & I shall have to develope what I wrote in the L.Q.R. which duly to mistress etc. I hope it will not be a breach of Copyright. Then goodbye for the present to such activities

I hope we shall meet soon.

Yours ever Wright

TEL: BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE.
BURBAGE.
NR. MARLBOROUGH.

9 Aug. 52.

Dear Goodhart,

Many thanks for your 'valuable' address on Law Reform. I have read it with great satisfaction. I should scarcely have ventured to trouble you with a letter if I had not been to point out a small misprint at the foot of p. 7, 4th line from the end — 'by' should be 'but' — Note the number of Q.B.A.s who appear in the list inside the cover. Good for the law, or probably the Q.B.A.

Professor Morgan has sent me a long letter on Superior Orders. I was very delicate about the illustrious name of the Lord Chancellor, who had not noticed the error. I always dreamed new editions of a large & elaborate book. Morgan attributes the error, at least in this Country, to Oppenheim in the first edition of his International

law published in 1906. We would still have if we had not had a Second War.

Morgan opened that at Buckmaster's request he prepared in 1919 a Report by a sub-Committee in 1919. It was 12000 words long - twice as long as what I first dictated to you, excellent typing. But no we took any notice of Morgan's Report. I shall tell Morgan to send you a Copy of this Report & you to send it back with notes & Comments.

Your mention of Bleak House brings to my mind Mark Romer's story about me - that when appointed M.R. I prepared myself for my new duties by reading Bleak House - I suppose to stiffen my Courage against Chancery Judges.

Of course I read with pleasure your letter to the Times - answer to Cork. Answers. We indeed irrepressible. You neatly scuttled what we had to leave out, for reasons of Space, from my letter —

FROM LORD WRIGHT, DURLEY HOUSE, BURBAGE, NR. MARLBOROUGH, WILTS.
TEL: BURBAGE, WILTS, 217 STATION: SAVENAKE

58

I have got a Ticket for the Pilgrims on Oct 14. In writing I asked if we sit next for. Please cancel that if it is not convenient. Many

Dr. Goodhart, K.B.E., D.C.L., etc.
The Lodge
University College
Oxford.

TEL:
BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

59

1 Feb. 53.

Dear Goodhart,

I have much pleasure in signing & returning the enclosed form. I am sure others would join, but perhaps it is not necessary. I hope my address is not out of place.

I notice he is 9 years older than I am!

Yours,
Wright

Perhaps Jr will in due course send the form to Secretary.

Tel:
BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

31 Oct. 53.

Dear Goodhart,

I write a few words to thank you for your kind & agreeable hospitality & my visit to the Lodge on Thursday. They are certainly most elegant & comfortable.

If you remember at any time will you please convey to the Professor my appreciation of the help he gave me at the Moot. He took an active part in the discussion throughout & in particular summed up at the

end most fully & authentically. It was a pleasant function. I was very sorry that I was a little tired; as I sometimes am, which is the reason why I refuse generally any future engagement that involves my taking part. I do not imagine Dr. Cotton can help in that matter, but I can ask him.

With Kind regards,
Yours very sincerely
Wrightson

P.S. I wonder if the Porto Alegre, 20-P.-, would not be a fine, & for anyone else a good subject for a Moot - perhaps more "de lege ferenda" than "de lege lata" - a nice Concrete question.

TEL:
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STATION: SAVERNAKE

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NR. MARLBOROUGH.

19. Oct. 54.

Dear Prof. Hall,

It was kind of you to notice my birthday and send your good wishes. My birthday is fast becoming a hardy annual.

I told you Phillips who as reporter attends Moscow delegations & succeeds in taking photos of Moscow slums & getting them back to the D.T.?

You must have enjoyed your American visit. I remember so well

P.S. The enclosure will, I hope, be of use to the Institute of Progressive

a good many years ago attending the Celebrations of the Harvard Law school Tercentenary. We had a great time. I remember particularly my old friend Storrs C.J. a wonderful man. He died his early death. I am reminded also of Hughes, & the splendid memorial booklet issued — two known of which a copy was sent me.

All good wishes & Kind regards.

Yours sincerely,
Wrenbury.

I had a long letter from Radcliffe, the best of the doctors, commenting — shortened & some approval of my article & Invitation. I am sorry about Porter, an old friend

TEL: BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE,
BURBAGE,
Nr. MARLBOROUGH.

8 April. 55.

Dear Goodhart,

I have been under the weather & still am. I had a cyst on my left knee which had to be removed at Headington by Scott Tubbs (Nuffield Hospital) but the doctors — no way cured; I cannot move about without pain.

I am consulting Mr. Scott who I believe is a great authority on orthopedic matters. But I

should like a second string. I am perhaps impatient. I left hospital a week ago.

Can you give me the name of the best orthopedic surgeon? Or are there bathing establishments at Bath or elsewhere prepared for such cases?

I was glad to see you had formed Trinity as we expected a year ago. I wanted to come & see Dr at the High Table at Commemoration & some other feast. But that must await my recovery. Yours Overright

TEL.: BURBAGE 217
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March 23. 89.

Dear Overbeck,

We have been watching with interest the election news & saw yesterday the Satisfactory ending. The result was perhaps foregone, but the majority was very satisfactory.

I can now watch his future advancement with admiration.

I am not writing to Phillips directly as he will be inundated with Congratulations. But perhaps you will mention to him that I have written,

We are already thinking about the forthcoming visit of the American lawyers & the Law bodies — London. There is so much to be arranged. Canadian

I think my last visit to the U.S. Bar was to Winnipeg: I have forgotten the year. I wonder how I can get a copy of the Report. I suppose it was the Canadian Bar Report. Can you tell me where I can apply?

All good wishes

Wright

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NR. MARLBOROUGH.

6 March. 59.

Dear Good luck.

Did you notice in the W.R. report of the H.L. judgment in Mar Norton Mill Case, — No 9. W.L.R. 1959 The Comms in which Simonds accounts for the judgment in the C.A. of Jenkins L.J. by saying that it was "largely due to the observations of Lord Wright &

Lord Mayhew (I.C.L. p. 339)
Governors (Dr. Schools & Economics) drew
my attention to this, or I should not
have noticed it. He ordered if I
would write a note for his Review.
When I had read the judgment I
withdrew my Counsel offer & wrote
a note ~~of~~ I thought I had better
summarise observations Mayhew of the Lord
Lease to salve
been alive moved ~~would~~ I am sure have
agreed. Indeed the H.L. judgments
seem largely involuntary in that
respect & cannot justify all the
Lords said about the doctrine of "stare

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II

decisis" perhaps more
accurately stare decisis" as it
seems.

What dreadful weather. But
I have spent the winter at home
without a single cold.

With kind regards to you
and Lady Goodhart.

Yours sincerely

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DURLEY HOUSE.
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NR. MARLBOROUGH.

Mar 22. 59.

Dear Goodhart,

You are extremely kind to suggest a little dinner for me on my birthday. If you & a Suffragette number of my friends think I deserve [illegible] honours, I shall certainly do my part in gratitude for it. But I am a long time ahead & I shall leave it to you.

I wish above all I were already a recipient of your hospitality. I

hope to attend your dinner of the British

Academy next March.

If I may turn to Denham's judgment

& the decision of the H.L. in Davies's Case.

My first reaction was to keep out of it

& leave the question of the decisions &

the law journals. But I feel I have

been peculiarly singled out (in the

Manchester) for comment, in a matter in

which I had no part, some eight

1938 & again a few years later. The

law is now established by the H.L.

unless some (some) new foreseen refinements

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II

develope.

I have now read the judgments

which I had not when I wrote to you.

I feel the manufacturer is only

one type of person whom "aliens" as

regards the employer. The employer's obli-

gation is to provide safe appliances,

at least made with due care &

diligence. As I said 20 years ago

in Bolam v. Clyde, [illegible] at p. 87 "It is the

obligation which is personal to the

employer not the performance? The manufacturer is only the person whom the employer gets to do his duty. The employer is liable for the manufacturer's failure to use due care & diligence when he hands the article over to the Public. I am also much impressed by Jenkins' proposal that is not fairly treated by the H.L.

As we may be overturning the view of the H.L. & have been brought in, I am not sure I ought not to express my views. What do you think?

Kind regards to dear Gordon

Yr Wright

Tel.: BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE.
BURBAGE.
Nr. MARLBOROUGH.

2nd Mar. 59.

Dear Gordon,

I must apologise for my illegible answer to you, but I want to avoid any suggestion that I made it that we should be influenced by advising me. Clearly no such idea is possible. I shall in due course read your own views in the L.Q.R. in July

At best I am content to submit to the Annoyance of being brought into a case on the outside. I

am myself, impressed by the idea
that the naive Communism
expressed by Tennyson [illegible] is likely
to lead to field. I [illegible] best judgment
— but it was upheld by Reid & Stone
way, rehearsed) Keith. Feel wise
& careful & leave to the future the
development, if any.

I shall take no part — any
discussion.

By the bye — am I to come
on the 14th — dinner jacket or
decorations? Look in sometime
& drop a P.C. to tell me. Have
letter sent — no answer. I'm
working at

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DURLEY HOUSE,
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26 Oct '59.

Dear Goodhart, I have [illegible] a little long
in answering your very kind letter of
the 18th inst. But I was in bed or
till late last week & also had a
touch of my gastric trouble, which
comes occasionally, is not [illegible]
lethal or picturesque, but is rather
a little upsetting for the moment.

I must first of all tell you
how grateful I am to you for
arranging the Athenaeum dinner, which

PTO

It has been one of the finest moments of my life. It will certainly be a memory for my remaining ~~years~~ years: others helped, but you were the central feature of that dinner that went off with tremendous success — every way.

I am trying to write at length to Buckingham Palace for his generous tribute to me, which I cannot help feeling goes a little too far — makes me feel how little I have done. But all the same it is very "grateful & comforting".

I find it difficult to recreate the atmosphere of that small speech I made. I had no

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notes to check what I said. Completely impromptu. May I add such memories as I can now revoke?

I began by saying how thanks to you & Everhard & others I remembered how good a send-off I was being given in the last lap of my life, & reflected how much I had seen & experienced in the long years since I was a boy in my little skiff plying to the tidal waters at the mouth of the Tyne, afraid of being swept by the tide out to the mooring chains of the Trafalgar frigate, & how I died

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(3) dilate on how I got to Trinity & then went to the Bar & settled on that as my future Career — life. I gave two (only) instances of big cases — what I was concerned — both enormous Cases — what was counsel, (1) the Smyrna fires, (2) the Greek (scattering) Skittling Cases. Then I questioned what I had achieved — life & finally put to myself the other question whether I would choose to live my life over again. I said only on the condition that I was given not only another spell of

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years, but also the vital strength to remember the new Youth. Then I reminded The lecturer of old Greek ~~stories~~ to ~~tell~~ me of the stories, [what many may remember retold by Tennyson — a moving little] by (1) Tithonus, a beautiful youth, was beloved by the goddess of the Dawn. He asked the Goddess for the boon of ~~life~~ Eternal life & she granted it. But in a moment of inadvertence forgot to add "Eternal youth". So he grew aged & decrepid, whilst she

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(3) debate on how I got to Trinity &
then went to the Bar & settled on
that as my future Career — life.
I gave two (only) instances of beg
Cases — what I was concerned —
both mournful Cases — which was
counsel, (1) the Smyrna fires, (2) the Greek
(scuttling) Skittling Cases. When I questioned
what I had achieved — life & finally
put to myself the other question whether I
would choose to live my life over again.
I said only on the condition that I
was given with only another shell of

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Yes, but also the Vital Spring. The
of new Youth. Nor I
reminded The listeners of old Greek.
stories of the myth of
Tithonus, which many may remember
retold by Tennyson — a moving little
I dy (1) Tithonus, a beautiful youth,
was beloved by the Goddess of the
Dawn. He asked the Goddess for
the boon of & Eternal
life & she granted it. But in a
moment of inadvertence forgot
to add "Eternal Youth". So he
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renewed
~~renewed~~ ~~renewed~~ the constant splendour
& beauty renewed every morning:
I added that one must that the Gods
Could revoke their gifts. The gift
of Eternal life did not carry / the
gift with it of Eternal youth -
So I go on hoping that I
shall not - unless what tarnishes
I possess still.
I might have added that
any how old age will not destroy
the friendship my friends have for
me or my answering friendship for
them till the end.

Yours sincerely
C.S. Lewis

P.S. This is miserable scrawl but I hope your excellent secretary will be able to decypher it

W.

TEL.: BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

31 Dec. 59.

Dear Goodhart,

How kind of you to write another letter to me about Davies Case. I have been I fear rather tiresome & crotchetty about Simonds. But he was just a little uppish

I am afraid the expectant world will enjoy reading your final pronouncement — Until then Sincerest Kindest regards & all best wishes for 1960, the New Year & New Decade.

Waugh

TEL.: BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE.
BURBAGE.
NR. MARLBOROUGH.

March 24. '60

Dear Goodhart,

I have not words sufficiently to thank you for calling on me to brighten the few days at the Radcliffe, an extremely good hospital. But I was & am grateful all the same.

I am largely recovered from the effects of that inevitable little operation but still have some lingering element of fatigue. What I regret at this moment is that I do not feel equal to the attendance at the British Academy dinner on the 29th inst. leaving here by train in the morning & finishing my

TEL.: BURBAGE 217
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DURLEY HOUSE,
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NR. MARLBOROUGH.

Jan. 12. 61

Dear Goodhart,

I am in receipt of
your letter of the 10th inst & do
hope to see you here on Sunday
afternoon, say about 3 p.m.
but I hope you will stay to
tea. I could stay during
tomorrow if that will be
more convenient to you.

My wife joins with me in
kind regards & all best wishes
for the New Year.

I deplore the wanton waste of
the weather rates for
to visit unfortunate &c.

I apologise for my absence yesterday & will be
rendered in my lectures. - W.

at night after dinner. So I decided to
give it a miss, with great regret.
I enjoyed the dinner last year & on
previous years & hope all others
in the future. The B.A. is a great
institution & brings together many
diverse elements of Bristol intellectual
~~life~~ achievement - as witness its
annual proceedings.

I feel inside me of the
annual progresses but I am an eager
watcher from the Bank. For myself my
new
motto is now "Carmen to me from Virgil
"Rura amem Sylvasque inglorias."

All Kind regards to a doughty
fighter like yourself from Wright

P.S. I feel that Fred Pollock has
outdone me as in other aspects with his 2 delightful
& unexceptionable & unpublished works of his own 90
W.

77

ROYAL COURTS OF JUSTICE,
W.C.2.

Thursday
[1935-7]

Dear Goodhart,

I have roughly
drafted a paper. I send
it now because I
want you to look
through it & discuss
it with me before
dinner on Saturday.
Could you meet me

ROYAL COURTS OF JUSTICE,
W.C.2.

Dear Goodhart,

I wonder if we could have a few words about the Report before Wednesday.

I am against making any exception about guarantees. I do not think it necessary to do

at 11 am. about 6.15 or 6.30 on Saturday & have a talk. Then I have Sunday to revise & rewrite.

Be prepared to find I will or indeed scrap it altogether.

Yours sincerely
Wright

at Ilm. about 6.15 or
6.30 on Saturday &
have a talk. Then I
have Sunday to revise
& rewrite.

Be prepared to
find fault & indeed
scrap it altogether.

Yours sincerely
Wright

ROYAL COURTS OF JUSTICE,
W.C.2.

Dear Goodhart,

I wonder if we
could have a few words
about the Report before
Wednesday.

I am against making
any exception about
guarantees. I do not
think it necessary to do

Hurley over the weekend,
but can have supper
during or Saturday
+ shall be hunting -
the morning.

Can you keep
a word with
Meehan + Gulbridge?

Jm Wright

TELEPHONE WESTERN 3016.

48, HORNTON STREET,
W.

Wednesday.

Dear Goodhart.

I am afraid I am engaged on April 19 — to dine with the Canada Club. I always accept their invitation because the P. C. I wish I had known earlier that you were coming to London. Next week is the last week of term & I am full up except Monday. Could you come somewhere with me — Tuesday? & might dine at the United Universities Club at 8 or Supper & Cabaret at the Dorchester at 9.30 or 10.

Yrs Wright

TELEPHONE WESTERN 3016.

48, HORNTON STREET,
W.

Mar. 28.

Dear Goodhart. It is mean to put the responsibility on me, but — the whole of the end of term a great dinner at the U. U. Club may be nicer. We can try their best claret instead of hard champagne which I am tired. We can have Singleton to join us, & he will amuse us also while & not complain if we talk shop.

So it'd be 8 O.C. Monday next United University Club, Black tie.

Yrs Wright

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

June 26.

Dear Goodhart. I have written a rough draft of a letter for Harvard. It will need revision & retyping – I hope to do the 4th draft before I go away & send it then when I return about the 3rd week in August. Would you look at this draft & tell me whether it is the sort of thing they want & whether it is too short & too long & am I in Louis's lecture. You have so much experience in these matters. Could you get it typed (with large margins) by the Oxford Typists who are always very good. I hope to do the other 3 in the next fortnight. Yours ever,

I expect you will not agree with all I have written.

TELEGRAMS: BURBAGE
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

19 Feb. [c. 1941]

Dear Goodhart,

I am sending to the L&R the script in Untied Australia. When the Law Reports appear, it will be necessary to put the L&R references to the quotations (in substitution for A&R which was what I worked upon) & to check the language. But I feel that that might be done by your sub editor. May I leave it so?

The ~~X~~ Copy is not very creditable, in a few places. I will give your sub editor Copy of Bowell's decision, marking it – the proper place at p. 11

I shall send the Copy to Kennedy. I hope this week and then my literary effort shall cease – at least to the press.

Yours ever,

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

Saturday
[c. 1941]

Dear Goodhart, I should have rung you on the telephone, but we are quite cut off. It doesn't look as if it would be possible to get over to-day.

If you are in London on Wednesday, you might perhaps lunch or dine with me (as I can walk over) if there is anything to discuss.

I am glad you like the verses. It is long ago of course I have passed over a good many things. I have not got the references

Is that necessary in a Review? I shall revise it, but not as drastically as I intended & hope to be in time a corrected copy by Monday, if possible.*

Winfield wants to include it in the book, at least he thought he did when I talked to him on Wednesday. I am sending him the MS so that he can decide. He is not doing it for the Cambridge L.J.

Kind regards

Yours ever

Roscoe

* Perhaps I had better wait a few days to see if Winfield has any criticisms.

Book Review Headnote to come

86

Law Politics by Mr Justice Felix Frankfurter

Sol:

Mr Frankfurter now Mr Justice of the Supreme Court of the United States when about 18 years ago Frankfurter dedicated his book on the Labor Injunction to Mr Justice Brandeis he addressed him as one "for whom law is not a system of artificial reason, but the application of ethical ideas with the freedom of the Cave" I should like to take that pregnant description, so justly applied to Brandeis, to apply it to Frankfurter as well as to him as I do also. It is impossible not to realize this on reading the recently published volume of Occasional Papers of Felix Frankfurter 1913–1938, which has been edited by Archibald MacLeish & E. F. Prichard Jr. The editors describe these papers as journalism & indeed they were, being contributed from time to time to various periodicals & dealing with matters which

of the moment had a topical appeal. But if the occasion was ~~less~~ transient, the manner & matter of these papers had more than a transient value & deserved collection & publication. They also show the wide range of subject, his vivid & accurate intelligence, the [illegible] study & [illegible] he devoted to them. One most valuable section of this book deals with three great justices, in an attempt to define the elements of judicial greatness. Holmes, no doubt greatest of all; Brandeis, Cardozo, who ~~follow~~ [illegible] in the footsteps of these great judges is shown only the author of Frankfurter, who would therefore know his analysis of their qualities. Holmes & Cardozo, the less valued Brandeis, not merely ~~[illegible]~~ the law by their judicial ~~exposition~~ opinions, but also as Mr. Mansfield knew

(2)

general philosophy by other judicial writings. It may be permitted to hope that Frankfurter will not hesitate to follow their example & this also will on occasion ~~be~~ add ~~to~~ to his regular course of judicial utterances, give the world the benefit of his wisdom & experience ~~mediator~~ — a purely personal capacity. Doubtless his new position may to some extent debar him from again embarking that incisive & penetrating discussion of judgments of the Supreme Court which may be found in his Studies of the Commerce clause & of Mr. Justice Holmes & the Supreme Court, or again ~~[illegible]~~ his examination of the Labor Injunction & of the Business of the Supreme Court. But I see no reason why a judge, merely as such, should be debarred from seeking ~~[illegible]~~ to enlighten the world by other judicial writings, subject to all proper limitations affecting his position.

(3)

Some
the readers of these papers may be tempted
to observe that there is very little law in Ilam.
But they have to bear. Their error would
be due to a ~~restriction~~ limited meaning of the word "Law" as
~~meaning~~ implying it to be confined to
the ordinary Common
Law, perhaps even Case Law. Frankfurter
is concerned mainly with public law and the
chair which for many years he held at the
Harvard Law School was of Administrative &
Public Law. Even England a large, ~~indeed~~ indeed
the largest part of modern law is to be found
in Statutes & Statutory Rules & Orders which are
made by ~~the~~ Statutory Authorities. Still more
must this be so in the United States, where
there is the vast ~~accretion~~ body of law which has
gathered round the Constitution, in addition to
the great mass of Statutes & Ordinances.
This in the United States
about [illegible] in England has led to the development
of Administrative Law. As long ago as 1927

(4)

Frankfurter drew attention to the developed
nature of administrative law — a brief but
illuminating article republished — the volume
under review. He pungently observed that
legal education had only too ~~often~~ often to
[illegible] administrative
law, but "Necessity in the matter of discovery
and in this illegitimate zodiac administrative
law, almost overnight has ~~achieved~~ achieved the
profession" He amusingly tells ~~(the~~ (the Scales tell their own
Dicey's tale) has ~~become~~ become the watchword
emphasis, the unduly emphasis of what he calls
"the famous Laski Case" (1915 AC 120). Frank-
furter observes that "the manifold response of
the Government to the forces & needs of
modern society is bringing up a body of
law not written by legislatures & by ~~of~~
administrations not made by courts & not
subject to their revision" Even in 1927 it is
clear that Frankfurter was conscious of the
deficiencies in breadth — the process of adjusting

(5)

the exercise of the powers of the administrative agencies to the traditional system of Anglo American Law & Courts. In a late & most instructive book (~1936) "The Growth of Judges in Washington", our author, the Assistance of Judges trained Lawyers in Government Service for a year, young men of first rate Ability in England, it seems, have felt that difference less acutely, just as they have experienced less difficulty in the Control of administrative Tribunals by the ordinary Courts. The doctrine of the separation of powers has counted for less influence than in the United States. It has never been a principle of government, at most & rarely, in local government where Conflicts of Powers, as determined by the Courts of the Peace, the Justices made regulations, directed their execution & dealt judicially with their breach, as Blackstone

has explained. The modern Englishman is prepared to accept the new that, though Judges & legal procedure are admirable in their proper province, the procedure of Law Courts is not the Job method for ascertaining facts & that when the Judges are solving disputes carefully & Courts decisions studying requirements of policy are elementary matters of Justice such as a fair hearing, are observed. But Frankfurter & those in the Course of his papers discuss the problems of these Emergencies in the United States.

Frankfurter's attitude to Law in the Judicial sense is best seen in two papers, One "The Condition for the Rise & Method of Legal Research" & the other "Law Schools & Lawyers". His papers on the three great Judges are mainly, indeed almost entirely, Concerned with Public Law, for as the Supreme Court itself says. The protection against the

produce emphasis on Organization & Control with
personality of those who research
the [illegible] but her main thesis is
based on his Conception of the nature of law.
[illegible] she speaks of "the second
root from which the law derives all the
juices & life" (quoting Holmes). She
takes a "functional approach" "law-books
in action" "the administration of law as the
center of gravity" as she helps "explaining
the dominant preoccupation of Contemporary
jurisprudence" She adds that the problems which
they imply are as intricate & scholarship as
they are still unanswered. She contrasts with the
modern outlook the methods of Story who
found the Common law a perfect system of
deductive demonstration, a [illegible] law
Blackstone's" "Landell" [illegible] — the
40's still Concerned of law as a self Contained
system, the logical unfolding of relatively few

principles whose history & meaning & direction
were all immanent in the cases" Langdell's
method, he says, was inductive, the method
he had learned from Darwin's Origin of Species
"but his outlook was that of a theologian — he
was an implacable logician, a brilliant
reasoner with a fixed legal framework. The
extent to which every law library & every law writer
today goes beyond case law for the understanding
of cases in the procedure of Langdell's preoccupation
preoccupation with formal law". Then
Frankfurter quotes Holmes again as stating
the ideal of modern law. "I look forward" said
Holmes "to a time when the part played by
history in the explanation of dogma shall be
very small & instead of mysterious research
we shall spend our energy on a study of the
ends sought to be attained & the reasons for
desiring them" Thus the study of law

9

meant on hard-
head not possibly be

+ economics disciplines
the social sciences + kindred Such
is Frankfurter's understanding of the ideal research.
Incidentally he protests against the false
antithesis between induction & deduction.
The process - law, as in other sciences generally,
is "deduction-in-induction-deduction" He further does,
Frankfurter clinches his argument from that
great philosopher & scientist, Alfred Whitehead -

But I must all give the impression that
Frankfurter is indifferent to, or unfair in the
narrower & more technical application of law in
ordinary human affairs. He appreciates that
law is to be tested by the manner in which it functions
in the affairs of men, He illustrates that theories
both from the standpoint of individual cases & by
reference to broad principles of legislation. As to the
former class, the longest chapter of all in this
volume deals with the case of Sacco & Vanzetti,
the Italian shoe operatives & the fish peddlers, who were

(10)

+ sentenced to death
Convicted of murder in the Criminal Court at
Dedham, Norfolk County, Mass. That was in
June 1921. Frankfurter's paper was published in
March, 1927. During these six years Court
proceedings had been going on in order to ensure the decision
the fate of these
two unhappy men was still undecided. Later
still notwithstanding Frankfurter's article & a
book subsequently published, Stays were granted.
Frankfurter seems to me to show conclusively
that the trial was a mistrial, & that there was
a clear miscarriage of justice. In any case
in England (and most Latin countries) men under sentence
of death for years. The practice in England
the case of
of a convicted murderer obtains a respite to
enable him to appeal an appeal is
granted & the House of Lords, the final court
respited the sentence Commuted. Whatever may
be the merits of the appeal. It might perhaps
appear strange that a man like Frankfurter

(11)

so deeply immersed in questions of public law, should Cardozo himself so intimately — the fate of these two humble & obscure men. But that would be to misapprehend Frankfurter's supreme passion for justice which alike animated his fight for the two Holmes & this distant campaign against what he held the narrow & illiberal Conclusions of the Constitution. This latter is the theme of two of the most important sections of the volume, which review the work of the Supreme Court. Its political & judicial functions; the roles "Labor & the Courts", of which Frankfurter here, as indeed all his writings, is the ardent advocate & the views of which Holmes, Brandeis, Stone, Cardozo were the principal judicial exponents. In these articles we have a clear & simple language a statement

with "Business & the Courts"

(12)

of the principles which Frankfurter in his more precise & technical writings has elaborated. These are already familiar to all who are at all interested in these questions. I shall resist the temptation to occupy more space in what is supplementary though I cannot forbear to put a plea about the Labor Injunction which I am happy to think has been rejected almost from the record by the English Common Courts, primarily perhaps on the technical grounds such as the definition of property. Frankfurter is quite uncompromising about its unfairness & injustice. On all these questions disclosed in these volumes of the work I feel the fascination & difference inevitable in one who is looking from the outside at issues affecting the life of a great nation which however closely akin in so many

(13)

respects
~~was~~ result ours is all the same so different
in aspects in so many ways of the highest moment
~~both principles & fundamentals~~. In the
same spirit I shall forbear any
comments on what Frankfurter has
~~called for perhaps~~ from investors called "a
"Political Autobiography". I may here
observe that I have thought attributed
to Frankfurter the various headings of the
sections & chapters, but I may have been
wrong in doing so. May may have been
merely the captions chosen by the Editors.
But the captions appear to be sufficiently
accurate & I am sure no harm has
been done by the course I have adopted
in so doing. I shall conclude by venturing
to say that I have found the last three
addresses included in the volume
~~essays~~ (most brilliant suggestive. I
mean the Campaign speech delivered
over the radio (station WJZ) on November 5, 1932.

(14)

Why I am for Governor Roosevelt and
Also the speech
"what we contribute to American life" and
"The Shape of Things to come" (1937). ~~X~~
But I have found the whole
volume stimulating & instructive
throughout.

(15)

It [illegible] to look [illegible] volume [illegible] background [illegible] These [illegible] would [illegible] Untold [illegible] work.

Dear Goodhart.

I am looking thro' proof as I have developed a dreadful cold & want to keep near the fire. My head is like a trump.

As you want the proofs back at once, I have dispensed to Endeavour here & now.

I like the notes. Your reference to Colemph [or Scandalum magnatum] is a masterpiece. I also like your use of the word fantastic in the second note at the end.

I am glad you referred to dismissal thro. I used to be rude to have a reference to Ambassadors as I did.

The proof notes are purely suggestions for your consideration. Disregard them or not as you like. They are unimportant.

I am pleased that you referred to the actual facts of what happened in the H. of L. It was pure impudence of Alken to state or at least give the impression that the H. of L. certainly intended a review by the Courts. That odd idea was mysteriously evolved all

Dear Goodhart.

I am working like a fiend as I have developed a dreadful cold & want to keep near the fire. My head is like a turnip.

Am sending the proofs back at once. I have drawn pencil to indicate here & there.

I like the notes. Your reference to Carleigh [or Scandalum magnatum] is a masterpiece. I also like your use of the word fantastic in the second note at the end.

I am glad you referred to Abrams the Law. Would it be safe to make a reference to Ambrose case that I cited.

The formal notes are purely suggestions for your consideration. Disregard them or act as you like. They are unimportant.

I am pleased that you referred to the actual fact of what happened in the H. of L. It was pure impudence of Alken to state or at least give the impression that the H. of L. certainly intended a remand to the Courts. That odd idea was mischievously suggested all

thought the argument that made me regret the
awful Knox note. But I am afraid it's a
bad impression that remains.

If you are disappointed by the paucity
of my comments, it is not due to want of
care in reading the proofs, but to my
complete approval of admiration

Yrs very sincerely

You will shortly have my book
in your hands.

I think the Lordships ought to
be encouraged rather than
overloaded but I hope you ~~shall~~ will
look in here & tell me
the Habeas Corpus procedure correct.
I have only the French at hand, but I
expect what you say agrees with my
statement.

though the argument that made me reject the
wider known rule. But I am afraid it is a
bad impression which remains.

If you are disappointed by the fourth
of my Comments, I am not due forward if
Come in reading the note proofs, but to my
complete approval of admitting

Yrs very sincerely

You will shortly receive if you have
not just yet.

I think the Lord Justices Judg
concerned should not be
overlooked but the effect should
I took some pains to get
the Habeas Corpus procedure correct.
I have all the formal at hand but I
expect what you say agrees with my
statement

TELEGRAMS: BURBAGE
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

15 Dec.

Dear Goodhart,

I was glad to hear that there was no question of publication until the April number of the L.Q.R. That will give an opportunity to decide if the paper is worth publishing: I do not want to repeat myself in too many places but those repeat to the Commander Gutteridge. In any case what I wrote needs revising. I wrote in haste because I had got it out of my head that there was a definite understanding

TELEGRAMS: BURBAGE
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

15 DEC.

Dear Lockhart,

I was glad to hear that there was no question of publication until the April number of the L.Q.R. That will give an opportunity to decide if the paper is worth publishing: I do not want to repeat myself or to state common places to those versed in the Command Question. In any case what I wrote needs revising. I wrote in haste because I had got it out of my head that there was a dispute understanding

for the January number. Of course, as usual I feel ill till the last moment

I shall be at Lincs on Friday between 12 & 1, or near 12 as possible. The only snag I can see is that we have a Canadian Publisher on Thursday. If time & hand bd, it must finish that day. But if it went over Friday then my Oxford visit would fail. I could come after Xmas,

Much regards to Mrs Goodhart

Yrs

W.

Will that suit? Canadian Friday. Don't mind a big lot if possible not to.

for the January number. Of course, as usual I feel ill till the last moment

I shall be at Lincs on Friday between 12 & 1, or near 12 as possible. The only snag I can see is that we have a Canadian Publisher on Thursday. My friend Lambert, I must speak that day. But if it went over Friday then my Oxford visit would fail. I shall come after Xmas,

Kindest regards to Mr Goodhart

Yrs

PV.

Will the typescripts be available on Friday. Don't send it by post if possible but to.

TELEGRAPHIC ADDRESS:
c/o DETINU, LESQUARE.
TELEPHONE:
WHITEHALL 4152.

UNITED UNIVERSITY CLUB,
1, SUFFOLK STREET, S.W.1.

6 Aug.
[1942?]

Dear Postbag

You were good enough to say you'd like that I might visit Oxford this Long.

I wonder if the last week of August might do. I could spend the night of Aug 23 in town & come to Oxford next morning. Stalky has promised to take me & dine at Christ Church, & if Crosemont Lewis, I might

on ~~the 23rd~~ the 24th I shall return to town on Thursday 25th & spend the intervening days either in Oxford or at Boars Hill, if Convenient. Shelleyites might put me up at B.N.C. on the 24th. or I might get a room elsewhere. I shall bring as little luggage as possible, a bag that I could carry if necessary.

It seems Cool to propose so much but you are always so Kind. Do not hesitate to say no, if it is not Convenient. The same is

Yr letter of 24th I shall return to town on Friday 25th & spend the intervening days either – Oxford or at Boars Hill, if convenient.

Shelleyheres might put me up at B.N.C. on the 24th & I might get a room overlook. I shall bring as little luggage as possible, a bag that I shall carry if necessary.

It seems Cool to propose so much but you are always so kind. Do not hesitate to say no, if it is not convenient. The same is true about Shelleyheres. I wonder if you could phone him & make what he says – that is, if you approve of the scheme.

I am quite prepared to have my way that if it is not convenient to you then I shall arrange a different date or even stay at home.

Yr Roberts

I was sorry to hear Lord Farquharson has died

TEL.: BURBAGE 17.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

28th June. [c. 1946]

Dear Goodhart,

I returned yesterday from my travels. I was most kindly & generously entertained – N.Y. by your brother & whose hospitality I cannot say enough. I saw Gov. Davis & Berkshire – the former is reduced by his severe illness & the latter bowing with energy & enthusiasm. I could not achieve anything definite. My visits do not seem to know what the Lot for Oxford will be in the U.S. after the disasters of 1939.

At Tokyo. I had an interesting & I am satisfied important & useful

unreason. The preparation for the trial seems not fair.

I prepared a little paper on how Crimes additional to what you have good enough to publish in your L.Q.R. I wonder if you would think this worth a few pages of your Journal? If so whether you could publish it in October before it is outdated by the judgments.

I hope to see you before you go away. I shall be at the O & C Club next week. I sit in the P.C. on Monday, Tuesday.

Yours
[signature]

The copy of my paper which I enclose is the only one I possess. I left one in proof in Tokyo. The typing is bad but the best I could get.

TEL: BURBAGE 17.

DURLEY HOUSE,
BURBAGE.
NR. MARLBOROUGH.

9 Oct. [1947?]

Dear Goodhart,

I cannot find the copies of my flippant observations, but I may get them in due time when I write my forthcoming volume.

Could you send the MSS to

Miss Wildy,
U.N. War Crimes Commission
Lansdowne House,
W.1.

I have told her you would do so. She is the principal typist secretary. I will return the MSS & 2 copies for yourself.

I must see that I am fully to
doing what publishing my articles.
I regret that I allowed him to
persuade me that I owed Stevens
Lands but that seems ungrateful
because he has been a good friend.

I shall be at the O+C Club
on the 20th of May night. I do
hope we can split another bottle of that
claret.

Yours

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

August 4. [1950]

Dear Goodhart,

I want to see the Galsworthy lecture for 1948, delivered by Charles Morgan on "The Epitaph of the Novel, a modern problem Considered in the Context of Metaphysics." A long enough title.

The British Academy said it was published by the Clarendon Press. I wrote to the Clarendon Press Oxford as a sufficient address. I suppose

I should have addressed to the Oxford University Press. Will you ask me if you Mystmidons in Oxford to "Contact" the Press Fund at they got any letter stamp [illegible] know about the Lecture & where I can get it.

I was glad I saw Braithwaite.

Is there a solution of Holmes postponing Mr Carnahan published in ILS? I have got 7 published writings.

Yours Wright

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

P.S. I shall be in London next week after next. Next week I come to attend Smith's service and return that day. W. (1950?)

Dear Goodhart,

Megarry tells me you are back from Copenhagen. I hope you had a nice holiday.

I sent Megarry a speculative note mainly about Jacobs. I say speculative because I wanted you to decide whether I published in the L.Q.R. Upon reflection it might seem to associate you with more drastic ideas than you are wedded to. I have long pleaded for permanence

not exercise authority (No one ever
reject precedents altogether) So I
thought I was a criminal beyond hope
You might modify the more
extreme phrases in my Note & regret
I indulged in the irony that you had not
it altogether. Else my handwriting, as he might have detected
off the Jones.
In any event I hope to write a
long & exhausting (? issue) article on
Precedents & send it to Harvard or
some where else — & then Modern L.R.
The Charity case (Chancellor & Ors (Bullock)
Outlook still rankles in me & I
hope before I die to tell my own tale.

So do not hesitate to send back
what I have written. In any case
Singleton's pet case ("the welder" (Hortmore)
have a note perhaps already has one
of you. Yrs. Wheatley

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE.
BURBAGE.
NR. MARLBOROUGH.
WILTS.

Oct. 24.
[1952?]

Dear Professor

I visited Dr. Cotton:
he examined me minutely for
an hour with the help of many
instruments, electrical & otherwise,
& gave me a clean, & even
complimentary, bill of health. He said
that what had been troubling
me over my rare vacations for the
last four years was what was
called anaemia of the brain:
it was circulatory, I have always
had a very low blood pressure,

TEL.: BURBAGE 17.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

19 Oct. [1905]

Dear Football. It was very nice seeing you again after your long absence my wife ordered I to have an argument with what she said – at she had a dog shot (accidly?) last year & has been upset about it. I've ever sympathised with shooting syndicates, & those disgusting gamekeepers. A dog is in law much favoured I said – one prefers that it was a

Has Crosby written Cranbrook a fresh epistle, was Punch, what we want is more effective & unremitting opposition to Chinese Slavery.

what comes with it very rare – weals, slight faintings & lapses of consciousness, what would be generally unobserved & more than unfelt. It was intensely better than high blood pressure which may result – strokes. There was he said, no Cure; I should disregard the occasional lapses & go on as if they had never been.

What do you think of the debate on corporal punishment. The H.L. & the high old tory love the smell of blood & I did not go for many reasons but one which I had. I might have added my voice in support of the L.C. I am not much impressed by the judicial utterances. The H.L. loves the smell of blood, but did it know the difference between flogging & birching! – There are troubles enough of

"familiar" animal, much to the pleasure of Fred Mockett. The law perhaps matters little as long as one shot in the city, in the dark, & the murderer cannot be traced. We advertised widely, got the police to work for us, & offered rewards but cared not a jot beyond suppression.

I gave an address last week at Belfast. I enclose the type – I added one or two things, e.g. I compared the position of the Church with its Catholic & Protestant followers as recorded by

TEL.: BURBAGE 17.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

Swift & I gave a summary description of Utilitarianism as the reduction and abandonment of the idea of freedom.

Do you think the address worth publishing & if so where & what part should I offer it. Perhaps it is outside the scope of the L.Q.R.? If so I have thought vaguely of the Quarterly. Can you help?

I want if I can [illegible] to U.S. next Spring. Is one of

going to Australia (D.V.) next autumn. I don't like to vanish in going to U.S., quite apart from the dollar difficulty. I wonder if I could give a few lectures, & get the necessary dollars?

Then so many other matters we can discuss when we meet. I am writing to the P.C. on Monday week in the Australian Relations business & I come & stay with Hall he is Lord in 25 & 26 & has no O. & C.

I've been glad to see you looking so well. All best regards

Yours

(I've had a letter with the Nice Kings)

TEL: BURBAGE 217
STATION: SAVERNAKE 5m

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

6 Aug.

Dear Quadrant,

My wife & I would like to run over to see you at University & perhaps have lunch. I am free pretty continuously for the rest of the week, indeed most of September; but she is often away for Harvest shows & other fêtes.

Let me know if or when we might run over to Oxford – & choose time: we might perhaps arrange a date. I believe I am supposed to have made a certain small reputation by my pictures, but

candid friends say I am likely to destroy it by the articles which I write in legal topics, & say I should not any more commit such indiscretions. Dr Prague would write more. I may indeed be too lazy & write any more, or I may be tempted to write a little article (say) legal Causation as responsibility on which I briefly touched in an article in the Cambridge L.J.

Anyhow what do you think.

Kind regards Yours ever Goodhart

TEL.: BURBAGE, WILTS. 217.
STATION: SAVENAKE.

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH,
WILTS.

Dec 7.

read 8/12

Dear Megarry,

I have obeyed your order & write promptly what I have to say. More time for contemplation would have been welcome. But you & good luck can alter, add to or cut out as you like.

Will you please check references. "The dog Hector poisons" I add from memory. Was of course Baker v Snell 1908 2 K.B.

I want to catch the post so look out for things I've corrected

Yours Goodhart

I have not the older Reports

TEL.
BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE.
BURBAGE.
NR. MARLBOROUGH.

10 Dec.

Dear Postmark,

I was glad to see your letter in the Times yesterday about Zebra Crossings. Very acute criticisti.

Thank you for quoting me. It seems a long time since 1934. I had forgotten that I said anything about it.

I have a ticket for the Pilgrims next Tuesday, hope to.

Yours ever,
J. Wright.

TEL.:
BURBAGE 17.

DURLEY HOUSE.
BURBAGE.
NR. MARLBOROUGH.

8 May.

Dear Postmark.

Of course I should prefer L&A for my article on Damages (if it should be written, say in 8 weeks) but I do not want you to think I am pressing it upon you.

I think your proposal that you should act as arranging Editor's programme (so far as most fixed by the travelling scheme): so far as we are concerned we want to do what we can. I happen to be free — the week May 15 to 22. We can put her up or take her a run but she will have a full scheme. I shall write to her to

get in touch with you.
I am in town next Wednesday
& Saturday [illegible]

TELEGRAPHIC ADDRESS:
c/o DETINU, LESQUARE.
TELEPHONE:
WHITEHALL 4152.

UNITED UNIVERSITY CLUB,
1, SUFFOLK STREET, S.W.1.

Tuesday.

Dear Goodhart

I understand you
wish be at Oxford
on Friday next & I
came down in the
evening & went
back about 3. Could
you write a telephone

Perhaps you would lunch with me at the George & Dragon & I could ask Wadsworth.

If Tuesday doesn't suit suggest a day next week

Yrs

I go both to Dursley & Longfield

TELEGRAMS: BURBAGE
TELEPHONE: BURBAGE 17
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

Dear Goodhart,

I enclose type of my article for Journal.

If you are sufficiently interested with you care to glance through it & in any case return it to me in a day or two & I can mail it.

Longfield has been through it also Kennedy & I-10 000 words & about 15 000 words. Longfield suggested ~~not~~ no matter. Do you or a editor agree? Anyhow I can revise & re-write

Yrs
JW

TELEGRAMS: BURBAGE.
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
NR MARLBOROUGH,
WILTS.

119

Wednesday.

Dear Goodhart,

I tried to telephone this morning to say that my coming over today & have a good many things in general. But I cried it all through.

TELEGRAMS: BURBAGE
TELEPHONE: BURBAGE 17.
STATION: SAVERNAKE.

DURLEY HOUSE,
BURBAGE,
Nr MARLBOROUGH,
WILTS.

Jan. 17.

Dear Goodhart,

Stung by your taunts about
Masculinity, I thought I should
write to the matter again; but
when I sat down, my spirit failed
& I contented myself with a few
alterations.

I think I had better, if
I should not be [illegible] the Competence
of a Committee under some
friend, such as Politis, and not
see it through the Press myself
& send it to me for a final
revision, if that is considered necessary.
There is something intensely repulsive

I shall suffice soon be difficult
or impossible to find a taxi at all. But I
should like to try a taxi rank &
Oxford, either tomorrow or
~~the~~ Saturday. But if Parliament
meets earlier day I think I shall go
as I did yesterday. Saturday

Drop me a note if ~~on the~~ is
possible. There is not time for Friday
now.

Yrs
W.

TEL: BURBAGE 217
STATION: SAVERNAKE

DURLEY HOUSE,
BURBAGE,
NR. MARLBOROUGH.

13 Aug.

Dear Goodhart

I received this morning your letter of the 11th Aug. It was very good of you to write such a full & interesting one & I write so fully to me.

I am not sure when you will receive this letter from me: but I wanted to explain to you at once that I had reverted to my original view that if I wrote at all on the Swag problem I had better wait until a later occasion if it should ever arise. It is I

Jane, what any thing I have written.

At least I shall not see this again for 2 or 3 months.

I expect to be in town every night Monday to Friday next week & the following week. So if you are free any evening telephone the Cambridge University Bottle Club or Reform as you like.

With thanks for Wednesday evening which I enjoyed.

Yours

think better to leave your exposition of the ~~my~~ legal situation as it stands in your masterly letter to the Times: it is so complete & coherent – I can find nothing to add & nothing to correct. I had drafted more than one sketch of a letter, but had only invented in this particular my Conviction quieta non movere, at present I cared not add any ~~to~~ clarification but might if anything add confusion. ~~I~~ Your letter as it stands will be a rallying point for the legalistic aspects.

We shall look forward to seeing you soon after the 8th Sept. I

TEL:
BURBAGE 217
STATION SAVERNAKE

DURLEY HOUSE
BURBAGE.
NR. MARLBOROUGH.

V.2.

wonder how things will have worked out as recorded as they are, no doubt many words will have passed & many speeches will have been made.

Yrs Wright

P.S. Consalvi, of course, is dead set law –

I do not like writing anyhow, & the less of an anecdotal character. I shall some day I hope collect my articles up to date & probably write a general introduction. Before we can talk later –

W.

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TEL.
BURBAGE 217
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Yrs Wright

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W.

123

DURLEY HOUSE,
BURBAGE,
Nr. MARLBOROUGH.

Jan. 17th.

Dear Professor,

I received the copies of your work on the life of Robin; it must have meant a lot of research for you. It gave me tremendous pleasure to read as I remember many of the cases after 1928, most of the commercial cases were quite beyond me but terribly interesting to listen to.

What a wonderful life he had.

Thank you so much,

Yours very sincerely,

Marjorie Wright

124

25/5. [1936]

Dear Wright

I enclose the memo that Agnetti & I have prepared on the American Tariff. The typing is a little defective in one or two places but it is think clear enough for your preliminary consideration. If you think anything of it we should be will send it to Forbes - I thought you would like to have it first.

Yrs.

Maynard Keynes

The Rydings,
Sylvester Road,
Cambridge.

June 16th 1936

Dear Master of the Rolls

(1) Many thanks for the offprint of the article in the Harvard Law Review I am very glad to have it. Please do not trouble to return "Abuse of Rights" as I have got other copies.

(2) Report on the Jus Quaesitum: — I must confess that I am disappointed with this. It contains admissions that the law is defective but only deals with the remedies for

this situation in a very half hearted way which is tantamount to a recommendation that the law should be left as it is subject to a few procedural reforms. In other words ~~were~~ we are still to be saddled with the consequences of such cases as Dunlop v Selfridge and Tweddle v Atkinson & are invited to adopt all kinds of dodges in order to avoid the clumsiness of the existing law.

It is somewhat disheartening to find that Goddard & Asquith are not prepared to go even as far as the Americans

Yours very sincerely

H B Gutteridge

TELEGRAPHIC ADDRESS
55 TEMPLE.
TELEPHONE
1345-6 CENTRAL.

4, PAPER BUILDINGS,
TEMPLE, E.C.4.

6/7/36

Dear Lord Wright,

Jus quaesitum tertio.

I am not surprised that you thought the 'constructive' part of our report somewhat tame. But Mr. Justice Goddard (who compiled the first draft of it in advance of any real discussion) took rather strongly the line that no substantial injustice arises today from the absence of a jus quaesitum tertio; and that although our business is Law reform, the need for particular reforms must be made out, and was not in his view made out in the present case. I had started from a different assumption, but he rather converted me at the time to his view that our law achieves through a patchwork of devices, very much the same result that Scottish Law achieves by a uniform rule; at all events it was clear that he had made up his mind, and that short of writing a dissenting report (which I should have thought a presumptuous

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Continuation page.1.

thing to do in face of his far greater experience) there was no means of expressing any lingering doubts I entertained. I therefore concurred in the report, though my own prejudice was and remains in favour of a single rule, even when a similar result can be obtained by a farrago of makeshifts; and I am not quite so convinced even now as he is, that the farrago does achieve similar results.

I cannot go back on our report in his absence, but after reading all the material about jus quaesitum tertio, I feel strongly that if the Committee as a whole think a case for reform has been made out, the principles of the Scottish[x] law should be adopted - preferably in the form in which they are summarised or adapted at the end of Lawson's memorandum, in his Rough Draft 1. Would it be a possible course to circulate (1) our report (2) Lawson's Memorandum including his Rough Drafts 1 and 2 to the Committee together for discussion ? The Committee

x The American third party beneficiary rules seem far too complex, however interesting.

TELEGRAPHIC ADDRESS
55 TEMPLE.
TELEPHONE
1345-6 CENTRAL.

4, PAPER BUILDINGS,
TEMPLE, E.C.4.

Continuation Page 2.

could then decide, if so minded, that its report to the Lord Chancellor should consist of (1) and (2) dove-tailed together: viz (a) of a analysis of the existing devices - trust, assignment, statutory provisions etc - which enable a tertius in effect to claim benefits intended for him (b) of an intimation that the Committee as a whole think these devices serve the purpose inadequately, and should be replaced or supplemented by a uniform rule or set of rules; and (c) of an exposition of the rules proposed taken from Rough Draft No.1.?

This avoids the difficulty I feel in adopting our report as it is acceptable to you, but in a form in which it would do violence to the views of Mr Justice Goddard. At any rate such a draft could hardly come before the Premier as a report of Mr Justice Goddard or his Committee.

Yours sincerely
Cyril Asquith.

3.

FOREIGN OFFICE. S.W.1.

September 7th, 1939.

My dear Wright,

Many thanks for your letter of the 5th about Goodhart. Since I received your first letter I have had one from Goodhart offering his services if he could be of use, and I have told him that I have gladly noted his offer and have also informed the Procurator-General. Your present letter suggests, however, that he might perhaps be of considerable assistance to our Foreign Publicity Department, and I am accordingly sending extracts from your two letters to Lord Perth and suggesting that he should consider this possibility.

Yours very sincerely
Will Malkin.

The Right Honourable
Lord Wright,
Durley House,
Burbage,
Nr. Marlborough.

You will see that I have shaped your suggestion; it is very kind of you.

LORD WRIGHT

"The Times", June 29th 1964.

Lord Wright P.C., G.C.M.G., died on Saturday, June 27th 1964. He was 94.

Robert Alderson Wright's career owed nothing either to birth or to fortune. He was the son of John Wright, Marine Superintendent of South Shields, so that he may be said to have inherited his interest in shipping. He was born on October 15th 1869. He graduated in 1896 with a First Class in the Classical Tripos. ×2 1899 He was called to the Bar by the Inner Temple in 1900 in his 32nd year. It is not always realised that those who are called to the Bar at what might be described as a mature age often prove unusually successful.

He was a pupil of Mr. (afterwards Lord Justice) Scrutton, also a Trinity man, who had perhaps the largest commercial practice. The Commercial Court at that time was at the height of its great reputation. Although the 1914-18 war brought a decline in the ordinary mercantile business of the courts, the Prize Court was particularly busy. Novel problems concerning impossibility of performance in the law of contract and questions concerning the causation in admiralty and in tort were of particular importance. He was frequently briefed before the House of Lords and the Judicial Committee of the Privy Council. "The Times" said : "Though he had

an attractive vein of dry humor, his advocacy, like that of several of his contemporaries in commercial practice, was lugubrious rather than brisk." Later in life, he enjoyed delivering speeches, but his delivery made it difficult for his audiences to hear all that he said.

In May 1925 he was nominated by Lord Cave L.C. to succeed Lush J., who had resigned. He made an excellent Judge and showed more patience than had been expected. Later in life he became more talkative.

He presided at the trial of two remarkable cases. The first was Banco do Portugal v. Waterlow & Sons Ltd. The defendants, the well-known printers, were fraudulently induced to print a large number of Portuguese notes, in the belief that the Bank of Portugal had given authority. It was only after more than £500,000 worth of notes had been put into circulation in Portugal that the fraud was discovered. The main point at issue in the case was whether the Bank of Portugal had suffered any loss by the circulation of the notes. Lord Wright gave judgment for the Bank for £569,421. The Court of Appeal in 1931 reversed his judgment, but in 1932 the House of Lords restored it by a majority of 3 to 2. The result of the case gave rise to a similar division of opinion in financial and in economic circles.

In July 1931 he presided at the trial at the Central Criminal Court of Lord Kylsant, who was charged with issuing a false prospectus in regard to the shares of the Royal Mail Steam Packet Company. The false statement in the prospectus was that the Company had paid certain dividends in previous years, but no notice was given that the source of these dividends no longer existed. Lord Kylsant appealed to the Court of Criminal Appeal, but his conviction was affirmed in a judgment delivered by
which is reported in

In April 1932 Lord Dunedin resigned as a Lord of Appeal and Wright succeeded him. The appointment was welcomed by the Bar, although some surprise was expressed that Lord Justice Scrutton in the Court of Appeal had been passed over.

Three years later, in 1935, Lord Hanworth resigned the Mastership of the Rolls. There was some difficulty in filling this very onerous post, so Wright was invited to take it, on the understanding that when a vacancy arose among the Lords of Appeal he would be free to resume his former office. He did so two years later in April 1937 when resigned. He was succeeded by

Wright's judgments in the Court of Appeal met with universal approval, but he had found all the administrative work a strain on his not very robust constitution. During the next ten years, until his resignation in 1947, he delivered a large number of important judgments, both in the House of Lords and in the Judicial Committee. Among these were the following :

During the war, Wright was particularly concerned with questions concerning the guilt of the Nazi leaders. In February 1945 he was elected Chairman of the United Nations War Crimes Commission. The function of this Commission was to collect some of the material on which the charges subsequently presented at the trials at Nuremberg were based. It was generally agreed that the work of the Nuremberg Tribunal was greatly facilitated by the care and speed with which the Commission had performed their duties. For these services, he was made a G.C.M.G. in 1948.

Of less popular interest, but of greater practical importance, was the work that Wright did as Chairman of the Law Revision Committee which had been created by Lord

Sankey L.C. in . He held this office until . The Committee issued reports during this period; all of them were used as a basis for parliamentary legislation, although the 6th report concerning the Statute of Frauds and the disputed question concerning consideration in contracts was only partly enacted.

Wright never forgot his interest in academic law. He wrote a number of valuable articles which were later collected in his book entitled

In 1940 Wright was elected a Fellow of the British Academy. In he was made an Hon. Fellow of Trinity College, Cambridge, and in he became Deputy High Steward of Cambridge University.

Wright had been an enthusiastic mountaineer when young. Later he became a keen horseman.

B A Proc.

LORD WRIGHT — 14pt Caps
1869 - 1964 — 12pt figs

Book. 12/13pt. 27 lines

Robert Alderson Wright, later Lord Wright of Durley, was always more interested in other people and in the things that they did than he was in himself or in his own remarkable career. As a result, there are few records of his early life; in "Who's Who", the only references before he took his B.A. degree at Cambridge in 1896 are "b. 15 Oct. 1869; s. of John Wright, South Shields; Educ. privately; Trinity College, Cambridge." His father had been Marine Superintendent of South Shields, so that it was from him that his son obtained his first knowledge of ships which was to prove so useful to him later in his legal career. Strange to say, he never seemed to take any interest in sailing, although he was interested in other forms of sport. He once remarked that he had not been strong as a child and that he spent most of his time reading at home; this probably explains his passion for books and his belief in the importance of exercise. Although he never played any games, he was, as a young man, a keen mountaineer and a member of the Alpine Club. Later in life he became an enthusiastic horseman and continued to ride until he was over 90. He was particularly proud of the fact that his wife, whom he had married in 1928, Margery Avis, daughter of F. J. Bullows of Sutton Coldfield, was one of the most expert horsewomen in England.

Wright matriculated at Trinity College, Cambridge, in 1893, at the age of twenty-four, which is considerably older than is true of the normal undergraduate. He read Classics and was placed in the First Division of the First Class Part I of the Classical Tripos in 1895. He was placed in the First Class (undivided) of Part II of the Classical Tripos in 1896; the section which he took was that on philosophy, which stood him in such good stead later in life. He was elected to a Prize Fellowship in 1899 on a dissertation concerning a philosophical subject: according to the recollection of an old friend, it was concerned with the philosophy of Lotze.

A Fellowship at Trinity in those days entitled the winner to a stipend of about £200 a year for five years without any obligations. This income, supplemented by part-time law teaching, enabled him to go to the Bar and maintain himself while waiting for work. He was called to the Bar by the Inner Temple in 1900 when he was thirty-two. This is an illustration of the interesting fact that those who are called at what might be described as a mature age often prove unusually successful, as did, for example, Viscount Hailsham and Sir Patrick Hastings.

Wright was a pupil in the chambers of Mr. (afterwards Lord Justice) Scrutton, who was also a Trinity man. At that

time, he shared the leadership of the Commercial Bar with John Andrew Hamilton, later Viscount Sumner. The Commercial Court had been founded in 1895 when it became clear that difficult problems arising in the business world were not being adequately dealt with by some of the common law judges. Moreover, a common law jury might not be able to understand the commercial problems. Scrutton had a remarkable "stable" of pupils; in addition to Wright, they included Lord Atkin and Lord Justice Mackinnon. Work was very slow in coming to Wright and at one time he very nearly abandoned practice for whole-time law teaching. When work came, it came with a rush; he informed a friend that his fees rose from £300 in one year to £3,000 in the next.

When the First World War began in 1914 there was, as was natural, a decline in the ordinary business of the courts, but the Prize Court, as was inevitable, made up for this. The problems of Prize Law were of the greatest importance at that time because the strict enforcement of the blockade against Germany and her allies was an essential part of the war strategy by which the Allies hoped to win the war. It is of interest to note that in the Second World War there was only a single important prize case. The Commercial Court

also had to deal with the various novel problems concerning ~~the~~ impossibility of performance under the law of contract. Of equal interest were a number of cases concerning the nature of causation, e.g. whether the destruction of a ship had been caused by a war risk. It was in these that Wright was pre-eminent, for his training as a classical scholar and his interest in philosophy enabled him to deal with these difficult philosophical questions with unusual clarity and thoroughness. It was particularly in the House of Lords and in the Judicial Committee of the Privy Council that he shone. Perhaps "shone" is not the right word, because as "The Times" said in its obituary notice (29 June 1964): "Though he had an attractive vein of dry humour, his advocacy like that of several of his contemporaries in commercial practice was lugubrious rather than brisk." Thus, it is said that after addressing the House of Lords for several days in a case arising out of the destruction of Smyrna in 1922, he concluded in a hesitant manner by saying : "and then there is a claim in regard to a piano, but I will not go into that."

In 1917 Wright took silk and soon became the undisputed leader of the Commercial Bar. ~~In May 1925 he was nominated by Lord Cave L.C. to succeed Lush J., who had resigned. He had shown a certain amount of irritability during his last years at the Bar, due to overwork, but he made an excellent judge, showing more patience than had been expected.~~

In 1925 he was nominated by Lord Cave L.C. to be a judge of the High Court of Justice, King's Bench Division, in succession to Mr. Justice Lush, who had resigned. At the Bar, Wright's strength had lain in his capacity to marshal his facts in a clear and orderly manner, and to concentrate on those which were essential to the establishment of his case. This gave him particular strength when he became a trial judge. Although he had had virtually no experience in the criminal courts, he proved to be an outstanding criminal judge. His most famous criminal case was the trial of Lord Kylsant in 1931. Kylsant, who had been the Chairman of the Royal Mail ~~Steamship~~ Steam Packet Company, signed a prospectus relating to the issue of certain securities. It stated that "during the past ten years the average annual balance available has been sufficient to pay the interest on the present issue more than five times over." This statement was literally true, but Kylsant knew that other facts, which entirely altered the picture, were being deliberately suppressed. In his charge to the jury, Mr. Justice Wright emphasized that sometimes half a truth is no better than a downright falsehood. When Kylsant was convicted, he appealed to the Court of Criminal Appeal, but it affirmed his conviction, quoting at length from the Judge's summing up to the jury (Rex v. Lord Kylsant,

[1932] 1 K.B. 442).

Perhaps the most difficult case that came before Wright as a judge of first instance was the famous Banco de Portugal v. Waterlow & Sons Ltd., which proved to be as interesting and difficult for the economists as it was for the lawyers. The defendants, who were the well-known printers of bank-notes, were employed by the plaintiff bank to print a new issue of their notes. Thereafter the defendants delivered more than £500,000 of these notes to a group of conspirators who were able to put them into circulation in Portugal. There was little question that the printers had been guilty of negligence in acting without due care on the fraudulent instructions of the conspirators, but the great difficulty of the case lay in determining the measure of damages that the bank had suffered. On the one hand, it was argued that as there was no limit on the number of notes that the bank could issue, it followed that it had suffered nothing more than nominal damages by the issue of these notes. On the other hand, it was claimed for the bank that it was entitled to recover the full face value of the notes, which amounted to £569,421. Mr. Justice Wright gave judgment for the plaintiffs. This was reversed in the Court of Appeal, but was restored by the House of Lords, [1932] A.C. 452 by a majority of three to two.

The third outstanding case which Wright J. tried was Bell v. Lever Brothers Ltd. When Bell retired from the Chairmanship of the Niger Company, which was controlled by Lever Brothers, they agreed to pay him £30,000 as compensation for the loss of his office. Thereafter they discovered that he had entered into secret speculations in cocoa which would have entitled them to dismiss him from office without any payment being made. Wright J. held that the contract had been void, as it was based on a mutual mistake of fact affecting a fundamental assumption as the basis on which the agreement had been made. His judgment was affirmed in the Court of Appeal, but was later reversed in the House of Lords [1932] A.C. 161, by three to two. He remained unrepentant concerning that case, and many academic writers, both here and in the United States, have agreed with him. To allow a person to retain £30,000 in these circumstances seems to show an inelastic application of the concept of mistake.

In 1932 Wright was created a Lord of Appeal in Ordinary, by-passing the Court of Appeal. Some people thought that Lord Justice Scrutton ought to have been promoted, but his age prevented this, he being at that time seventy-six.

, and ordered that the moneys paid thereunder should be repaid by Bell.

Wright then began a career of fifteen years in the appellate courts which must have been one of the most successful in the whole of English legal history. It has always been the boast of the common law that it is founded on practical reason and sound common sense. ~~It is this~~ It was these characteristics which particularly distinguished the work of Lord Wright. He fought against subtle distinctions, unnecessary fictions, and historical survivals which are a hindrance to the proper development of the law. In the interpretation of statutes, of wills, and of contracts he always sought to avoid reaching a result which was inconvenient or apparently irrational. It might be said that he was the personification of the reasonable man. He was particularly interested in the law relating to damages which has suffered more than any other branch of the law from over-subtlety and misleading metaphors. He gave it a new start by his practical interpretation. Typical of his approach was his statement, in Liesbosch Dredger v. S.S. Edison, [1933] A.C. 449, 460, that "in the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic, but simply for practical reasons."

In 1935 Lord Hanworth resigned as Master of the Rolls,

i.e. President of the Court of Appeal. It was difficult at that time for the Government to find a suitable successor, so that Wright was persuaded to accept the office on the condition that he would return to the House of Lords as soon as possible. He found the work onerous, but the ~~three~~ two years during which he presided in the Court of Appeal were particularly valuable. ~~It is not possible to refer in detail to any of the great number of cases that he decided there, but~~ A quotation from his judgment in Berg v. Sadler & Moore, [1937] 2 K.B. 158, 162, may be of ~~value~~ interest as an illustration of his style. The point at issue in the case involved the maxim Ex turpi causa non oritur actio. Concerning this ~~This~~ he said :"This, though veiled in the dignity of learned language, is a statement of a principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities."

In 1937 Lord Wright returned to the House of Lords, and Sir Wilfrid Greene succeeded him as Master of the Rolls. His enthusiasm for the law remained unabated and many of his judgments have become leading authorities. Perhaps the most interesting was in Bourhill v. Young, [1943] A.C. 92, the famous "shock" case in which he rejected what has

been called the area of physical danger test, viz. a person who suffers from a mental shock can only recover damages if at the time of the shock he was so close to the scene of the accident that he was in physical danger. Here again, Lord Wright applied a rule of common sense when he suggested that the practical question was whether the defendants should have foreseen that the plaintiff might have received such a shock by becoming aware that such an accident, and should have guarded against it.

It ~~would be~~ is impossible to deal here in any detail with the many outstanding judgments that he delivered. As was natural, his pronouncements on commercial and shipping law were of peculiar importance. Reference may perhaps be made to Lazard Brothers & Co. Ltd. v. Midland Bank Ltd., [1933] A.C. 289, in which the consequences which followed on the dissolution of the Moscow Bank were in issue, and Bank of Baroda v. Punjab National Bank, [1944] A.C. 176, in which he discussed the certification of a cheque. But it is true to say that there was hardly a single branch of the law in which he was not an expert and to which he did not make a valuable contribution.

Some critics suggested that his judgments tended to be more like chapters from a text-book than a decision in

a particular case, because he placed so much emphasis on the history of the law and on some of its vagaries. It was, however, usually the busy practitioner who advanced this criticism rather than those who were concerned with law as a science. Wright realised that as a member of the House of Lords and of the Judicial Committee of the Privy Council it was his duty to see that the decisions of these Courts should not only reach a proper conclusion, but should also establish as far as possible general principles that could be followed in future cases. It was for this reason that his judgments were regarded with such great respect by the Courts both in the United States and in the Dominions, and were cited on a great number of instances in their own decisions.

Lord Wright's other contributions to the development of the law rank second only to his judgments. Collected in part in his "Legal Essays and Addresses" (1939) or published in the Law Quarterly Review, he played a notable role as an expounder and critic of the law. His attempt to place the law of quasi-contract, better known in the United States as the doctrine of unjust enrichment, on a rational basis by rejecting the fiction of an implied

contract, is known to all legal students. In this field he proved in large part to be successful, although the House of Lords has insisted in following its own precedent in Sinclair v. Brougham, [1914] A.C. 398. It is also probable that his criticism of the self-imposed rule that the House of Lords is absolutely bound by its own judgments will bear fruit in the near future. In no other countries do the highest courts place themselves in such a strait-jacket.

Wright never forgot that he had been a part-time law teacher for a ~~brief~~ number of years, with the result that there has probably been no other English judge who has done so much to encourage the study of law from the scholarly standpoint as he did. His address entitled "The Study of Law" (1938), 54 L.Q.R. 185-209, explained the absence in this country of a systematic and scientific study of law which Sir Frederick Pollock, whom he greatly admired, had deplored. Remembering his classical upbringing, he said : "What need then, it may be asked, is there for the scientific and systematic study of law ? Is it still not enough to proceed from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science ? Why

contaminate unenlightened common sense or rule of thumb by principle or system ?" He answered these questions with a firm negative. He pointed out that in one sense the systematic study of English law was impossible because although its growth had been determined in part by logic, it had also in part been based on convenience, on artificial or procedural requirements, and in part on power, accident, and on the survival of primitive habits of mind, while on the other hand he held that all this made it the more necessary to apply the scientific method so that anomalies could the better be eliminated when they had been unmasked. He then proceeded to give a brief illustration of legal rules that were out-of-date. Some of these have been eliminated since then by what he termed strong and liberal-minded judges who succeeded in distinguishing the present cases from those that had been decided in the past. Some of the anomalies have been eliminated by statutory reform.

Legislative law reform owes more to Wright than has ever been fully recognized. When Lord Sankey, the Lord Chancellor, appointed the Law Revision Committee in 1934 Lord Hanworth was its first chairman, but after a few months Lord Wright succeeded him. It was in large part due to his

enthusiasm and energy that the Committee issued eight Reports in the next five years, seven of which have been enacted by Parliament with only slight alterations. Only one of the Reports encountered stron opposition which side-tracked it until its provisions could be further debated. This was the Sixth Report, published in 1937, which recommended the abolition of the Statute of Frauds, except in regard to real property, and various alterations in the law relating to the necessity for consideration in contracts. Some of these recommendations, especially the one concerning the Statute of Frauds, have been given statutory effect in recent years, but a number of the technical rules concerning consideration still remain, so as to cause occasional injustice. It is of interest that the new Law Commission, created in 1965, has announced in its first Report that it will devote further study to these matters.

It was Wright's experience in the Prize Court during the 1914-18 War which, he said, first made him aware of the ruthless manner in which the Germans treated their enemies. He was, therefore, willing, in spite of his many legal commitments, to become in 1944 the Australian Representative

on the United Nations War Crimes Commission, and to accept the Chairmanship in 1945. The importance of the work done by this Commission has not been generally realized. It collected most of the material on which the charges ~~subsequently~~ thereafter presented at the trials at Nuremberg were based, and that Tribunal subsequently acknowledged how greatly its work had been facilitated by the care with which the Commission had performed its duties. In spite of his age Lord Wright visited some of the worst of the prison camps in Germany as soon as the fighting had stopped. For these services, he was awarded a G.C.M.G. in 1948.

Arising out of his work as Chairman of the War Crimes Commission, Lord Wright wrote an article entitled War Crimes Under International Law (1946, 62 Law Quarterly Review 40) which was one of the most important contributions ever made to that difficult subject. It explained the grounds on which the Governments of the United Kingdom, the United States, the French Republic, and the Union of Soviet Socialist Republics established a Tribunal for the trial and punishment of the major war criminals of the European Axis countries. The jurisdiction of the Tribunal covered the following crimes : (a) crimes against peace, i.e. planning and waging a war of aggression;

(b) war crimes, i.e. violations of the laws and customs of war; (c) crimes against humanity, in particular murder, enslavement, and torture. In the establishment of this Tribunal and in determining its jurisdiction, Lord Wright and Justice Robert H. Jackson of the United States Supreme Court played a major part.

In the introduction to his article Wright points out that the nature, the sources, and the sanctions of International Law differ radically from those of Municipal Law because the former has no legislature or established Court. Thus "International Law represents the imperfect endeavour to develop a body of rules and principles which will go towards establishing a rule of law among the nations.. . . There may be such rules without legislation, without Courts and without executives to give effect to them." To speak of ex post facto rules in this connection is meaningless for the rules are based on the recognition that they are part of "the instinctive sense of right and wrong possessed by all decent men - and all civilized nations." It is only in this way that International Law can develop.

Similarly as there was no established Court it was necessary to create an appropriate Tribunal similar to the Military Commission which had been established in the

United States to try the German prisoners who had been charged with landing in the United States for the purpose of spying and sabotage (cf. Saboteurs, Ex p., Quirin (1942) 317 U.S. 1.) Such a Court must be fair, and it must conduct the trial on principles of elementary justice, but it need not be neutral. Otherwise it would never be possible to try an enemy spy.

In regard to the jurisdiction of the Tribunal, Wright pointed out that war crimes and crimes against humanity had long been recognized as crimes by International Law. In convicting the prisoners at Nuremberg under these charges no novel law was being created so that it could not be argued that their convictions were based on ex post facto law. In regard to the crimes against peace it had become generally accepted in recent years that a war of aggression was the worst crime that could be committed for "it is the accumulated evil of the whole."

Having dealt with these major points, Lord Wright then replied to the arguments based on the defence of superior orders, and the defence of the immunity of heads of state.

At the present time the future of International Law seems to be a black one, but sooner or later it will be

necessary for the nations of the world to be governed by decent rules of conduct if they are to survive. When that time comes the importance of Lord Wright's contribution to International Law will be recognized.

Wright received many honours. In 1940 he was elected a Fellow of the British Academy. He was also elected an honorary Fellow of Trinity College, Cambridge, and he held the office of Deputy High Steward of Cambridge University.

A. L. Goodhart

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LORD WRIGHT

1869–1964

ROBERT ALDERSON WRIGHT, later Lord Wright of Durley, was always more interested in other people and in the things that they did than he was in himself or in his own remarkable career. As a result, there are few records of his early life; in *Who's Who*, the only references before he took his B.A. degree at Cambridge in 1896 are 'b. 15 Oct. 1869; s. of John Wright, South Shields; Educ. privately; Trinity College, Cambridge'. His father had been Marine Superintendent of South Shields, so that it was from him that his son obtained his first knowledge of ships which was to prove so useful to him later in his legal career. Strange to say, he never seemed to take any interest in sailing, although he was interested in other forms of sport. He once remarked that he had not been strong as a child and that he spent most of his time reading at home; this probably explains his passion for books and his belief in the importance of exercise. Although he never played any games, he was, as a young man, a keen mountaineer and a member of the Alpine Club. Later in life he became an enthusiastic horseman and continued to ride until he was over ninety. He was particularly proud of the fact that his wife, whom he had married in 1928, Margery Avis, daughter of F. J. Bullows of Sutton Coldfield, was one of the most expert horsewomen in England.

Wright matriculated at Trinity College, Cambridge, in 1893, at the age of twenty-four, which is considerably older than is true of the normal undergraduate. He read Classics and was placed in the First Division of the First Class Part I of the Classical Tripos in 1895. He was placed in the First Class (undivided) of Part II of the Classical Tripos in 1896; the section which he took was that on philosophy, which stood him in such good stead later in life. He was elected to a Prize Fellowship in 1899 on a dissertation concerning a philosophical subject: according to the recollection of an old friend it was concerned with the philosophy of Lotze.

A Fellowship at Trinity in those days entitled the winner to a stipend of about £200 a year for ~~five~~ six years without any obligations. This income, supplemented by part-time law teaching, enabled him to go to the Bar and maintain himself

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while waiting for work. He was called to the Bar by the Inner Temple in 1900 when he was thirty-two. This is an illustration of the interesting fact that those who are called at what might be described as a mature age often prove unusually successful, as did, for example, Viscount Hailsham and Sir Patrick Hastings.

Wright was a pupil in the chambers of Mr. (afterwards Lord Justice) Scrutton, who was also a Trinity man. At that time he shared the leadership of the Commercial Bar with John Andrew Hamilton, later Viscount Sumner. The Commercial Court had been founded in 1895 when it became clear that difficult problems arising in the business world were not being adequately dealt with by some of the common law judges. Moreover, a common law jury might not be able to understand the commercial problems. Scrutton had a remarkable 'stable' of pupils; in addition to Wright, they included Lord Atkin and Lord Justice Mackinnon. Work was very slow in coming to Wright, and at one time he very nearly abandoned practice for whole-time law teaching. When work came, it came with a rush; he informed a friend that his fees rose from £300 in one year to £3,000 in the next.

When the First World War began in 1914 there was, as was natural, a decline in the ordinary business of the courts, but the Prize Court, as was inevitable, made up for this. The problems of Prize Law were of the greatest importance at that time because the strict enforcement of the blockade against Germany and her allies was an essential part of the war strategy by which the Allies hoped to win the war. It is of interest to note that in the Second World War there was only a single important prize case. The Commercial Court also had to deal with the various novel problems concerning impossibility of performance under the law of contract. Of equal interest were a number of cases concerning the nature of causation, e.g. whether the destruction of a ship had been caused by a war risk. It was in these that Wright was pre-eminent, for his training as a classical scholar and his interest in philosophy enabled him to deal with these difficult philosophical questions with unusual clarity and thoroughness. It was particularly in the House of Lords and in the Judicial Committee of the Privy Council that he shone. Perhaps 'shone' is not the right word, because as *The Times* said in its obituary notice (29 June 1964): 'Though he had an attractive vein of dry humour, his advocacy like that of several of his contemporaries in commercial practice was lugubrious rather than brisk.' Thus, it is said that after addressing the

House of Lords for several days in a case arising out of the destruction of Smyrna in 1922, he concluded in a hesitant manner by saying: 'and then there is a claim in regard to a piano, but I will not go into that.' In 1917 Wright took silk and soon became the undisputed leader of the Commercial Bar.

In 1925 he was nominated by Lord Cave L.C. to be a judge of the High Court of Justice, King's Bench Division, in succession to Mr. Justice Lush who had resigned. At the Bar Wright's strength had lain in his capacity to marshal his facts in a clear and orderly manner, and to concentrate on those which were essential to the establishment of his case. This gave him particular strength when he became a trial judge. Although he had had virtually no experience in the criminal courts, he proved to be an outstanding criminal judge. His most famous criminal case was the trial of Lord Kylsant in 1931. Kylsant, who had been the Chairman of the Royal Mail Steam Packet Company, signed a prospectus relating to the issue of certain securities. It stated that 'during the past ten years the average annual balance available has been sufficient to pay the interest on the present issue more than five times over'. This statement was literally true, but Kylsant knew that other facts, which entirely altered the picture, were being deliberately suppressed. In his charge to the jury, Mr. Justice Wright emphasized that sometimes half a truth is no better than a downright falsehood. When Kylsant was convicted, he appealed to the Court of Criminal Appeal, but it affirmed his conviction, quoting at length from the judge's summing up to the jury (*Rex* v. *Lord Kylsant*, [1932] 1 K.B. 442).

Perhaps the most difficult case that came before Wright as a judge of first instance was the famous *Banco de Portugal* v. *Waterlow & Sons Ltd.*, which proved to be as interesting and difficult for the economists as it was for the lawyers. The defendants, who were the well-known printers of bank-notes, were employed by the plaintiff bank to print a new issue of their notes. Thereafter the defendants delivered more than £500,000 of these notes to a group of conspirators who were able to put them into circulation in Portugal. There was little question that the printers had been guilty of negligence in acting without due care on the fraudulent instructions of the conspirators, but the great difficulty of the case lay in determining the measure of the damages that the bank had suffered. On the one hand, it was argued that as there was no limit on the number of notes that the bank could issue, it followed that it had

suffered nothing more than nominal damages by the issue of these notes. On the other hand, it was claimed for the bank that it was entitled to recover the full face value of the notes, which amounted to £569,421. Mr. Justice Wright gave judgement for the plaintiffs. This was reversed in the Court of Appeal, but was restored by the House of Lords, [1932] A.C. 452, by a majority of three to two.

The third outstanding case which Wright J. tried was *Bell* v. *Lever Brothers Ltd.* When Bell retired from the chairmanship of the Niger Company, which was controlled by Lever Brothers, they agreed to pay him £30,000 as compensation for the loss of his office. Thereafter they discovered that he had entered into secret speculations in cocoa which would have entitled them to dismiss him from office without any payment being made. Wright J. held that the contract had been void, as it was based on a mutual mistake of fact affecting a fundamental assumption as the basis on which the agreement had been made, and ordered that the moneys paid thereunder should be repaid by Bell. His judgement was affirmed in the Court of Appeal, but was later reversed in the House of Lords, [1932] A.C. 161, by three to two. He remained unrepentant concerning that case, and many academic writers, both here and in the United States, have agreed with him. To allow a person to retain £30,000 in these circumstances seems to show an inelastic application of the concept of mistake.

In 1932 Wright was created a Lord of Appeal in Ordinary, by-passing the Court of Appeal. Some people thought that Lord Justice Scrutton ought to have been promoted, but his age prevented this, he being at that time seventy-six.

Wright then began a career of fifteen years in the appellate courts which must have been one of the most successful in the whole of English legal history. It has always been the boast of the common law that it is founded on practical reason and sound commonsense. It was these characteristics which particularly distinguished the work of Lord Wright. He fought against subtle distinctions, unnecessary fictions, and historical survivals which are a hindrance to the proper development of the law. In the interpretation of statutes, of wills, and of contracts he always sought to avoid reaching a result which was inconvenient or apparently irrational. It might be said that he was the personification of the reasonable man. He was particularly interested in the law relating to damages which has suffered more than any other branch of the law from over-subtlety and

misleading metaphors. He gave it a new start by his practical interpretation. Typical of his approach was his statement, in *Liesbosch Dredger* v. *S.S. Edison*, [1933] A.C. 449, 460, that 'in the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic, but simply for practical reasons'.

In 1935 Lord Hanworth resigned as Master of the Rolls, i.e. President of the Court of Appeal. It was difficult at that time for the Government to find a suitable successor, so that Wright was persuaded to accept the office on the condition that he would return to the House of Lords as soon as possible. He found the work onerous, but the two years during which he presided in the Court of Appeal were particularly valuable. A quotation from his judgement in *Berg* v. *Sadler & Moore*, [1937] 2 K.B. 158, 162, may be of interest as an illustration of his style. The point at issue in the case involved the maxim *Ex turpi causa non oritur actio*. Concerning this he said: 'This, though veiled in the dignity of learned language, is a statement of a principle of great importance; but like most maxims it is much too vague and much too general to admit of application without a careful consideration of the circumstances and of the various definite rules which have been laid down by the authorities.'

In 1937 Lord Wright returned to the House of Lords, and Sir Wilfred Greene succeeded him as Master of the Rolls. His enthusiasm for the law remained unabated and many of his judgements have become leading authorities. Perhaps the most interesting was in *Bourhill* v. *Young*, [1943] A.C. 92, the famous 'shock' case in which he rejected what has been called the area of physical danger test, viz. a person who suffers from a mental shock can only recover damages if at the time of the shock he was so close to the scene of the accident that he was in physical danger. Here again, Lord Wright applied a rule of commonsense when he suggested that the practical question was whether the defendants should have foreseen that the plaintiff might have received such a shock by becoming aware of such an accident, and that they should have guarded against it.

It is impossible to deal here in any detail with the many outstanding judgements that he delivered. As was natural, his pronouncements on commercial and shipping law were of peculiar importance. Reference may perhaps be made to *Lazard Brothers & Co. Ltd.* v. *Midland Bank Ltd.*, [1933] A.C. 289, in which the consequences which followed on the dissolution of the Moscow Bank were in issue, and *Bank of Baroda* v. *Punjab*

National Bank, [1944] A.C. 176, in which he discussed the certification of a cheque. But it is true to say that there was hardly a single branch of the law in which he was not an expert and to which he did not make a valuable contribution.

Some critics suggested that his judgements tended to be more like chapters from a textbook than a decision in a particular case, because he placed so much emphasis on the history of the law and on some of its vagaries. It was, however, usually the busy practitioner who advanced this criticism rather than those who were concerned with law as a science. Wright realized that as a member of the House of Lords and of the Judicial Committee of the Privy Council it was his duty to see that the decisions of these Courts should not only reach a proper conclusion, but should also establish as far as possible general principles that could be followed in future cases. It was for this reason that his judgements were regarded with such great respect by the Courts both in the United States and in the Dominions, and were cited on a great number of instances in their own decisions.

Lord Wright's other contributions to the development of the law rank second only to his judgements. Collected in part in his *Legal Essays and Addresses* (1939) or published in the *Law Quarterly Review*, he played a notable role as an expounder and critic of the law. ~~His attempt to place the law of quasi-contract, better known in the United States as the doctrine of unjust enrichment, on a rational basis by rejecting the fiction of an implied contract, is known to all legal students.~~ In this field he proved in large part to be successful, although the House of Lords has insisted on following its own precedent in *Sinclair* v. *Brougham*, [1914] A.C. 398. It is also probable that his criticism of the self-imposed rule that the House of Lords is absolutely bound by its own judgements will bear fruit in the near future. In no other countries do the highest courts place themselves in such a strait-jacket.

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In the introduction to his article Wright points out that the nature, the sources, and the sanctions of International Law differ radically from those of Municipal Law because the former has no legislature or established Court. Thus 'International Law represents the imperfect endeavour to develop a body of rules and principles which will go towards establishing a rule of law among the nations. . . . There may be such rules without legislation, without Courts and without executives to give effect to them.' To speak of *ex post facto* rules in this connexion is meaningless for the rules are based on the recognition that they are part of 'the instinctive sense of right and wrong possessed by all decent men—and all civilized nations'. It is only in this way that International Law can develop.

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try the German prisoners who had been charged with landing in the United States for the purpose of spying and sabotage (cf. *Saboteurs, Ex p., Quirin* (1942) 317 U.S. 1.) Such a Court must be fair, and it must conduct the trial on principles of elementary justice, but it need not be neutral. Otherwise it would never be possible to try an enemy spy.

In regard to the jurisdiction of the Tribunal, Wright pointed out that war crimes and crimes against humanity had long been recognized as crimes by International Law. In convicting the prisoners at Nuremberg under these charges no novel law was being created so that it could not be argued that their convictions were based on *ex post facto* law. In regard to the crimes against peace it had become generally accepted in recent years that a war of aggression was the worst crime that could be committed for 'it is the accumulated evil of the whole'.

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At the present time the future of International Law seems to be a black one, but sooner or later it will be necessary for the nations of the world to be governed by decent rules of conduct if they are to survive. When that time comes the importance of Lord Wright's contribution to International Law will be recognized.

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A. L. Goodhart

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LORD WRIGHT

Law Quarterly Review, 1947, 63 L.Q.R. 259, 261.

On the occasion of Lord Wright's resignation, the Law Quarterly published a brief tribute to him. It pointed out that although he had had little previous experience in criminal or ordinary common law trials, he proved to be remarkably successful with juries, who appreciated his common sense. It has been said that his conduct of the Kylsant case, which has proved so important in stressing the necessity for good faith in company law, was a model of its kind, and that no other Judge could have so successfully explained to a jury the basic principles involved.

His judgment in Lever Brothers v. Bell was affirmed in the Court of Appeal, but was later reversed by a majority in the House of Lords, 1932, A.C. 161. He remained unrepentant concerning that case, and many academic writers, both here and in the United States, agree with him. In this case, the Company paid £30,000 to cancel a contract which it could have avoided for nothing.

It has always been the boast of the common law that it is founded on practical reason and sound common sense. It is this characteristic which particularly distinguishes the work Lord Wright has done. He has fought against

subtle distinctions, unnecessary fictions, and historical survivals which are a hindrance to the proper development of the law. In the interpretation of statutes, of wills and of contracts he ~~has~~ always sought to avoid reaching a result which is inconvenient or irrational. If we may say so, he is the personification of the reasonable man.

Among his important cases were Lazard Brothers & Co. v. Midland Bank Ltd., 1933, A.C. 289, which concerned the dissolution of the Moscow Bank; Bourhill v. Young, 1943, A.C. 92, the shock case; and Liesbosch, Dredger v. s.s. "Edison", 1933, A.C. 449. He said : "In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic, but simply for practical reasons."

In other cases, he tried to place the doctrine of unjust enrichment on a rational basis. He rejected the fiction of an implied contract. He also criticized the rule which the House of Lords has imposed on itself that it is absolutely bound by its own judgments.

Obituary

LORD WRIGHT

FORMER LORD OF APPEAL

Lord Wright, P.C., G.C.M.G., a former Master of the Rolls and Lord of Appeal, died on Saturday at his home near Marlborough. He was 94.

Robert Alderson Wright's career owed nothing either to birth or to fortune. He was the son of John Wright, Marine Superintendent of South Shields. Born on October 15, 1869, he was educated privately and at Trinity College, Cambridge, and graduated in 1896 with a first class in the Classical Tripos. He was a Fellow of Trinity from 1899 to 1905, and was called to the Bar by the Inner Temple in 1900, in his thirty-second year.

Wright was a pupil of Mr. (afterwards Lord Justice) Scrutton, then at the height of his very large commercial practice. From the close of the last century the Commercial Court had begun to be the stepping-stone to many promotions to the Bench, and, as the leaders passed upwards, first-rate juniors in that branch had great opportunities for advancement. By 1917, the year in which he took silk, Wright had achieved a high position in the confidence of the City firms of commercial solicitors. While the 1914-18 War brought a decline in the ordinary mercantile business of the Courts, the Prize Court was a valuable source of additional profit, and the end of the war brought an aftermath of litigation. From that time onward Wright was in nearly every important commercial case before the Courts, and was frequently briefed before the House of Lords and the Judicial Committee of the Privy Council. Though he had an attractive vein of dry humour, his advocacy, like that of several of his contemporaries in commercial practice, was lugubrious rather than brisk.

When in May, 1925, Mr. Justice Lush resigned, Wright's nomination by Lord Cave, then Lord Chancellor, to fill the vacancy was received by the profession with great satisfaction. He made an excellent Judge, and showed more patience on the Bench than was expected from a somewhat irritable manner, for which perhaps overwork was responsible, occasionally displayed at the Bar. In his earlier days on the Bench he was a Judge of the silent type, but it was noticed that latterly in the House of Lords and Privy Council he developed the habit of maintaining a running commentary on the arguments of counsel.

TWO NOTABLE TRIALS

As the commercial cases which he usually tried were not widely reported in the press, his name was little known to the public. Towards the close of his career as a Judge of the King's Bench Dvision, however, it fell to him to preside over two of the most remarkable cases of their day—Banco de Portugal v. Waterlow and Sons, Ltd., and the trial of Lord Kylsant. The first of these arose out of a criminal conspiracy of which Waterlows, the well-known printers, were the innocent victims. They were induced to print a large number of notes in the belief that the Bank of Portugal had given authority, and the notes were put into circulation in Portgual. The hearing of the action before Wright occupied 21 days, at the end of 1930, and he gave judgment for the bank for £569,421. In July, 1931, he presided at the trial of Lord Kylsant at the Central Criminal Court on charges of publishing, as chairman of the Royal Mail Steam Packet Company, false balance-sheets and a false prospectus. On the first charge he was acquitted, but he was convicted on the second and sentenced to 12 months' imprisonment. Wright's handling of this intricate case greatly enhanced his already high reputation as a Judge, and on the resignation of Lord Dunedin as a Lord of Appeal, in April, 1932, he was singled out at once among about three Judges as likely to be promoted. His appointment was entirely justified, and at a time when the House of Lords and Privy Council had never been stronger in legal talent his presence added even greater strength to those Courts. His legal path had lain among the type of litigation which comes before the final tribunals, and at the Privy Council his fine mind soon made itself master of the intricacies of Indian litigation.

In 1935 an unusual break occurred in Wright's judicial career. Lord Hanworth, shortly before his death, had resigned the Mastership of the Rolls in October, and at the time the Government was in some difficulty in filling the post satisfactorily. Wright was invited to take it on the understanding that, on the first vacancy arising among the Lords of Appeal, he would be at liberty to resume his former office. The Mastership of the Rolls, with its appanages, at that time the Record Office, as well as the control of solicitors, is recognized as the most onerous of judicial posts, and Wright, who was neither young nor very robust when he assumed it, was understood to feel the strain and was somewhat annoyed that the resignation of one of the Lords of Appeal was delayed beyond its expected time. However, in April 1937, a vacancy occurred, and Wright, to his great satisfaction, resumed his former duties as a Lord of Appeal which he carried out until his resignation in 1947.

WAR CRIMES COMMISSION

In February, 1945, he was elected chairman of the United Nations War Crimes Commission. The object of this commission was the collection of material on which the charges subsequently investigated at the trials at Nuremberg were based. During their inquiries the members of the commission visited Germany and inspected the camps where the worst crimes had been perpetrated. Later, at the invitation of the Australian Government, Lord Wright went by air to Japan to attend the trials of the war criminals there. He also visited Washington for consultation with the American authorities. It was generally agreed that the work of the Nuremberg Tribunal was greatly facilitated by the care and speed with which the commission had performed their duties. For these services he was made a G.C.M.G. in 1948.

He was made a Bencher of his Inn in 1923, and elected Treasurer in 1946. For a time Wright was chairman of the committee concerned with law revision, a topic much under discussion at the present time. He had been Deputy High Steward of Cambridge University which conferred on him the degree of Hon. LL.D., as also did the Universities of Birmingham, London, and Toronto.

In his younger days Wright had been a mountaineer and was a member of the Alpine Club. He was also a keen horseman, a taste shared by the lady whom he married in 1928, Margery Avis, daughter of F. J. Bullows, of Sutton Coldfield.

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TEL: VICTORIA 0350.

59, CADOGAN GARDENS,
S.W.3.

June 10th 1926.

Dear Mr Goodhart

Thank you for your letter of April 26th, referring to my speech on the position of the Prime Minister. I have not been able to answer before because of pre-occupation about the General strike, and its consequences.

I think it is quite possible that I may manage an article on the subject for the October number of the Law Quarterly, but I should have to put the thing together during August. If you will keep me up to scratch about this I will do my best, for I may say that my speech has attracted some attention in high quarters, and I think the subject calls for new treatment in view of recent events and developments.

Yours sincerely,

John Simon

A. L. Goodhart, Esq
Corpus Christi College
Cambridge.

P.S. Macmillan are about to publish for me a book entitled "Three Speeches on the General Strike" with some legal matter which might interest you.

VICE REGAL LODGE,
DUBLIN.

Aug 30
1926

Dear Mr Goodhart,

I am afraid I cannot manage that article on the position of the Prime Minister which you suggested for the October number of the Law Quarterly. I am away from books & have not managed all the reading which I planned for it. Perhaps

I might also [illegible] for a later number.

I was glad to see from a note of "F. P's" in the July number that Pollock is disposed to agree with me about the essential illegality of the General Strike.

Yours sincerely

John Simon

HOUSE OF LORDS,
S.W.1

(TEL.: WHITEHALL 6240)

In any reply please quote No.

27th Dec.,
1 9 4 0.

My dear Prof. Goodhart,

It was most kind of you to remember me so pleasantly this Christmastide, and I am looking forward to reading your two booklets with both interest and profit. Owing to the erratic war-time posts they did not reach me till to-day, so I have not yet had time to give them more than a cursory glance, but, on looking through them, they appear to me to fill a very definite need. It is invaluable to have these problems presented in a succinct and easily-assimilable form, so that the ordinary man and woman can see them as a whole in all their complexity and so escape being carried away by sentiment and prejudice.

With every good wish for the coming year,

Yours sincerely

Simon

Professor
A.L. Goodhart.

HOUSE OF LORDS,
S.W.1

5th November, 1941.

My dear Goodhart,

I thought you might be interested in the enclosed brief discourse and possibly might find in it material for a note in the L.Q.R. I like your October number - it is amusing to see the controversy about Benham v. Gambling still going on! What is wanted, I should say, is an amending or repealing Act of Parliament - don't you think so?

I had Winfield staying with me last night and we discoursed on many things from "cabbages to kings". You will find the last number of the Appeal Cases includes some interesting decisions in the highest tribunals, but it was too late for your last issue. The reporter is not very swift and there is quite an accumulation of Lords' decisions which he has not yet got into published form.

Is there any ancient authority known to you on the question whether those who exercise a market franchise (in this case a local authority holding a cattle market on the highway) are under any duty towards the public using the ordinary roads to protect them from escaping cattle? This is an amusing point which we have now to decide, and there are indications at the moment that opinion may be divided, though I am not without hope that we shall ultimately agree. My own view, at any rate at present, is that there is no such duty. The market authority provides pens, not to keep cattle shut up so that they will not hurt members of the public, but in order that the business of the market may be conveniently carried on. An escaping steer, with a

hitherto unblemished character, is not a lion or a tiger carelessly released out of a menagerie, but is one of the most ancient examples of a wayfarer on the public roads. I suppose there is no analogy in the Year Book - something about the Abbot of Crowland's cow having upset the Bishop of Ely during his peregrinations.?

Yours ever,

Simon

Professor A.L. Goodhart, LL.D.

HOUSE OF LORDS,
S.W.1

19th November, 1941.

Dear Goodhart,

Thank you for your letter of November 10th. As regards the Brackenborough case, I have a clear view which I think may be shared by the others who took part in hearing the Appeal. If I may venture to make a comment on what is in your letter, I would say that it seems to me very important to distinguish between the obligations of the market-authority to the owner of cattle who escape because of a defect in the pen, and the obligations of the market-authority to a member of the general public who happens to be in the road outside the market. I entirely agree with your comment that Slesser L.J. went off the rails by relying so much on the Knott case.

As for my discourse about these Foreign Maritime Courts, you are, of course, welcome to make any use of the material I sent you in the L.Q.R. as you think fit. I did in fact make a second speech about the subject when the opening of the Norwegian Court was celebrated at a luncheon and I enclose the only note I have of it.

Lastly, about Regulation 18B I venture to hope that you will not emulate the performances of some other persons who are alleged to be constitutional authorities, and encourage confusion among two perfectly different things. One is the abstract and general propositions about civil liberty and habeas corpus, which no lawyer or statesman would ever dream of treating lightly. The

IN REPLYING TO THIS LETTER THE FOLLOWING NUMBER SHOULD BE QUOTED

HOUSE OF LORDS,
S.W.1

22nd December 1941.

My dear Goodhart,

I am sending you a copy of a magazine calling itself "The Solicitor", which on page 196 goes to great length about the Liversidge case. I am glad to hear that you will have some articles about it in the coming number of the L.Q.R. I could wish that, with all this ignorant but lofty criticism about, you found it in your heart to write a paragraph somewhat as follows:-

"The House of Lords' decision about the meaning and application of Defence Regulation 18B brought out a fine crop of letters to the "Times", from a perusal of which one would gather that some at any rate of the writers did not appreciate what was the point to be decided. The point was nothing more than the proper interpretation of half a dozen words, yet some of the most voluble and emphatic of the commentaries which followed treated the decision as though the judicial defence of fundamental, constitutional liberties was involved. The decision of the House of Lords (albeit with one distinguished dissentient) must be taken to be good law, and we have the less reason for doubting it since Lord Maugham and the three Law Lords who agreed with him were taking the same view which had commended itself more than once to members of the Court of Appeal, to the Lord Chief Justice and to a number of Judges of First Instance. Two things in the subsequent commentaries have particularly surprised us and we may take as an illustration Mr. P.E. Roberts' letter, for it contains both. First, an analogy is sought to be drawn between decisions of the time of Charles I touching individual liberty and the decision in the present case. There could not be a more complete contrast. The Caroline argument was that the executive could inflict imprisonment upon a citizen without any authority given by an Act of Parliament. The present decision is in relation to a regulation, which is admittedly authorised by an Act of Parliament, which expressly provided for

other is the wholly different question as to the correct interpretation of half a dozen words in a particular Defence Regulation. The latter was, of course, the only question before the House of Lords, and, with all respect to some correspondents of the Times, is not a point of vast general constitutional importance at all. I notice that Mr. P.E. Roberts (in addition to calling the majority view in the House of Lords a "verdict", which I hope is not the way in which he instructs his pupils) is pleased to say that it is now generally recognised that Lord Shaw's judgment in ex parte Halliday was right, and that all the others were wrong. Thus is constitutional history written. I doubt whether P.E.R. even knows that the issue in Halliday's case was quite different, viz. whether the Defence of the Realm Act was sufficiently wide to authorise the making of the regulation. No question of the meaning of the regulation was involved. Why he should announce ex cathedra that Finlay, Dunedin, Atkinson and Simonds were wrong and the late Shaw right, I have not the least idea. He had better include in his condemnation Swinfen Eady, Pickford, Bankes, Reading, A.T. Lawrence, Rowlatt and Atkin L.J.J. all of whom took the 'majority view'.

Come and look me up when next you are in London.

Yours very sincerely,

Simon

Professor A.L. Goodhart, LL.D.

such a regulation being made. It would be the height of absurdity not to appreciate the distinction between the inability of the executive to detain without Parliamentary authority, and the power of the executive to detain when statutory authority is given. Secondly, Mr. Roberts makes the surprising assertion that Lord Shaw's dissenting judgment in Rex v. Halliday soon came to be regarded as right, and the verdict (sic) of the majority as wrong. One wonders from what source of information, hitherto concealed from the rest of us, this assertion is derived. Halliday's case dealt with a wholly different matter, viz. the question whether in the last War the old Regulation 14B was within the Defence of the Realm Act, and with all respect to the memory of the late Lord Shaw, it requires a double dose of academic omniscience to assert, a quarter of a century later, that the view expressed by Lord Finlay, Lord Dunedin, Lord Atkinson, Lord Wrenbury, Lord Reading, Lord Justice Swinfen Eady, Lord Justice Pickford, Lord Justice Bankes, Mr. Justice A.T. Lawrence, Mr. Justice Rowlatt, Mr. Justice Low and Mr. Justice Atkin is, by common consent, erroneous."

I think I promised you a copy of my judgment about the escaping steer. Here it is. It is an extraordinary coincidence that on the day the judgment was delivered the "Times" contained an extract from its issue of December 15th, 1841, which was about a similar incident tried at the Mansion House.

Yours very sincerely,

Simon

Professor A.L. Goodhart, LL.D.

HOUSE OF LORDS,
S.W.1.

30th December 1941.

My dear Goodhart,

I return the proofs, which I have read with much interest and approval. I am very glad indeed, if I may say so, that your own editorial note should refer to Maugham's "powerful judgment". The approval is, I venture to think, abundantly deserved and it will give him great satisfaction.

I still hanker for the mention of some of the "thirteen Judges who disagreed with Lord Shaw". I have ventured to insert for your consideration an additional sentence. You notice, of course, that Laski's assertion is that Lord Shaw's dissent was "justice" - apparently a statement on the lines of "that may be law but it is not justice". The egregious P.E.R. I think improved on this and asserted that all competent lawyers considered Lord Shaw's conclusion was the correct law.

I am delighted to see how clearly you have pointed out the distinction between Caroline despotism and internment based on Statute.

A possibly far-fetched analogy has occurred to me while dictating this letter. Supposing that Parliament was to put the duty of the Home Secretary on the subject of reprieving murderers in Statutory form, I suppose the enactment might run - "After sentence of death has been passed and before the execution takes place, the Home Secretary shall consider all the circumstances of the case and if he has reasonable cause to believe that the circumstances afford no sufficient ground why the convicted person should be reprieved, he shall direct that the execution should take place". Could the murderer, on learning that he was to be hanged, issue a writ against the Home Secretary alleging that there was reasonable cause for his reprieve? I hope I shall not be regarded

as too "executive minded" if I advance the view that no such action would be conceivable.

My wife joins me in kind regards and good wishes for 1942 to you both.

Yours sincerely,

Simon

Professor A.L. Goodhart, LL.D.

P.S. By the way, I might let you know that I am quoting Lord Selborne's dictum in Caledonian Railway v. North British Railway in a judgment I am preparing to deliver on the proper construction of a cryptic clause dealing with income tax.

"DOWDING".
TADWORTH.
SURREY.

~~71 ADDISON ROAD~~
~~LONDON. W.14.~~
~~PARK 0470.~~

19th February, 1942.

My dear Goodhart,

I send you two pronouncements of mine in the House of Lords to-day.

Heyman and Darwins is, I hope, going to be a really useful decision and I have tried to state in unmistakable terms the true rules which govern the application of an Arbitration Clause. Macmillan and Wright both said expressly that they agreed with my general propositions.

In order to reach this smooth water I had to explain, or rather explain away, three decisions of the highest authority which in my humble judgment contain ~~d~~ bad reasoning and false conclusions. Two in the House of Lords and one in the Privy Council! It is worth noting that the two bad decisions in the Lords in both cases arose when the then Lord Chancellor tried his hand at giving judgment extempore! What a warning to their successors to be more careful.

The other case is of less general interest because it ~~deals~~ turns on crabbed sections of the Income Tax Acts, but it is not unamusing, for my proposition in effect comes to this, that in the Finance Acts the House of Commons must be given much latitude to use legal expressions in the wrong sense. I am rather pleased about the result, for my Draft Judgment started a conversion among my colleagues which can only be compared with the achievements of St. Augustine. Russell, however, remains obdurate and supports Clauson who wrote a very powerful judgment in the Court of Appeal.

You will soon have the decision in the Constitutional case which came to us from Northern Ireland. It was argued at each stage in grandiose fashion, until I ventured to ask in the House of Lords whether in Northern Ireland, if a man was prosecuted before a Magistrate and discharged, the prosecution could appeal to Quarter Sessions! Whereupon, after great flusteration and the summoning of the A.G. for Northern Ireland, it appeared that the whole of the proceedings through

three Courts had been carried out when there was no jurisdiction at all - a very Hibernian result, and not too creditable to the legal and judicial authorities over there. I think I shall get the TIMES to write a short Leader about it entitled - "The Court That Took The Wrong Turning".

Yours ever,

Simon

Professor Goodhart.

HOUSE OF LORDS,
S.W.1

(TEL. WHITEHALL 6240)

In any reply please quote No.

5th March 1942.

My dear Goodhart,

Here is a copy of the soi-disant "constitutional" case of Northern Ireland which, after a question from the Woolsack, turned into what may become a locus classicus dealing with the rule that there is no appeal open to the prosecution when the prosecution fails. The only broad exception that I can recall is in the code of Indian criminal procedure, where it has been thought necessary to let the prosecution appeal from the first Judge. I think there may be an exception by Statute in one or two unusual instances, but I have not looked them up.

Yours sincerely,

Simon

Professor A.L. Goodhart, LL.D.

P.S. Thank you very much for your comments on Heyman v. Darwin and on Gibbs. I am making the corrections you suggest.

10

HOUSE OF LORDS,
S.W.1

(TEL.: WHITEHALL 6240)

In any reply please quote No.

3rd June 1942.

Confidential.

My dear Goodhart,

It is very good of you to say that you will look in to see me here on Friday after 4. I feel rather ashamed to make such a call on you, but the fact is that I am just completing a judgment which will overthrow Chandler v. Webster, and would very much value your confidential advice on the way I have tried to put it. This is all, of course, most confidential, but you may be interested to learn that the House of 7 judicial persons is unanimous in this view.

I venture to enclose a rough draft of my main passages. If you are able to look at this and bring it up with you, I shall benefit the more from our talk.

Yours sincerely,

Simon

Professor A.L. Goodhart, LL.D.

Confidential
please return

This alleged principle is to the effect that where a contract has been frustrated by such a supervening event as releases from further performance "the loss lies where it falls", with the result that sums paid before that event are not to be surrendered, but that all obligations falling due for performance after that event are discharged. This proposition, whether right or wrong, does not first appear in Chandler v. Webster, but in Blakeley v. Muller & Co., decided by a Divisional Court in January 1903, [1903] 2 K.B.760 Note, which was also a case arising out of the abandonment of the coronation procession owing to King Edward VII's sudden illness. In that case, Mr. Justice Channell said, "If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back, and it could be sued for . . . It is impossible to import a condition into the contract which the parties could have imposed and have not done so. All that can be said is that when the procession was abandoned, the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment. It is like a case of a charter party where the freight is payable in advance and the voyage is not completed, and the freight, therefore, not earned. Where the non-completion arose through impossibility of performance, the freight could not be recovered back." In Civil Service Co-Operative Society, Ltd. v. General Steam Navigating Co., which was decided in the Court of Appeal in October 1903 [1903] 2 K.B. 756, Lord Halsbury L.C. expressed entire concurrence with this passage in the judgment of Mr. Justice Channell. Lord Alverstone C.J., who was a party to both these decisions, took the same view.

If we are to approach this problem anew, it must be premised that the first matter to be considered is always the terms of the particular contract. If the contract itself stipulates for a particular result which is to follow in regard to money already paid should frustration afterwards occur, this governs the matter. The ancient and firmly established rule that freight paid in advance is not returned if the completion of the voyage is frustrated should, I think, be regarded as a stipulation introduced into such contracts by custom, and not as the result of applying some abstract principle.

The question now to be determined is whether, in the absence of a term in the contract dealing with the matter, the rule which is commonly called the rule in Chandler v. Webster should be affirmed.

This supposed rule has been constantly applied in a great variety of cases which have since arisen, and necessarily so, because the rule had been laid down in plain terms by the Court of Appeal in England, and the present appeal provides the first occasion on which it can be effectively challenged. A very different rule prevails in Scotland, as was made plain by the decision of this House in Cantiere San Rocco v. Clyde Shipbuilding and [illegible]ering Co. [1924] A.C.226. In that case the Earl of Birkenhead (at p.233) was careful to reserve the question whether Chandler v. Webster and the other English cases on the point were rightly decided, saying, "The question is as to the law of Scotland, and I desire to say nothing which may in any way fetter opinion if those authorities hereafter come to be reviewed by this House, for none of them is binding upon your Lordships." Similarly, Viscount Finlay (at p.241) observed that it would be out of place on that occasion to enter into the question dealt with in Chandler v. Webster, adding, "the principle of English law was re-stated with great clearness by Lord Fanmoor in the case of French Marine v. Compagnie Napolitaine d'Eclairage et Chauffage par le Gaz (27 Com.Cas. 69 at p.94). This statement forms no part of the judgment of the House of Lords in that case, but there is no doubt that the principle has been repeatedly acted on in the Court of Appeal." Lord Dunedin in the Cantiere San Rocco case (at p.248) referred to the different angle of approach from which an English or a Scottish Judge would look at the question, and thought that the cause was to be found in the reluctance of the English law to order the repayment of money once paid. But he added, "I do not enlarge on the topic, for I am not at all concerned to criticise English law . . . . For the purpose of this case, it is sufficient to say, as I unhesitatingly do, that Chandler v. Webster, if it had been tried in Scotland, would have been decided the other way." Lord Dunedin's restraint was not imitated by Lord Shaw, whose pronouncement included a vigorous denunciation (at p.259) of the proposition that the loss lies where it falls as amounting to a maxim which "works well enough enough among tricksters, gamblers, and thieves." The learned Lord asserted

that this was part of the law of England (presumably meaning that it had been so laid down by the English Court of Appeal), but patriotically rejoiced that it had never been part of the law of Scotland.

Mr. Valentine Holmes, in his able argument for the Respondents, asked us to consider whether this House would be justified in disturbing a view of the law which has prevailed for nearly forty years, which has been so frequently affirmed, which has been constantly applied in working out the rights of the parties to commercial contracts, and which, moreover, at any rate furnished a simple rule against the effect of which the parties to a contract can, if they so desire, expressly provide. These are weighty considerations, but I do not think they ought to prevail in the circumstances of this case over our primary duty of doing our utmost to secure that the law on this important matter is correctly expounded and applied. If the view which has hitherto prevailed in this matter is found to be based on a misapprehension of legal principles, it is of great importance that these principles should be correctly applied, for, if not, there is a danger that the error may spread in other directions, and a portion of our law of contract be erected on a false foundation. Moreover, though the so-called rule in Chandler v. Webster is forty years old, it has not escaped much unfavourable criticism. My noble and learned friend Lord Atkin when sitting in the commercial court as Mr. Justice Atkin in Rusecco v. Welsh [1923] 10 Ll.L.Rep. 214 at p.217 doubted whether any two business people in the world would ever make a contract which embodied such a doctrine as Chandler v. Webster laid down; and in the present case the Court of Appeal, while bound by previous authority, hinted a hope that this House might be able to substitute a "more civilised rule." I think, therefore, that we ought to regard ourselves as at liberty to examine the challenged proposition freely, and to lay down what we regard as the true doctrine in English law without being hampered by a course of practice based on previous decisions in the Court of Appeal.

The locus classicus for the view which has hitherto prevailed is to be found in Sir Richard Collins' judgment in Chandler v. Webster. It was not a considered judgment, but it is hardly necessary to say that I approach this pronouncement of the then Master of the Rolls with all the respect due to so distinguished a common lawyer. When his judgment is studied, however, one

cannot but be impressed by the circumstance that he regarded the proposition that money in such cases could not be recovered back as flowing from the decision in Taylor v. Caldwell [1863] 3 B. & S. 826. Taylor v. Caldwell, however, was not a case in which any question arose as to whether money could be recovered back, for there had been no payment in advance, and there is nothing in the judgment of Mr. Justice Blackburn which, at any rate in terms, affirms the general proposition that "the loss lies where it falls". Sir Richard Collins' application of Taylor v. Caldwell to the actual problem with which he had to deal in Chandler v. Webster deserves close examination. He said at p. 499 of [1904] 1 K.B.:-

> "The plaintiff contends that he is entitled to recover the money which he has paid on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does no doubt raise a question of some difficulty, and one which has perplexed the Courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in Taylor v. Caldwell - namely, that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that the money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply."

It appears to me that this crucial passage is open to two criticisms:-

(a) The claim of a party who has paid money under a contract to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based upon any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got what he bargained for. It is a claim to recover money to which the defendant has no further right because in the circumstances that have

happened the money must be regarded as received to the plaintiff's use. It is true that the effect of frustration is that, while the contract can no further be performed, "it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done." But it by no means follows that the situation existing at the moment of frustration is one which leaves the party that paid money and has not received the stipulated consideration without any remedy. The remedy, if any, does not arise under the terms of the contract; both parties have done up to date what the contract stipulated, neither more nor less. But to claim the return of money already paid on the ground of total failure of consideration is not to vary the terms of the contract in any way. The claim arises, not because the right to be repaid is one of the stipulated conditions of the contract, but because, in the circumstances that have happened, the law gives the remedy. It is the failure to distinguish between (1) the action of assumpsit for money had and received in a case where the consideration has wholly failed, and (2) an action on the contract itself, which explains the mistake which I think has been made in applying English law to this subject matter. Thus, in Blakeley v. Muller & Co. (cited above), Lord Alverstone C.J. said, "I agree that Taylor v. Caldwell applies, but the consequence of that decision is that neither party here could have sued on the contract in respect of anything which was to be done under it after the procession had been abandoned". That is true enough, but it does not follow that because the plaintiff cannot sue "on the contract" ~~think~~ he cannot sue debors the contract, for the recovery of a payment in respect of which consideration has failed. In the same case, Mr. Justice Wills relied on Appleby v. Myers L.R. 2 C.P.651, where a contract was made for the erection by A. of machinery upon the premises of B. to be paid for upon completion, and in the course of the work the premises were destroyed by fire. It was held that both parties were excused from further performance, and that no liability accrued on either side. But the liability referred to was liability under the contract, and the learned Judge seems to have thought that no action to recover money in such circumstances as the present could be conceived of unless there was a term of the contract, express or implied, which so provided. Once it is realised that the action to recover money for a consideration that has wholly failed rests not

upon a contractual bargain between the parties, but (as Lord Sumner said in Sinclair v. Brougham [1914] A.C.398 at p.452) "upon a notional or imputed promise to repay", the difficulty in the way of holding that a pre-payment made under a contract which has been frustrated can be recovered back appears to me to disappear.

(b) There is, no doubt, a distinction between cases in which a contract is "wiped out altogether", e.g. because it is void as being illegal from the start, or as being due to fraud which the innocent party has elected to treat as avoiding the contract, and cases in which intervening impossibility "only releases the parties from further performance of the contract". But does the distinction between these two classes of case justify the deduction of Sir Richard Collins that "the doctrine of failure of consideration does not apply" where the contract remains a perfectly good contract up to the date of frustration? This conclusion seems to be derived from the view that, if the contract remains good and valid up to the moment of frustration, money which has already been paid under it cannot be regarded as having been paid for a consideration which has wholly failed. The party that has paid the money has had the advantage, whatever it may be worth, of the promise of the other party. That is true, but it is necessary to draw a distinction. In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act - I am excluding contracts under seal - and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration. But when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails, the inducement which brought about the payment is not fulfilled.

(There may be cases where by the terms of the contract the money is paid to secure a bare promise, but I leave these exceptions on one side.)

If this were not so, there could never be any recovery of money,

for failure of consideration, by the payer of the money in return for a promise of future performance. Yet, there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled. A simple illustration is an agreement to buy a Horse, the price to be paid down, but the horse not to be delivered and the property not to pass until the horse has been shod. If the horse dies before the shoeing, the price can unquestionably be recovered as for a total failure of consideration, notwithstanding that the promise to deliver was given. This is the case of a contract de certo corpore where the certum corpus perishes after the contract is made; but, as Lord Justice Vaughan Williams' judgment in Fleall v. Henry [1903] 2 K.B. 740 explained, the same doctrine applies "to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance." I can see no valid reason why the right to recover pre-paid money should not arise on frustration arising from supervening circumstances as it arises on frustration from destruction of a particular subject matter.

[1943]

Houses of Lords

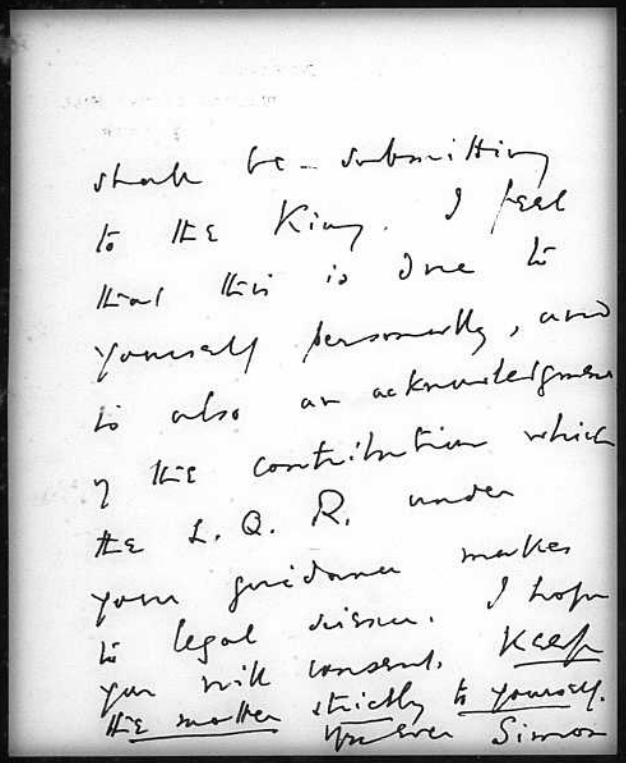
15

DOWDING,
WALTON-ON-THE-HILL,
SURREY.
TEL. BURGH HEATH 303.

Confidential

My dear Ford Lark,

It will be necessary, notwithstanding the war, to create a few additional Silks shortly, and it would give me great pleasure to include your name in the list which I



thank he - submitting
to the King. I feel
that this is due to
yourself personally, and
is also an acknowledgment
of the contribution which
the L. Q. R. under
your guidance makes
to legal science. I hope
you will consent. Keep
the matter strictly to yourself.
Yours ever Simon

(b) 16

IN REPLYING TO THIS LETTER THE FOLLOWING NUMBER SHOULD BE QUOTED

NATIONAL SERVICE FOR DISABLED MEN

HOUSE OF LORDS,
S.W.1

22nd January 1945.

My dear Goodhart,

I have by no means forgotten our talk on December 18th about this most generous idea which you told me is under consideration by some American Judges and lawyers to help to rebuild portions of the Temple and of Gray's Inn after these troublesome times are over. As I then said, the suggestion -which of course proceeds from the other side of the Atlantic - arouses the deepest feelings of gratitude on this side, and if indeed American lawyers were thinking of taking some part in restoring some of the shattered buildings of the Inns of Court, this would be a wonderful proof of the fraternity of the profession on both sides of the Atlantic.

The further reply which I am now giving you at your request is the result of inquiries which I have made, and though, of course, I am writing quite unofficially and without specific authority from the Inns, I feel confident that what I am about to say might be safely taken as a description of the position.

Under the War Damage Act, 1943, if it is decided to rebuild on the site of a shattered building, the actual cost of the work will, in the great majority of cases, be provided by the War Damage Commission out of funds at their disposal - funds which, as you know, are paid in part at least by contribution levied under the Act from all property owners. For example, if it is decided that the Middle Temple Hall is to be restored so that the new building will be in the same form as the old one, (as I imagine that this will certainly be the wish of the Middle Temple, for who could want to alter a building in which Queen Elizabeth danced and Twelfth Night was first played?) then undoubtedly the money for this rebuilding will be provided by the Commission at the actual cost at the time of rebuilding. If, on the other hand, there are shattered buildings in the Temple which will not be rebuilt on previous sites, or not rebuilt at all, then the Act provides for the possibility of a "value payment"

which is the value equivalent to the value in 1939, and which, therefore, is likely to fall substantially short of the present cost or price. If it should be decided to build new buildings in new positions (and there are strong arguments in favour of this in certain cases), the value payments for buildings now renewed could be used towards such a purpose, but there would be a good deal of extra money to be found. If your American friends were interested in this, I daresay that later on a figure could be provided indicating the sort of additional sum that would be needed. Again, in the case of the Temple Church, which will certainly be rebuilt by reproducing the old one, there will remain ornaments and decorations to be paid for which would not be covered by the cost of works payment.

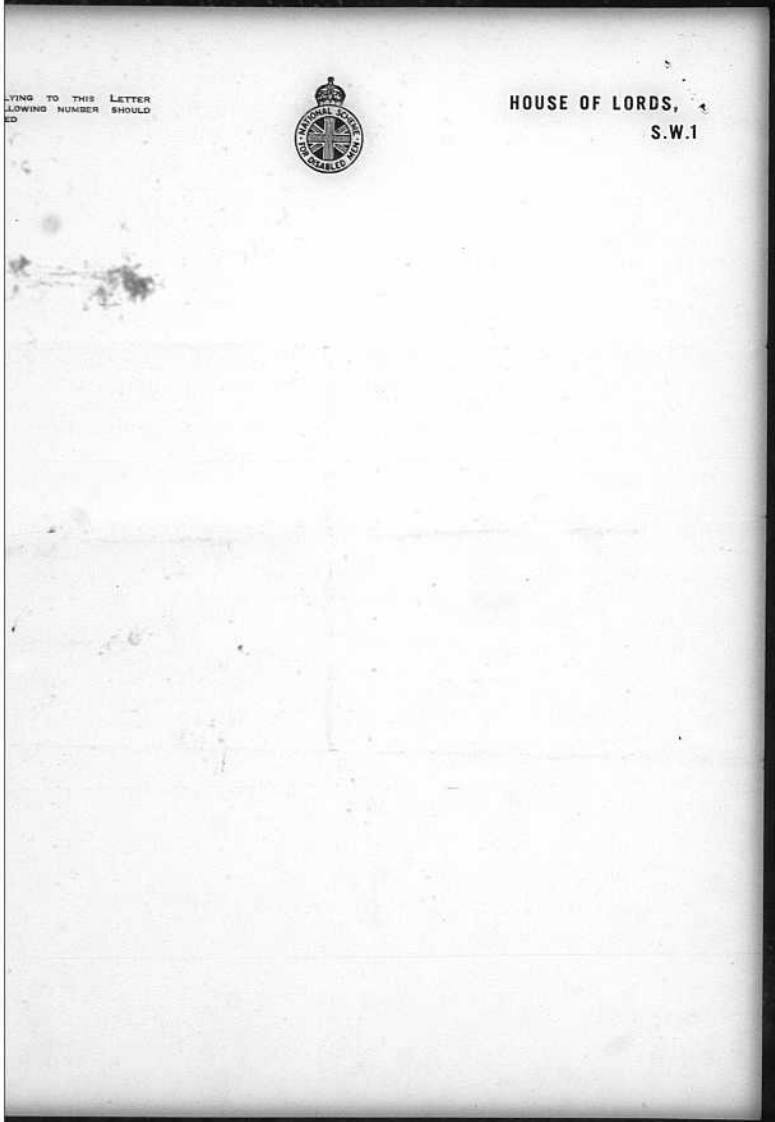
Possibly the information I have given above will be of some interest to you and your friends, though, as you will notice, it does not include an estimate of the figure, for that is at present an impossible estimate to make, but certainly a very substantial sum will have to be found.

It is very good of you to inquire tentatively about this matter, and I hope I have made it plain that while we are deeply grateful for these kind suggestions and should be proud and happy if they were adopted and carried out, we are not presuming in any way to count upon such help until it is actually proposed.

Yours sincerely,

Simon

Professor A.L. Goodhart, K.C.,LL.D.



...YING TO THIS LETTER
...LOWING NUMBER SHOULD
...ED

HOUSE OF LORDS,
S.W.1

18

HOUSE OF LORDS,
S.W.1

(TEL.: WHITEHALL 6240)

In any reply please quote No.

30th January 1945.

My dear Goodhart,

Thank you for your kind and encouraging words about the Contributory Negligence Bill. I shall get it through the Lords this week, and hope it may be law before the end of February.

You might be interested to see the judgment which I delivered a week ago, in which I discuss the ~~interesting and~~ hitherto unanswered question, "Can there ever be frustration of a lease of land?" Wright and Porter agreed with me in saying yes, it is just possible. Russell and Goddard said no. The question was largely academic, for we all agreed that in the particular case the lease was not frustrated.

I have attempted a definition of frustration which may perhaps find its way into the books. Tell me if you think it will do.

Yours sincerely,

Simon

Professor A.L. Goodhart, K.C., LL.D.

Final.
Confidential.

CRICKLEWOOD PROPERTY AND INVESTMENT TRUST, LIMITED AND OTHERS

v.

LEIGHTON'S INVESTMENT TRUST, LIMITED.

The Lord Chancellor

MY LORDS,

Lord Chancellor
Lord Russell of Killowen
Lord Wright
Lord Porter
Lord Goddard

By a lease dated 12th May, 1936, the predecessors in title of the Respondents demised certain land at Potters Bar to the Appellant Company, hereinafter referred to as the tenants, for a term of 99 years, and the other two Appellants joined in the lease as guarantors for the payment of the rent and performance of the covenants. It seems that the leasors were developing a building estate for residential purposes and the lease in question was a building lease under which the tenants were to build a number of shops to form what is commonly called a shopping centre for the residents on the estate. The subject of the demise was two parcels of land, one coloured red and the other blue on the plan attached to the lease. A question had previously arisen between the lessors and the local authority under a Town Planning Scheme for the area and there had been an appeal to the Minister. This appeal was compromised on terms which were scheduled to the lease and which in effect provided that not more than 24 shops in all should be built on these two parcels of land; that eight might be built at once, and, in addition, that not less than four shops to each 200 houses occupied should be permitted to be built in the future till the total of 24 was reached. The rent reserved was the aggregate of the following rents, (*a*) as to each of the 10 shop sites on the red land a peppercorn for the first year and thereafter a yearly rent of £35 for each site, and (*b*) as to each of the 14 shop sites on the blue land a peppercorn till the expiration of one year from notification by the landlords that erection of a shop thereon might proceed and thereafter a yearly rent of £35 for each site in respect of which such notification had been given. This notification that building might proceed was rendered necessary because of the compromise referred to above. Clause 2 of the lease contained covenants by the tenants to pay the rent and outgoings and to build 24 shops on the demised land, 10 on the red and 14 on the blue. The first 8 were to be built on the red land not later than 25th March, 1937; the remainder were to be built within one year from the notification by the landlords that building might proceed, but in certain circumstances, which need not be set out in detail, an "abeyance period," as it was called, might arise which would have the effect of postponing the obligation to build beyond the year. It was, however, expressly provided that nothing in the Clause which provided for this abeyance period should in any way affect the rent or rents payable in respect of the demised property or any part thereof or the time or manner of such payment.

It is clear, therefore, that the parties agreed that as soon as a year from the notification had elapsed the full rent was to be paid for the sites to which it related, although no buildings had been erected thereon. By Clause 4, a right of re-entry for non-payment of rent or breach of covenant was reserved, but it was provided that after any of the shops had been assigned or underlet this right should only be exerciseable upon the particular shop in respect of which the breach had occurred, the intention being that each should be held separately and independently of the others. The lease gave the tenants the option of purchasing both the red and

blue sites; this option has been exercised as regards the red and consequently we are not concerned with it or with the shops built upon it. There was also a provision in Clause 6 of the lease enabling the tenants at the expiration of seven years from the date of the agreement to give notice to determine the lease as to any of the sites in respect of which notice that building might proceed had not been given. As regards the blue land, no shops had been erected when notice that building might proceed was given as to two sites on 24th September, 1937. Further notices were given on 30th May, 1938, and 25th August, 1939, in each case as to four houses. No building has been begun on any of these ten sites, but it is admitted that by the provision for the abeyance period contained in the lease the tenants had not become under an obligation to build, nor were they in any other respect in default when this action was begun, except as to payment of rent.

On 17th May, 1938, the original lessors conveyed the land subject to and with the benefit of the lease to the Respondents, and as the Appellant Company had paid no rent since the outbreak of the present war, the Respondents issued a writ dated 8th April, 1942, against the Appellant Company as tenants and against the other two Appellants as guarantors claiming arrears of rent since September, 1939. If the Appellants are liable for any rent, there is no dispute that the amount due in this action is £419 14s. 3d. The Respondents applied for summary judgment and in the affidavit filed in opposition on behalf of the Appellants it was deposed that by reason of the outbreak of war the demand for these shops had ceased, that finance for their erection had become unobtainable and that the restrictions placed by the Government upon building and upon the acquisition of materials made it impossible to erect buildings on any of the sites or to continue the development. Consequently, it was said the agreement in relation to the 14 sites had been frustrated and the Appellants are under no liability thereunder.

On this affidavit the Master gave leave to defend, and on appeal to the Judge in Chambers the present Respondents admitted these allegations of fact and the admission was embodied in the order of the learned Judge. He made the usual order for trial in the short cause list; the affidavit was treated as a pleading and no further Defence was ordered.

Before this House, and apparently in both Courts below, the Appellants did not attempt to rely on the fact that the demand for shops had ceased, or on their inability to procure finance, as establishing a defence. They relied entirely on the impossibility of building created by the restrictions imposed on work of this character and on the acquisition of materials. Though these restrictions were not particularised it must be taken that they were imposed by valid orders or ~~prohibitions~~ under the Defence Regulations, and while it would have been more satisfactory if the documents relied upon had been set out or referred to, the case has proceeded (as must this appeal) on the footing that the performance of the covenant to build was impossible, and continues to be so while the orders or prohibitions are in force.

Asquith J., who tried the case, held on the authorities that the doctrine of frustration did not apply to a lease at all, and that for this purpose there was no distinction between a building lease and any other lease, though he said that had the doctrine applied he would have decided that the contract had been discharged. The Court of Appeal, in a judgment delivered by MacKinnon L.J., said that the doctrine had never been applied to a demise of real property and that there was clear authority that it cannot be; "it is "impossible for the Defendants to rely upon the doctrine of frus- "tration to relieve them from their obligations as tenants under a "demise of land for 99 years". Against that judgment the tenants appeal to this House.

Two questions are raised by the appeal: first, can the doctrine of frustration apply to determine a lease? and, secondly, even if it can, are the circumstances in the present case such as to produce the result that the lease has been determined by frustration? If, my Lords, we all agree (as I understand we do) that the answer to the second question is in the negative, it is not essential in the present case to reach a conclusion on the first question (as to which I gather that our opinions are divided). Nevertheless, I propose to express my opinion with regard to both questions, since the more general issue has been much discussed and was pronounced upon by the Courts below, where it was regarded as concluded by authority, including the authority of this House, in *Matthey* v. *Curling* [1922], 2 A.C. 180.

The broad issue must first be considered as though it were *res integra*: then I propose to consider the effect of previous decisions.

Frustration may be defined as the premature determination of an agreement between parties lawfully entered into and still executory on both sides, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither, of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice. (See the cases collected in Joseph Constantine S.S. Co. v. Imperial Smelting Corp. Ltd. [1942] A.C. at p. 180). But where it does arise, it operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition.

apply to such a lease are undoubtedly very rare.

A lease of land creates in the lessee an estate, which is a chattel interest. (Law of Property Act, 1925, sec. 1 (1) (*b*).) Such an estate, by the nature of the case, lasts at most for the term stipulated and may come to an end sooner. In normal circumstances, the estate continues to exist for the period of the agreed term—in the present instance, for 99 years from 25th March, 1936—but it is liable to be determined by the landlord's re-entry for non-payment of rent or for breach of covenant. This is expressly provided for by Clause 4 of the present lease. The question therefore is whether, in addition to predetermination under such express provisions, it is possible that a lease for years should predetermine from a supervening cause which amounts to frustration. If so, the term ends, no further rent is payable, and the lessor recovers the property with all permanent structures erected upon it, at once. It is said that this cannot be so, because a lease is more than a contract and amounts to an estate: but this reasoning seems to me to be dangerously near to arguing in a circle; if we assume that frustration can only arise in cases where there is a contract and nothing else, the conclusion of course follows that frustration cannot arise in the case of a lease. Where the lease is a simple lease for years at a rent, and the tenant, on condition that the rent is paid, is free during the ~~year~~ term to use the land as he likes, it is very difficult to imagine an event which could prematurely determine the lease by frustration—though I am not prepared to deny the possibility, if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. The

blue sites; this option has been exercised as regards the red and consequently we are not concerned with it or with the shops built upon it. There was also a provision in Clause 6 of the lease enabling the tenants at the expiration of seven years from the date of the agreement to give notice to determine the lease as to any of the sites in respect of which notice that building might proceed had not been given. As regards the blue land, no shops had been erected when notice that building might proceed was given as to two sites on 24th September, 1937. Further notices were given on 30th May, 1938, and 25th August, 1939, in each case as to four houses. No building has been begun on any of these ten sites, but it is admitted that by the provision for the abeyance period contained in the lease the tenants had not become under an obligation to build, nor were they in any other respect in default when this action was begun, except as to payment of rent.

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Asquith J., who tried the case, held on the authorities that the doctrine of frustration did not apply to a lease at all, and that for this purpose there was no distinction between a building lease and any other lease, though he said that had the doctrine applied he would have decided that the contract had been discharged. The Court of Appeal, in a judgment delivered by MacKinnon L.J., said that the doctrine had never been applied to a demise of real property and that there was clear authority that it cannot be; "it is "impossible for the Defendants to rely upon the doctrine of frus- "tration to relieve them from their obligations as tenants under a "demise of land for 99 years". Against that judgment the tenants appeal to this House.

Two questions are raised by the appeal: first, can the doctrine of frustration apply to determine a lease? and, secondly, even if it can, are the circumstances in the present case such as to produce the result that the lease has been determined by frustration? If, my Lords, we all agree (as I understand we do) that the answer to the second question is in the negative, it is not essential in the present case to reach a conclusion on the first question (as to which I gather that our opinions are divided). Nevertheless, I propose to express my opinion with regard to both questions, since the more general issue has been much discussed and was pronounced upon the Courts below, where it was [illegible]

[illegible]

Equally, if the terms of the arrangement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither, of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice. (See the cases collected in *Joseph Constantine S. & Co.* v. *Imperial Smelting Corp. Ltd.* [1942], A.C., at p. 160.) But where it does arise, it operates to bring the arrangement to an end as regards both parties forthwith.

Is there any good reason why this conception of frustration should not ever apply to a lease of land and result in its premature determination? I do not feel able to assert any *a priori* or absolute impossibility, thought the instances in which the doctrine might apply to such a lease are undoubtedly very rare.

A lease of land creates in the lessee an estate, which is a chattel interest. (Law of Property Act, 1925, sec. 1 (1) (*b*).) Such an estate, by the nature of the case, lasts at most for the term stipulated and may come to an end sooner. In normal circumstances, the estate continues to exist for the period of the agreed term—in the present instance, for 99 years from 25th March, 1936—but it is liable to be determined by the landlord's re-entry for non-payment of rent or for breach of covenant. This is expressly provided for by Clause 4 of the present lease. The question therefore is whether, in addition to predetermination under such express provisions, it is possible that a lease for years should predetermine from a supervening cause which amounts to frustration. If so, the term ends, no further rent is payable, and the lessor recovers the property with all permanent structures erected upon it, at once. It is said that this cannot be so, because a lease is more than a contract and amounts to an estate: but this reasoning seems to me to be dangerously near to arguing in a circle; if we assume that frustration can only arise in cases where there is a contract and nothing else, the conclusion of course follows that frustration cannot arise in the case of a lease. Where the lease is a simple lease for years at a rent, and the tenant, on condition that the rent is paid, is free during the ~~year~~ term to use the land as he likes, it is very difficult to imagine an event which could prematurely determine the lease by frustration—though I am not prepared to deny the possibility, if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. The

lease, it is true, is of the "site", but it seems to be not inconceivable that, within the meaning of the document, the "site" might cease to exist. If, however, the lease is expressed to be for the purpose of building, or the like, and if the lessee is bound to the lessor to use the land for such purpose with the result that at the end of the term the lessor would acquire the benefit of this development, I find it less difficult to imagine how frustration might arise. Suppose, for example, that legislation were subsequently passed which permanently prohibited private building in the area or dedicated it as an open space for ever, why should this not bring to an end the currency of a building lease, the object of which is to provide for the erection on the area, for the combined advantage of the lessee and lessor, of buildings which it would now be unlawful to construct? It is no answer to say that it may be presumed that the legislature would make express provision, by compensation clauses or otherwise, to deal with such a case: we are entitled to test the applicability of the doctrine by assuming supervening illegality, without any qualification. Neither, I think, is the theoretic possibility of frustration got rid of by stressing the complications that might in some cases arise between the parties if the relation of lessor and lessee is prematurely terminated for all purposes by such a cause. In the case of pure contract also, the situation resulting from frustration has raised questions of difficulty which, after 40 years of doubt, were only settled by the decision of this House in the *Fibrosa* case [1943], A.C. 32; and even then it was considered just and necessary to modify the common law consequences by a subsequent Act of Parliament. (6 & 7 Geo. vi. c. 40.)

A careful examination of the decided cases to which the Court of Appeal refers satisfies me that it is erroneous to suppose that there is authority binding on this House to the effect that a lease cannot in any circumstances be ended by frustration. In *Matthey* v. *Curling* [1922], 2 A.C. 180, the House did not say so: the decision there was that requisitioning by the Government was no answer to a claim on the covenant for rent, any more than ouster by a trespasser would be: the remedy of the tenant was against the Government for compensation. Equally, destruction by fire, after the Government had requisitioned the place, left the tenant still liable on his covenant to deliver up in proper condition, for the tenant could have covered the risk by insurance. Thus, on the true construction of the document, the two covenants still bound the tenant. It seems clear that, if the actual decision in *Matthey* v. *Curling* is as above set out, the Court of Appeal was mistaken in treating it as "clear authority" that the doctrine of frustration "cannot" be applied to a demise of real property. It is noteworthy that when *Matthey* v. *Curling* was before the Court of Appeal, Lord Justice Atkin, in his dissenting judgment, observed (at pp. 199, 200 of [1922], 2 A.C.): "it does not appear to me conclusive "against the application to a lease of the doctrine of frustration "that the lease, in addition to containing contractual terms, grants "a term of years. Seeing that the instrument as a rule expressly "provides for the lease being determined, at the option of the lessee, "upon the happening of certain specified events, I see no logical "absurdity in implying a term that it shall be determined absolutely "on the happening of other events—namely, those which in an "ordinary contract work a frustration."

This passage exactly expresses my view. I may further point out that in *Taylor* v. *Caldwell*, 3 B. & S. 826, when the question was raised whether the hall which was burnt down was demised to the Defendant or not, Blackburn J., at p. 832, said "Nothing, "however, in our opinion turns on this." The impression, which I venture to think is erroneous, that this House in *Matthey* v. *Curling* actually decided that frustration cannot arise in the case of a lease, is encouraged by the headnote to that case in the Law

Reports, which states that that decision affirmed *Whitehall Court* v. Ettlinger [1920] 1 K.B. It is true that Lord Atkinson in *Matthey* v. *Curling*, at p. 237, expressed the view that the *Whitehall Court* case was rightly decided, but none of the other Lords either said or implied this.

Moreover, in the *Whitehall Court* case Lord Reading C.J.'s primary decision was that the mere fact that the tenant was personally prevented from residing in the leased flat did not affect the existence of the chattel property vested in him under the lease. It is true that Lord Reading gave a further reason for his decision, which was based on the adoption of a sentence in Lush J.'s judgment in *London & Northern Estates Co.* v. *Schlesinger* [1916], 1 K.B. 20, at p. 24, but in this last quoted case also the actual decision of the Divisional Court was that a tenancy was not extinguished because the tenant for the time being was not allowed by law to inhabit the flat which had been leased to him. This was the ground of decision on which both members of the Divisional Court—Mr. Justice Avory and Mr. Justice Lush—concurred, and though Mr. Justice Lush added that a tenancy agreement was more than a contract and that the chattel interest created by the lease continued to be vested in the tenant, he did not in fact, I think, advance the abstract proposition that a lease can never be determined by events equivalent to frustration. At any rate, this House is not obliged to accept such a proposition, and, as I have indicated, I think it goes too far. The occasions, however, on which frustration terminates a lease must be exceedingly rare.

So much for the abstract and theoretical question. But there remains the practical issue whether what is proved to have happened in the present case could be enough to constitute frustration of such a lease. I do not agree with Mr. Justice Asquith that the orders requiring a suspension of building are sufficient to strike at the root of the arrangement. The lease at the time had more than 90 years to run, and though we do not know how long the present war, and the emergency regulations which have been made necessary by it, are going to last, the length of the interruption so caused is presumably a small fraction of the whole term. Frustration, where it exists, does not work suspension but brings the whole arrangement to an inevitable end forthwith. Here, the lease itself contemplates that rent may be payable although no building is going on, and I cannot regard the interruption which has arisen as such as to destroy the identity of the arrangement or make it unreasonable to carry out the lease according to its terms as soon as the interruption in building is over: this is the nature of the test for frustration suggested in the well-known case of *Metropolitan Water Board* v. *Dick Kerr* [1918], A.C. 119. I therefore conclude, on the facts, that the liability for rent under the covenant continued uninterrupted, and I move your Lordships to dismiss the appeal with costs.

(39773) Wt. 8484—26 30 1/45 D.L. G. 338

Final Confidential

SESS. 1944—[H.L.]

CRICKLEWOOD PROPERTY AND INVESTMENT TRUST, LIMITED AND OTHERS

v.

LEIGHTON'S INVESTMENT TRUST, LIMITED

OPINION

OF

THE LORD CHANCELLOR

23

HOUSE OF LORDS,
S.W.1

(TEL.: WHITEHALL 6240)

In any reply please quote No.

26th June, 1945.

My dear Goodhart,

You might be interested in the full copy of this Judgment. Wright agreed with me but we were in a minority, since Lords Macmillan, Porter and Simonds were of the other view.

Yours ever,

Simon

Professor A.L. Goodhart, LL.D., K.C.

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Simon

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M.5335/P.1190 4/44 Ho.(259)

26th March, 1947.

My dear Goodhart,

You might like to have a copy of the enclosed print. We delivered our Judgments yesterday.

Yours ever

Simon

Professor Goodhart,
Whitebarn,
Boars Hill,
Oxford.

29th July, 1947.

My dear Goodhart,

I would like you to examine my judgment in this case, in the course of which I have sought to knock out Wood v. Leadbitter for all time. It is 100 years old and is generally regarded as no longer law since the fusion of law and equity.

I think the fundamental reason why it was so decided was that a plaintiff at that date could not be permitted to join different causes of action in the same suit, and hence the plaintiff who sued in tort could not at the same time say that the landlord had sold him the right to remain on the premises without being regarded as a trespasser until the races were over. Anyhow, it is an interesting point.

Yours sincerely,

J. C. R.

for VISCOUNT SIMON.

Professor Goodhart,
Boar's Hill,
Oxford.

16th December, 1947.

My dear Goodhart,

You might be interested to see the amendments which I am moving to the Personal Injuries Bill to-~~morrow~~ day. I enclose the existing Bill on which I made a speech on the Second Reading. It seems to me that the clause "abolishing" contracting out" is very obscurely expressed, so I have suggested a new form which the Lord Chancellor is going to accept. The great thing is to make the change in the law perfectly clear to ordinary readers.

Here endeth Priestley v. Fowler.

I am also proposing to prohibit contracting out from the consequences of the new Act, as Asquith did in 1893. This, I think, is clearly right and Jowett agrees.

Yours very sincerely,

Simon

Professor Goodhart,
Law Quarterly Review.

A

B I L L

INTITULED

An Act to abolish the defence of common employment, to amend the law relating to the liability in damages for breach of statutory duty and to the measure of damages for personal injury or death, and for purposes connected therewith. A.D. 1947.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Common employment.

1.—(1) The common employment of two persons shall not affect the liability of one of them of a third person for anything done or omitted by the other.

43 & 44 Vict. c. 42.

(2) Accordingly the Employers' Liability Act, 1880, shall cease to have effect, and is hereby repealed.

Breach of statutory duty.

2.—(1) Where this section applies, a person shall not be liable, in an action for breach of statutory duty, to damages for personal injuries or death, if it is shown that it was not reasonably practicable to avoid or prevent the breach.

(2) This section applies to any breach of statutory duty consisting of a contravention of or non-compliance with an enactment designed wholly or mainly for the protection from

A.D. 1947.

personal injury of persons engaged in any work or process, or persons in or about the premises or place where any work or process is or has been carried on, or any class of such persons; and for the purposes of this section the expression "enactment" includes a provision of an order or other instrument having effect under an Act of Parliament.

(3) This section applies to enactments contained in or having effect under any Act whenever passed (including a local or private Act) and, in the case of an enactment contained in or having effect under any Act passed before this Act, shall have effect notwithstanding anything inconsistent therewith in that Act or enactment.

Measure of damages.

3.—(1) In an action for damages for personal injuries (including any such action arising out of a contract), there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit, industrial disablement benefit or sickness benefit for the five years beginning with the time when the cause of action accrued.

This subsection shall not be taken as requiring both the gross amount of the damages before taking into account the said rights and the net amount after taking them into account to be found separately.

(2) In determining the value of the said rights there shall be disregarded any increase of an industrial disablement pension in respect of the need of constant attendance.

(3) The reference in subsection (1) of this section to assessing the damages for personal injuries shall, in cases where the damages otherwise recoverable are subject to reduction under the law relating to contributory negligence or are limited by or under any Act or by contract, be taken as referring to the total damages which would have been recoverable apart from the reduction or limitation.

(4) In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act, 1946, or the National Health Service (Scotland) Act, 1947, or of any corresponding facilities in Northern Ireland.

9 & 10 Geo. 6. c. 81.
10 & 11 Geo. 6. c. 27.

(5) In assessing damages in respect of a person's death in any action under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, or under the Carriage by Air Act, 1932, there shall not be taken into account any right to benefit resulting from that person's death.

9 & 10 Vict. c. 93.
22 & 23 Geo. 5. c. 36.

A.D. 1947.

(6) For the purposes of this section—

(*a*) the expression "benefit" means benefit under the National Insurance Acts, 1946, or any corresponding Act of the Parliament of Northern Ireland;

(*b*) expressions used in the National Insurance Acts, 1946, for any description of benefit under those Acts have the same meanings as in those Acts, except that they include also the like benefit, if any, under any corresponding Act of the Parliament of Northern Ireland;

(*c*) an industrial disablement gratuity shall be treated as benefit for the period taken into account by the assessment of the extent of the disablement in respect of which it is payable.

Definition of "personal injury".

4. In this Act the expression "personal injury" includes any disease and any impairment of a person's physical or mental condition, and the expression "injured" shall be construed accordingly.

Application to Crown.

5. This Act shall bind the Crown.

Northern Ireland.

6.—(1) If the Parliament of Northern Ireland passes legislation for purposes similar to the purposes of this Act, then in connection with that legislation any limitation on the powers of that Parliament imposed by the Government of Ireland Act, 1920, shall not apply in so far as it would preclude that Parliament from enacting a provision corresponding to some provision of this Act.

10 & 11 Geo. 5. c. 67.

(2) This Act, except in so far as it enlarges the powers of the Parliament of Northern Ireland, shall not extend to Northern Ireland.

Short title and commencement.

7.—(1) This Act may be cited as the Law Reform (Personal Injuries) Act, 1947.

(2) Sections one and two and subsection (1) of section three of this Act shall apply only where the cause of action accrues on or after the day appointed for the National Insurance (Industrial Injuries) Act, 1946, to take effect; but subsections (4) and (5) of the said section three shall apply whether the cause of action accrued or the action was commenced before or after the commencement of this Act.

9 & 10 Geo. 6. c. 62.

PARLIAMENTARY DEBATES

(HANSARD)

HOUSE OF LORDS

OFFICIAL REPORT

(UNREVISED)

Vol. 152. No. 18

Thursday, 4th December, 1947

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LONDON
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Law Reform (Personal Injuries). [H.L.]

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B I L L

INTITULED

An Act to abolish the defence of common employment, to amend the law relating to the liability in damages for breach of statutory duty and to the measure of damages for personal injury or death, and for purposes connected therewith.

The Lord Chancellor.

Ordered to be printed 25th November 1947

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HOUSE OF LORDS

Thursday, 4th December, 1947.

The House met at four of the clock, The LORD CHANCELLOR on the Woolsack.

Prayers.

PUBLIC REGISTERS AND RECORDS (SCOTLAND). [H.L.]

LORD MORRISON: My Lords, I beg leave to present a Bill to provide for the appointment of a Keeper of the Registers of Scotland and of a Keeper of the Records of Scotland, the transference to such Keepers of the powers and duties of the Keeper of the Registers and Records of Scotland and the discontinuance of that office; to amend the law and procedure regarding registration in the General Register of Sasines and for purposes connected with the aforesaid purposes. I beg to move that the Bill be now read a first time.

Moved, That the Bill be now read 1ª.—(*Lord Morrison.*)

On Question, Bill read 1ª, and to be printed.

LAW REFORM (PERSONAL INJURIES) BILL. [H.L.]

4.4 p.m.

Order of the Day for the Second Reading read.

THE LORD CHANCELLOR (VISCOUNT JOWITT): My Lords, I rise to move that this Bill be now read a second time. The Bill deals with a variety of matters, all of which I fear are complicated and technical, and your Lordships may think that they bear very little relation to each other, save for the fact that they all arise out of that branch of the law which is concerned with a man's liability to an action for damages for personal injuries caused to someone else. I think it may assist your Lordships if I say at once that the main object of the Bill is to deal with what is known as the problem of alternative remedies. When the Bill for what is now the National Insurance (Industrial Injuries) Act, 1946, was before Parliament it was quite rightly pointed out that there was an omission in that Bill because, although it proposed to repeal the Workmen's Compensation Acts, there was nothing in it to take the place of the provisions contained in those Acts relating to alternative remedies.

The problem, as those of your Lordships who are familiar with this subject will know, is that where a man meets with an injury at his work there are many cases in which he may have a perfectly good claim against his employer for a lump sum by way of damages for negligence. The Workmen's Compensation Act did not destroy this right of action for damages, but it provided that an injured person was not to be entitled to damages as well as to compensation under the Act. The remedies, in short, are not cumulative, they are alternative, but when the Workmen's Compensation Acts disappear, as they will do in the case of persons injured after the day appointed for the commencement of the new national insurance schemes—which I anticipate will be some time in July of next year—the Courts would be faced with the problem, if provision were not made for it by this Bill, of what is to happen in the case of a person who has been injured by the negligence of another person in such circumstances that he has a right of action for damages, while at the same time he is entitled to receive benefit under the National Insurance Acts. Are the remedies to continue to be alternative or are they now to be cumulative? If they are to be cumulative, is the injured person to be entitled to recover damages in full notwithstanding the benefit that he has received, or may become entitled to, under the National Insurance Acts?

Your Lordships will remember that this matter was most carefully and thoroughly considered by a Committee under the Chairmanship of Sir Walter Monckton which reported in July, 1946, and the present Bill is intended to deal with the recommendations contained in that Report. As I have said, the central problem of this Bill is that of alternative remedies, and I therefore think the House would prefer me to deal first with this matter, which is covered by Clause 3 of the Bill. After giving the matter the most careful and anxious consideration we have come to the conclusion that the fairest way of dealing with the matter is that which is proposed by Clause 3—

[The Lord Chancellor.]

namely, that an injured person should be entitled to receive his national insurance benefits in full and that he should also be able to bring an action for damages in any case in which he may allege that some other person was responsible in law for his injury, but that in assessing any damages which may be awarded to him, the Court should take into account, against any loss of earnings or profits which may flow from the injury, one half of the insurance benefits which the man has received or which he probably will receive, during the five years from the time when the cause of action first arose.

There is here a problem which may be looked at in either of two ways, and I confess that I find that the arguments on both sides fairly evenly balance. You may think, as did the majority of the Monckton Committee, that if a man receives insurance benefits in respect of an injury, the whole of those benefits should be brought into account and set off against any damages which the injured man may be able to recover from the person who has caused, or is responsible for, the injury. You may, on the other hand, think, as the trade union representatives on the Monckton Committee thought, that damages should not be affected by any insurance benefits which may be received, and that the injured man should be able to recover his damages and his benefits in full. The argument for deducting the whole of a man's insurance benefits from his damages is based on the principle that he should not be able to recover, by way of damages and benefits, more than the maximum which he could have recovered from either source alone. The basis of damages in a civil action, it is said, is compensation for actual loss, so that if an injured man loses £5 a week in earnings and gains £2 a week in benefit, his actual loss under this head is not £5 but £3 a week. This is the view which commended itself to the majority of the Monckton Committee.

On the other side, it is argued that insurance benefits are something to which the injured person has a right, quite apart from any damages which he may be able to recover because they are part of an insurance scheme to which he, himself, has contributed and because any other course would in some degree enable the wrong-doer to benefit from the fact that the man he has wronged happens to have an insurance covering the risk. Those who take this view point to the fact that a court in assessing damages takes no account of any sum which may have been received under a private contract of insurance, which is regarded as due solely to the prudence and foresight of the injured person and as in no way affecting the liability of the wrong-doer. While this argument may be strong in a case where the defendant is not the employer of the injured party, and so has made no contribution towards the insurance benefits which that party has received (save as a taxpayer), it is much weaker in employment cases where the defendant himself has contributed roughly one half of the contributions from which the injured person is drawing his benefit.

Moreover, in so far as this argument relies on the view that a wrong-doer should not be allowed to benefit from the existence of a scheme of national insurance, it is, of course, based on a fallacy and ignores the fact that civil damages are intended as compensation to put the injured party, so far as may be, in as good a position as he was before the injury took place—they are not intended as a penalty from wrong doing.

In recommending that benefits should be taken into account in assessing damages, the majority of the Monckton Committee took the view that damages should be regarded as a whole and that no distinction should be drawn between damages attributable to loss of earnings or profits and those awarded for the injured person's pain and suffering. They did this, as I understand it, on the grounds, first, that some types of insurance benefit, such as disablement benefit, are intended to provide compensation for injuries, even though those injuries involve no financial loss, and, secondly, because they considered it unreal to split up damages which should, they thought, be regarded as a whole, and as being the sum representing what the Court considers fair compensation for the whole of the effects of the injury. Finally, they thought that if benefits were only to be set off against the element in damages awarded in respect of financial loss the result would be an encouragement for litigation. My Lords, I have given the gravest consideration to these arguments and, I confess, I am unable to agree with them.

I am completely at one with the Monckton Committee in their desire that a sum of money to be awarded by way of damages should be awarded as a whole and should not necessarily be split up into various heads. It would, in my view, be most unfortunate if a Judge or, still more, a jury were to be called upon in every case to say the exact mathematical formula by which a decision was arrived at since, as we all know, this decision is not capable of any precise measurement. The Bill, therefore, provides that it is not necessary to specify the gross damages before the deduction has been made or the net damages after the deduction, nor is it necessary to specify the amount of the deduction. The Bill, therefore, does not offend against this canon which the majority of the Monckton Committee approve.

No doubt it is true that if a person is entitled to receive insurance benefits and at the same time to bring an action for damages where he thinks he can establish negligence, it is likely that there will be a greater number of Common Law claims than is the case under a system where the claim to compensation and the Common Law action are alternatives, but I cannot regard this as a sound reason for rejecting an injured person's right to recover damages for the pain and suffering which he has been caused, if it is otherwise just that he should be allowed to recover. On these points I prefer the views which were put forward by Mr. Beney, the legal member of the Monckton Committee, when he said:

> "I would allow no deduction from the proper sum awarded for the suffering, mutilation, disfigurement and loss of enjoyment and expectation of life. Such sum ought to be paid in full, even at the risk that the unfortunate victim might in the end, when he had received the benefits under the scheme, get rather more than he would to-day. It is better to err on that side."

My Lords, as a result of considering the arguments on both sides, which I have outlined to your Lordships, the Government have come to the conclusion that, whilst there is no solution of this problem which is not open to criticism at some point, the compromise which the Bill proposes is the most satisfactory answer. No doubt it may be said that the five years' limit in respect of which benefits are to be taken into account is difficult to justify on strict grounds of logic. On the other hand, there is a very practical reason for limiting the number of years to five which will, I venture to think, commend itself to those who have had experience of the practice of the Courts in matters of this kind. There is undoubtedly some foundation for the view that in assessing damages, a Court is apt to pay more attention to a clearly defined sum, like a pension for life, than to the rather vague idea of loss of earnings over an indefinite period and it may make an unduly large reduction in damages in consequence.

I should think that what we all desire is that in the really serious cases, the effect of which would extend over a long time, the quantum of damages awarded should err, if at all, on the side of generosity, but that in the smaller cases the necessary deduction should certainly be made. It is moreover the fact that it is very difficult to peer into the indefinite future and to make deductions based on the expectation of what may happen after five years have passed. At the present time where loss of earnings which has occurred are usually mentioned as a special item of damage but where the period is vague and difficult to forecast, the loss is usually left at large as part of the general damages and it is precisely in this type of case that the risk of undue deduction from damages arises.

It would not be proper for me, at this stage, to invite your Lordships to consider the details of the manner in which damages are to be assessed, but I think that I should say that the Government considers that no deduction from damages should be made in respect of the death benefits payable under the National Insurance Acts. Here again we have departed from the view put forward by the majority of the Monckton Committee who, quite logically no doubt, considered that death benefits should be taken into account against damages, just like any other form of benefit. We think, however, that this would be wrong. Under the existing law, no account is taken of a widow's pension in assessing damages, and no account is taken of insurance monies when a Court is deciding what loss his dependants have suffered as a result of the death of the bread winner of the family. The total sum which will be involved as a result of ignoring the death benefits will not be large and I cannot believe that it will be seriously

[The Lord Chancellor.]
contended that this is not the right course to follow.

Now, my Lords, I have to turn to the two quite different subjects which are dealt with in the first two Clauses of the Bill. By Clause 1 it is proposed to abolish the doctrine of common employment. It is interesting to note that it is more than fifty years since Mr. Asquith, as Home Secretary, in 1893, introduced a Bill to abolish "common employment." I am glad to be following in his footsteps, though it is after a considerable lapse of time. I have no doubt that most of your Lordships will be familiar with the doctrine. Perhaps, however, I may briefly remind your Lordships of the history of this remarkable doctrine. It originated in the year 1837, in the case of Priestly *versus* Fowler, in which it was decided that a servant who had been injured owing to the overloading of a van by a fellow servant, could not maintain an action against his master. The reasons for this decision were obscure, but some twenty years later, the doctrine was upheld by your Lordships' House and was justified on the basis of implied contract by the workman.

Lord Cranworth explained it in this way:

"When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risk of carelessness from which their employer cannot secure them and they must be supposed to contract with reference to such risks."

This view may perhaps have been tenable in the *laissez-faire* economy which prevailed in the middle of the nineteenth century, but whether or not there was any justification for the doctrine of common employment at that time I do not think that anyone who is familiar with its practical application to-day can be found to defend it. The doctrine has been subjected to a barrage of criticism in recent years, coming from Judges and textbook writers, and I cannot believe that if your Lordships' House were free to consider it afresh to-day, without being bound by previous authority, the doctrine would have the slightest chance of survival. In a case which was decided in this House in 1939 the noble Lord, Lord Macmillan, described this theory of the implied acceptance of risk by a workman as a sheer fiction, and said:

"Whatever validity these grounds may have possessed a hundred years ago, it is manifest that in these present days of large-scale industry they have no foundation whatever in fact."

And the noble Lord, Lord Wright, spoke to the same effect when he said:

"I cannot help regarding the doctrine as an arbitrary departure from the rules of the Common Law based on prejudiced and one-sided notion of what was called public policy and sanctioned by no previous authority."

As the result of the acceptance of this doctrine all the Courts have been obliged to decide whether any given case fell on one side or the other of the line, the broad principle being that two workmen —if the doctrine is to apply—must be engaged in common work, and most ingenious, subtle and learned distinctions have been drawn. Thus, if a bus runs into another bus on the highway, both buses being owned by the London Passenger Transport, the doctrine would not apply, in spite of the fact that the conductor of the leading bus and the driver of the bus behind which runs into it are servants of the same master. Their employment would not be regarded as a common employment. But if the same thing were to happen with two trams, a different result would be arrived at, since the trams run on lines and are not capable of lateral deviation from their course. If, on the other hand, the two buses run into each other, not on a highway, but in the approach to the garage, then it is probable that the doctrine would apply in such a case.

I feel deeply sorry to deprive members of my profession of an opportunity of sharpening their wits on points of this sort, but I think the time has come to bury this misconceived and unfortunate doctrine once and for all. It is perfectly true that recent decisions of the Courts have sought to cut it down and to limit it, but it still applies between workmen working together on the same job, which is just where it is most likely that one man will be injured by the carelessness of another. It may possibly be said that to repeal the doctrine at this time will place an undue burden on industry just when it is being asked to do everything possible to capture foreign markets, but I cannot believe that there is any substance in this argument. Such extra liability as there may be will be passed on to insurers, and I cannot believe that the small extra charge on industry which

will be created should outweigh the advantages to be derived from the removal of an injustice which has for long been a bone of contention between master and man.

To balance any extra burden on industry which may result from the abolition of the doctrine of common employment, the Bill proposes to remedy what may be thought to be an injustice to employers under the existing law relating to the safety of their workers. The Monckton Committee pointed out that under the Coal Mines Act, 1911, an employer who was sued for breach of the obligations imposed by that Act could plead that it was not reasonably practicable for him to avoid or prevent the breach, but under the Factories Act, which is the other principal Act which creates statutory duties affecting workmen in their employment, there is no such limitation on an employer's liability, and once a breach of any of the statutory duties imposed on him by that Act is established, he can be held liable in damages, regardless of the fact that the contravention or non-compliance with the terms of the Act is due to causes over which he had no control, and against the happening of which it was impracticable for him to make provision. There seems to be no good reason for the continuance of this definition, and it is accordingly proposed that where any Act of Parliament, or any regulation made under it, imposes a duty for the protection of work people, the defendant to an action for damages shall be entitled to put forward the same defence as he could have, for instance, under the Coal Mines Act, 1911. Your Lordships will notice that the new defence is limited to Statutes which are designed for the protection of workmen. There may be cases where Parliament has decided as a matter of deliberate policy that it is in fact desirable to impose an absolute obligation in the case of certain duties. If there be such cases we do not seek to interfere.

As a result of this review I hope your Lordships will consider that this is substantially a non-controversial measure, conceived, as I believe, on sound lines, which carries out much needed reforms in a difficult branch of the law, and which at the same time provides a just and fair solution of the problem of alternative remedies. I have myself given very much thought to this matter, and discussed it from all angles, and I can confidently commend this Bill to your Lordships as being a satisfactory solution of this problem. I beg to move.

Moved, That the Bill be now read 2a.—(*The Lord Chancellor.*)

4.28 p.m.

VISCOUNT SIMON: My Lords, I rise to state on my own behalf—and I believe this is the view held by others in the House who have had legal training—that this Bill should be heartily commended. It is a lawyers' Bill. Some laymen, perhaps, would be inclined to say, even after the noble and learned Viscount's very clear exposition, that it is rather a technical Bill. It is gratifying to see that we have a reasonably full House and, if I may say so, I am particularly glad to see on the Cross Benches, as is proper, a number of members of your Lordships' House who are Law Lords, and who, according to what I think is a good convention, do not take part in matters of political controversy, but who, of course, are very fully informed from their experience as Judges of the matter with which we now have to deal. I remind myself that Sir Walter Scott, who was himself an advocate and a practising Judge, spoke on one occasion of "the irksome and even hateful profession of the law"; and he found a better occupation for his talents. But, if your Lordships will show your usual indulgence, I would like to say a few words, because I, too, have perforce had a good deal of familiarity with this difficul subject in the past.

Though this Bill appears to be a Bill of interest to legal specialists, it in fact deals with the rights of millions of ordinary citizens. In particular, it seeks to provide a just basis for settling the compensation that can be claimed and ought to be paid where a workman is injured at his work. If I may, in the short time to which I will try to limit myself, I will take the three topics in the reverse order; indeed, I adopt the order which is found in the Bill. The first topic dealt with in Class 1 is the abolition of the doctrine of common employment.

I agree with everything which the Lord Chancellor has said as to the desirability of putting an end to that doctrine. As a humble mute who attends the funeral service, I am very happy, my Lord Chancellor, to join you as chief mourner. In

[Viscount Simon.]

point of history, it really is a very remarkable doctrine, and it is of some interest to dwell upon it for a moment. It is not the result of Statute at all; it is not that Parliament has ever so enacted. In the year in which Queen Victoria came to the Throne a learned Judge delivered, though I think somewhat obscurely, the decision to which the Lord Chancellor has referred.

It is hardly worth while spending time on arguing small points of legal history, but I myself should have said that the idea there was an implied contract which denied to the fellow workman the right to get compensation from his employer when another employee was negligent and damaged him, was really enunciated first of all in the Courts of America. There was a well-known Chief Justice, Chief Justice Shaw of Massachussets, who delivered an elaborate judgment in which he explained this doctrine of an implied contract. Of course, there is not an implied contract at all. May I give your Lordships a perfectly simple domestic illustration? If one could conceive that any of your Lordships were in the position at this moment to have both a cook and a kitchen-maid—I am obviously dealing with times past—the doctrine would have this effect. If the cook by negligence poured boiling water over the kitchen-maid, the kitchen-maid could not claim compensation from you, the employer, although it was your servant, the cook, who had done it because, said the law, when the kitchen-maid entered your employment she knew you had a cook, and knew that she would be working alongside her in the same job of preparing your dinner. Therefore, the kitchen-maid (though she never said so, and you never said so), entered into an " implied " contract with you that if the cook did pour boiling water over her she could not claim damages from you. That is, in fact, the doctrine which has thus gradually been evolved.

Some of us in recent years have made the most manful efforts, so far as the rules of the law allow, to cut down the doctrine, and nowadays—and I think the Lord Chancellor will agree with me—we have at least qualified the doctrine as between two fellow servants. You cannot deny one servant his claim for damages against his employer when a fellow servant is negligent and damages him, if the two servants are not engaged on the same work. If you did not have some such limitation, in a large-scale industry—I speak particularly to the noble Lord, Lord Walkden—you might have two men at the opposite ends of a railway system, having nothing in the world to do with one another, and none the less the railway company would have a defence under the head of common employment.

But we have succeeded—I hope strictly within the proper limits of judicial interpretation—in establishing now that the two people must be engaged upon what we call " common work." There was decided in this House, in my time, as the Lord Chancellor has said, that if a bus runs into another bus on the high road—both buses belonging to the Corporation of Glasgow—that is merely a road accident, and therefore the injured workman on the one bus may get compensation from the Corporation, notwithstanding he was hurt by the negligence of a fellow servant. But when it comes to a Corporation tram losing control of itself and backing into another tram, the conductress of the tram who is hurt is bound by an " implied contract " when she entered the service of the Corporation, that she would not hold the Corporation responsible for the negligence of the tram driver who was careless. It is really high time we got rid of this. I can assure you that nobody is more willing to get rid of it than those who, in recent years, have had to do their best to administer the law on this subject.

I recollect reading in early years a passage in Sidney and Beatrice Webb's *History of Trade Unionism* on this subject. It is quite a short passage but it puts the point of view with extraordinary clearness and brevity. What the Webbs wrote in their book, at page 350, is this:

> " By the Common Law of England a person is liable for the results, not only of his own negligence, but also for that of his servant, if acting within the scope of his employment. The one exception is that, whereas to a stranger the master is liable for the negligence of any person whom he employs, to his servant he is not liable for the negligence of a fellow servant in common employment. By this legal refinement, which dates only from 1837, and which successive judicial decisions have engrafted upon the Common Law, a workman who suffered injury through the negligence of some other person in the same employment was precluded from recovering that compensation from the common employer which a stranger, to whom the same accident had happened, could claim and enforce. If by the error of a signalman a railway train met with an accident, all the injured passengers could obtain compensation from the railway company; but the engine driver and guard were expressly excluded from any remedy."

This means from the railway company because, of course, they could sue the signalman—

> " What the workman demanded was the abolition of the doctrine of 'common employment,' and the placing of the employee upon exactly the same footing for compensation as any member of the public."

Ever since I began to study the law I have thought that that was a just reform which ought to be made, and I am very glad to be taking part in the making of it now.

My noble friend referred, and rightly referred, to the Liberal Bill. I think it is not right that we should omit a reference to it. Mr. Asquith, when he was Home Secretary in Mr. Gladstone's last Government in 1893, introduced a Governmenot measure, the Employers Liability (Amendment) Act, to abolish the defence of common employment. I will not read it, but if anybody wants to see in perfectly pellucid language the doctrine of common employment analysed, described and also slightly ridiculed, it really is worth while turning to that great master of English to see how Mr. Asquith explained the matter to the House of Commons on February 20, 1893. The Bill came to grief. I will not raise any ancient wrongs by saying how it came to grief, but at any rate it did not pass both Houses.

I have had the interest to look up the actual Bill because I am going to submit to the Lord Chancellor—only for his consideration, because he knows I most heartily support him in this Bill—that really Mr. Asquith's Bill put his first clause in clearer terms than the draft we have before us. I know what drafting difficulties are, and the clause proposed has accomplished what is desired. But I cannot help thinking that not everybody will understand it the first time they read it. This is it:

> " The common employment of two persons shall not affect the liability to one of them of a third person for anything done or omitted by the other."

I think I may safely offer a small prize to those noble Lords who can explain what that means at the first hearing.

Now take Mr. Asquith's words:

> " Where . . . personal injury is caused to a workman by reason of the negligence of any person in the service of the workman's employer, the workman, or, in case of death, his representatives, shall have the same right to compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

Those words are very easy to follow the first time they are read. I suggest to my noble and learned friend for consideration—I do not know whether his draftsmen looked at Mr. Asquith's Bill—that possibly this clause could have been slightly more clearly expressed. It means exactly the same thing. But there is a great deal to be said for writing out our Statute Law in a way that he who runs may read!

There is one other observation I would venture to make—and again I put it purely as a respectful suggestion to the Lord Chancellor. Mr. Asquith's Bill included this provision, that having abolished the doctrine of common employment, there should not be any contracting out of that abolition. That is to say, the employer could not say to his workman " I will subscribe to your benefit fund; won't you sign this document saying that if you get injured you will not object to allowing me to raise this defence in Common Law? " Mr. Asquith's Bill expressly provided that that should not happen. It is in Clause 4:

> " A contract whereby a workman relinquishes any right to compensation to himself or his representatives for personal injury caused to the workman by reason of the negligence of the employer or of any person in the service of the employer, shall not, if made before the accrual of the right, constitute a defence to any action brought for the recovery of such compensation."

That is the well-known principle that, when Parliament lays down that there shall be a certain form of protection given to the injured, it shall not be open to the party that may have to pay to make a private contract with the individual, perhaps rather tempting his acquiescence by one means or another—not dishonourable but none the less exceptionable; therefore, a workman cannot contract out of his rights. I invite my noble and learned friend to consider whether something of that sort is not wanted here. There have been cases in which we have had legislation of this sort and where it has been possible for the employer to contract out

[Viscount Simon.]

with the workman. I think that was in the Act of 1880. That is all I wish to say on the first head.

As regards the second head, which the Lord Chancellor has very clearly explained, I must say I think the provision is only just. It is no doubt in the interests—if you can speak of interests in this matter, for we all want to do what is just and right—of the employer. This is the provision:

"... a person shall not be liable, in an action for breach of statutory duty, to damages for personal injuries or death, if it is shown that it was not reasonably practicable to avoid or prevent the breach."

The way the matter stands now is this, that if you have a statutory duty, for example, a duty to fence dangerous machinery, cast on the employer and if in fact—it does not matter what the circumstances are—the statutory duty has not been completely complied with, no amount of proof by the employer as to how careful he or his manager was, will help him. He is liable absolutely, without the smallest possible loophole of escape.

The workman who was injured in such a case has his rights, of course, and I am very glad he has, under what is now the Workman's Compensation Act, and when it comes into force, the Industrial Injuries Act. It does not seem to me to be reasonable or right, if it is proved by the employer that he has done everything that he reasonably could to comply with the regulations, to say to him: "You have none the less got to pay damages because in fact the regulation was not absolutely observed." The failure may have been due to a pure accident, something that happened suddenly which was beyond the employer's control, and yet the employer is liable. I agree with the Lord Chancellor in thinking that that is too stiff, especially in the light of the compensation which the workman will be entitled to get independently of this right under Clause 2.

I will be very brief about Clause 3, which again the noble and learned Viscount has fully explained. I think it was the noble Marquess, Lord Reading, and I myself, who in this House raised more than once this question: How are the Government under this new National Insurance (Industrial Injuries) Bill going to deal with this frightfully difficult question called "alternative remedies"? As the Lord Chancellor has explained, under the Workmen's Compensation Act you have a Clause dealing with alternative remedies. The workman may often have or, at any rate, may think he has, not only a right under the Workmen's Compensation Act to weekly compensation on the scale provided—or, if he is killed, provision for his widow—but also, quite independently of that Act, a claim against his employer at Common Law. Nobody has ever said under the Workmen's Compensation Act that he ought to be able to get both remedies; and that, of course, is right.

There was this provision made, that if he started an action against his employer for damages at Common Law and he failed because he could not prove negligence, none the less he was not denied all compensation but he could then and there ask the Judge who tried the case to say that he could get compensation under the Workmen's Compensation Act. That has happened in dozens of cases, and of course is perfectly just. What is the change that is taking place under the Government's new National Insurance (Personal Injuries) Bill? Amongst other things it is this: Whereas under the Workmen's Compensation Act, the compensation had to be paid by the employer and by nobody else—it was just his business to pay; he was sued in the County Court or at arbitration, and had to pay—now, of course, the compensation has to be paid out of a fund to which three people contribute. The workman, I think, contributes 5/12ths, the employer another 5/12ths, and 2/12ths come from the State. It does seem to me that in those circumstances it is perfectly right for the Lord Chancellor to propose, as he does in Clause 3, some sort of compromise.

If the workman succeeds in his action against his employer at Common Law, he will get a lump sum from the jury, if there is a jury, or if not from the Judge who is dealing with it as a matter of fact. Is he to get that lump sum without any regard to the fact that he is also going to get, under the national scheme, some more compensation? It does not seem to me to be right that he should get the lump sum without regard to that, and the question is by what method and how far should the lump sum be reduced on that account. I think this is one of the cases where the Government have very sensibly adopted the language of the

Law Reform (Personal Injuries) Bill.

[H.L.]

AMENDMENTS

TO BE MOVED IN COMMITTEE

BY THE VISCOUNT SIMON.

CLAUSE 1.

Page 1, line 5, leave out subsection (1) and insert—

("(1) It shall not be a defence to an employer who is sued in respect of personal injuries caused by the negligence of a person employed by him, that that person was at the time the injuries were caused in common employment with the person injured.")

Page 1, line 9, at end insert—

("(3) Any provision contained in a contract of service or apprenticeship, or in an agreement collateral thereto, (including a contract or agreement entered into before the commencement of this Act) shall be void in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed or apprenticed by the negligence of persons in common employment with him.")

CLAUSE 2.

Page 1, line 11, after ("to") insert ("pay")

Unjust Steward who said: "Sit down quickly, and write fifty per cent." I do not think you will get a better solution. The provision is, as your Lordships see, that, when the jury are assessing the lump sum which the employer is to pay to the injured workman, they must take into account the fact that he has also got compensation coming to him under this new scheme. So you should take one half of the benefit that he would get from that and a number of other benefit schemes for the five years beginning from the accident and deduct it. It is extremely speculative. You do not know that he is going to live for five years; you do not know that he is not going to pass out of industry; a woman may get married and pass right out of industry.

It is obviously a shot in the dark, but juries under well-qualified Judges constantly have to arrive at a figure which may be regarded as a shot in the dark. The jury have to assess the particular value of a broken heart, or rather the particular compensation which should be given in breach of promise cases; they have to assess the amount of compensation which should go to a man who has broken his leg, or perhaps has contracted some obscure disease. That is what juries are for, and there is nothing better for that purpose, in my humble judgment, than a collection of twelve reasonable citizens who take their work very seriously, and honestly try to arrive at a fair figure. I do most warmly agree with the noble and learned Viscount the Lord Chancellor—and I think some of my noble and learned friends who have great experience in this matter also agree—that it is absolutely right to say that you are not going to ask a jury to give you a lot of separate figures and then work out the result. They are extremely likely to be right in the conclusion, but, if you put twelve people together in the jury-box who have to settle unanimously each of the component factors, it is likely that you will be able to pick a hole in one of those factors and produce a great deal of complication and delay.

I will not say any more on the subject now, except to congratulate the noble and learned Viscount who has had the opportunity of introducing this Bill, on doing so. When it is passed, it will effect a real change in the law which will be to the advantage of great masses of our fellow subjects. It will knock on the head one of the doctrines under which I have suffered ever since I was called to the Bar. I am delighted that the occasion has now come when we can see these useful changes made in the law of the land.

4.53 p.m.

THE MARQUESS OF READING: My Lords, it requires a certain temerity for a mere member of the Bar to discourse to your Lordships' House on so esoteric a subject as is contained in this Bill, particularly in the presence of what I may call, without offence, the massed bands of the Lords of Appeal in Ordinary. My only comfort is that, although it is certainly open to your Lordships to move that I be no longer heard, they can no longer order me peremptorily to sit down. I would join with the noble and learned Viscount who has just spoken in commending this Bill to your Lordships' House, and in congratulating the noble and learned Viscount on the Woolsack in being instrumental in introducing it to this House. As has been said, it is, to a large extent, technical in form, but in context it is both a valuable and an important measure containing possibilities affecting a very large number of people. Anybody with any experience of the Courts knows how large a portion of the time available is taken up with cases of this kind.

The Bill is based, to a considerable extent, upon the recommendations of the Monckton Committee, and, I may say so, it is clear that that Committee, which conducted prolonged deliberations, arrived at a careful, comprehensive and valuable Report. As regards the actual contents of the Bill, the first clause, which deals with common employment, is one which I think will be welcomed by anybody who has ever had any contact with the law, as removing a defence which nobody greatly relished putting forward, because it had become a fiction and a fiction which, in the course of time, was becoming increasingly transparent and unmaintainable. In these circumstances, to attempt to maintain a fiction of that kind adds neither to the stature nor to the prestige of the law, and it is best that it should depart at the earliest moment. Before I pass from common employment, I would add one word to what the noble and learned Viscount has just said on the

Law Reform (Personal Injuries) Bill.
[H.L.]

AMENDMENTS
TO BE MOVED IN COMMITTEE
BY
THE VISCOUNT SIMON.

11th December, 1947.

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[The Marquess of Reading.]

matter of contracting-out. He was good enough to let me see the report which he had of Mr. Asquith's speech upon the Bill which he introduced, and it is perhaps not wholly without interest to note that, by a coincidence, the report of his speech in the *Hansard* for 1893 appears on page 1947, so we have at last spanned the intervening numbers!

The second clause contains, I think, a useful addition to the law by giving a further licence in the matter of statutory defence. The noble and learned Viscount on the Woolsack has not, if I may say so, attempted to defend as logical the third aspect of the Bill, which deals with damages, and rightly so, because I do not think it would be possible to put up a defence for it on purely logical grounds. But, on the other hand, the law in the last resort deals with human beings in their corporate or in their personal capacity, and with their relations one with another. Human beings are apt not to be very logical in themselves and, consequently, not very logical in their relations one with the other. Perhaps the best law is not the most logical law, but I agree that in this clause a compromise has been arrived at between the various conflicting views, which I think will receive general commendation as being fair, taking into account all the various factors to which consideration has to be attached. I say no more except again to express to the noble and learned Viscount on the Woolsack general thanks for having taken the opportunity to fill a gap of which we were very conscious when we were discussing the National Insurance (Industrial Injuries) Bill, and to fill it as adequately as it is filled by the present Bill.

5.0 p.m.

LORD PORTER: My Lords, the "massed bands" do not propose to blow a long, strident or loud note, but they do welcome this Bill and the form which it has taken. They welcome the first portion because it enables them to avoid those subtle distinctions which the law always endeavours to avoid if it can but is sometimes compelled to take, not owing to its own inherent weakness but because of the complications of nature. In the second place, one welcomes the proposal to protect against an enforced possibility which sometimes makes people pay for that for which they are in no sense responsible. I understand that the noble and learned Viscount is dealing with one aspect of the matter, and I need not refer to it further. With regard to the final matter with which the noble and learned Viscount dealt, as he said, in the case of an ordinary accident no account is taken of insurance, and no account is taken because the insured person may or may not insure himself—pay the premium. In this case, however, the workman does, to some extent, pay his own premium and, to that extent, he should have the advantage which those who pay a premium have. In so far as he does not pay a premium, then he should not have that advantage. In so far as the State or his employer pays the premium, you have got to deal with it somehow, and the least complicated the way the better. It has been done rather by the rule of thumb, which, after all, is the way in which juries arrive at their results. They arrive at them by general considerations, without any very logical method of reaching their conclusion. That is what has been done for this Bill. Certainly any Court of Appeal must be anxious that the matter shall be decided on some general principle and not on refined complexities with which they would have to deal. My Lords, I commend the Bill.

5.3 p.m.

THE LORD CHANCELLOR: My Lords, I will not detain your Lordships for more than a moment. I rise merely to thank your Lordships for what has been said, and to confess that it is rather an unusual experience for me to introduce a Bill and find that I get applauded from all sides of the House. I hope that is an omen of good things to come. With regard to the specific points that have been raised, I shall gladly consider, as the noble Viscount, Lord Simon, suggested, the wording of Clause 1 and compare it with the wording of Mr. Asquith's Bill. I am afraid I had not taken the trouble to look up the wording of that Bill. It may be that that is better, and I shall not necessarily adhere to this wording if I find that that wording is better, more especially because this wording is that of the draftsman and not of myself. The point about contracting out seems to me a substantial point, and I will gladly look into that if it is necessary. I am inclined to think that we ought to

put in an express provision to deal with it.

With regard to Clause 2 of the Bill, I hope I did not mislead your Lordships in what I said. That is the clause which provides that, so long as the employer can show he has done everything possible, he would have a defence, because the clause applies, of course, to every Act of Parliament which is designed wholly or mainly for the protection from personal injury of persons engaged in any work or works. If—and I have not got anything in mind at the present time—there is some Act which does not come into that category which imposes a duty, then, of course, that case would not be dealt with by Clause 2, because Clause 2 is limited to those Acts of Parliament which are designed for that purpose. As to Clause 3, I confess that when I was Minister of National Insurance I saw this problem looming ahead of me, and I considered it was going to be a very difficult one. My successor in that office, the present Minister of National Insurance, has, with his predecessor, given a great deal of time and trouble to this matter. We have collaborated together, and it is very satisfactory to me, as I am sure it is to him, to know that your Lordships approve our efforts, and I am very grateful to your Lordships.

On Question, Bill read 2ª and committed to a Committee of the Whole House.

CEYLON INDEPENDENCE BILL.

5.6 p.m.

Order of the Day for the Second Reading read.

THE LORD PRIVY SEAL (VISCOUNT ADDISON): My Lords, it is an exceptionally agreeable experience for me to commend to your Lordships a Bill which I believe will receive the same unanimous benediction as the one with which we have just been dealing. Further than that, I should like to say that personally it is a source of real satisfaction to know that twice in the same week one has been privileged to bring before the House measures which denote great advances by two different members of our Commonwealth—namely, New Zealand on Tuesday and Ceylon to-day. I should like to say how sorry I am that my noble friend Viscount Hall, as a former Colonial Secretary, is not able, owing to sickness, to take charge of this Bill to-day, but I count myself fortunate in being able to do so in his stead.

As your Lordships know, it has been the aim of British policy for a long time past to develop self-government in the different territories for which we have been responsible. It is a peculiar feature, I think, of the British genius that we have been able to do so and, at the same time, to keep in step with the development of national sentiment which has grown up all over the world and so to adjust our measures as to get the best of that characteristic growth. In looking at this subject, I reminded myself of something that Lord Balfour said some years ago about the British Commonwealth which I think is particularly appropriate to this Bill and to to-day—namely, that in the British Commonwealth free institutions are its life blood and free co-operation is its instrument. That is a fine testimony to the development which we see marked in the Bill now before us.

Ceylon has had a long and loyal history as a part of our Colonial territories and, as the House knows well enough, stood loyally by us in two wars without any flinching. It is characteristic of the development which has taken place that now we have before us a Bill which provides for Ceylon self-government as a member of and as a Dominion in the British Commonwealth of Nations. It is right that one should take the opportunity to say, first, how much has been owed during the last 17 years to the results of the Donoughmore Commission. It was that Commission which first enabled the people of Ceylon to exercise a franchise in a corporate way, and this Bill is a great tribute to the development which that has led to since 1931. Then I think it is right—and I am glad to see that the noble Lord is present—that we should recognize the important share in this development which the noble Lord opposite, Lord Soulbury, is entitled to claim. His energies led to providing the basis upon which this scheme has been built, and I happen to know also that the noble Lord has contributed in no small measure to the negotiations that have been going on during the past 12 months or so, which have resulted in this agreement.

Now, therefore, we have in Ceylon a Parliament with its two chambers, with a

[Viscount Addison.]

Prime Minister responsible to it, and a Cabinet, and we shall have a Governor-General occupying a similar position to that which a Governor-General occupies in the other States of the Commonwealth. This is the first occasion in our history upon which a Colony, developing this system of self-government of its own accord, has deliberately sought to become a Dominion State in our Commonwealth. It is the first time that such a thing has occurred, but we hope and expect that it will not be the last. It is a very significant illustration, showing how British government promotes these developments in Colonial territories. One of the first acts of this Government has been to sign with Ceylon the three vital agreements which your Lordships will see referred to in the White Paper which has been issued. They were signed on the 12th of last month. I expect that noble Lords who are interested, at all events, have acquainted themselves with them.

We have, as I say, entered into three agreements with the Government of Ceylon. The first is with regard to defence. The Defence Agreement provides for mutual assistance for defence against external aggression, and also for protection of essential communications. I need hardly say that that very important agreement receives the hearty support of our fellow members of the Commonwealth, Australia and New Zealand, to whom those communications are of course so vital. Then the agreement provides that Ceylon will grant to His Majesty's Government necessary facilities, including the use of naval and air bases, military establishments, and so on. Finally, it is provided that His Majesty's Government shall continue to exercise control and jurisdiction over His Majesty's Forces stationed in Ceylon. As we are well aware, the lessons of the last war, indeed the very elements of strategy, indicate how vitally important this agreement is and may be in the near future.

There is a second agreement which is called the External Affairs Agreement, under which Ceylon is to follow in relation to external affairs the principles and practices of the other members of the Commonwealth. Those who, like the noble Lord opposite and myself, have had business of this kind to conduct, know what that means in the way of consultation, communications and association all the time. I know that my successor in office will welcome to the councils the High Commissioner of Ceylon when this is all established. Ceylon will have a High Commissioner in London, and we shall be similarly represented in Ceylon. There are other provisions which are entirely in line with the practices of the other members of the Commonwealth. Then there is another very important agreement which safeguards the interests of public officers, those who have been engaged in the service of Ceylon under our rule and who may now wish to be transferred. The agreement safeguards their salaries, their leaves, and their pensions. It provides for certain classes of officers special compensatory terms on the same basis as was agreed for officers who might wish to retire on the introduction of the 1946 Constitution. Other provisions I need not describe in detail. But the important and gratifying feature in connexion with this matter is that these three important agreements go hand in hand with this provision for independence, and they reflect the spirit, and temper, of the people in Ceylon.

There are various technical matters in the Bill which may be dealt with in Committee. I do not propose to detain your Lordships by going into them to-day. What this Bill does, in fact, is to establish self-government in Ceylon, Ceylon being a member of the British Commonwealth, and these important agreements are an essential concomitant of this advance. It would not be right if, before I sat down, I omitted to say that a good deal of this is due to the Prime Minister of Ceylon, Mr. Senanayake. I have had the opportunity of meeting him on many occasions, and the noble Lord, Lord Soulbury, has met him on very many more. I can certainly say that he stood out in my mind as obviously a leader. His readiness to compromise, his willingness to recognize the importance of safeguarding the interests of minorities, and the many other good qualities which he displayed, greatly contributed to the conclusion of these agreements.

Finally, though he is by way of being a colleague of mine, I think I can properly refer to the constant activity, the friendly disposition and the helpfulness of my colleague, the Colonial Secretary. He has taken, as we all know, a

very active part in these negotiations over a period of many months. It so happened that by, shall we say, a charming accident, I happened myself to be in Colombo on the first day that the Parliament met there, and I was able to take part in a very interesting and refreshing tea party. It was very gratifying to find —though of course one expected it—the great good will which prevailed. I was very much impressed with the quality of the people with whom Mr. Senanayake had surrounded himself. Most of all, I think, all noble Lords who have been there must have been impressed by the situation of the place itself. The House of the Legislative Assembly is built on the edge of the ocean. It has as fine a setting, I should think, as any Parliament House in the world. It is, indeed, a beautiful place in a charming situation. On the evening that I was there, the light of the sun as it set over the sea was streaming into the Chambers of the Parliament House. I am sure we may all hope that that will symbolize the conditions which will be associated with the progress of self-government in Ceylon, and that the people of Ceylon will gradually realize to the full the ideals which animate the other members of the Commonwealth. I beg to move that the Bill be now read a second time.

Moved, That the Bill be now read 2ª.—(*Viscount Addison.*)

5.18 p.m.

VISCOUNT SWINTON: My Lords, it is my happy privilege, on behalf of the Conservative Peers in this House—and on this occasion none of them is in Opposition—to welcome this Bill and to bid it God speed. I join with the noble Viscount, the Leader of the House, in regretting the absence of the noble Viscount, Lord Hall, and still more the reason for his absence. Indeed, I know that nothing but serious ill-health would have kept him away on this occasion, which marks the consummation of so much excellent work on his part. But it is not unfitting, I think, that the noble Viscount, the Leader of the House, himself an old Dominions Secretary, should pilot this Bill and welcome a new Dominion. Perhaps, it is also not unfitting that an old Colonial Secretary should bid farewell and hail to an old Colony in supporting the Bill.

This is, indeed, a red letter day for Ceylon. If their hagiology permits of canonization, the people of Ceylon, I am sure, will name Lord Soulbury and his colleagues as patron saints of their island and their Constitution. They will also, I am equally sure, add to the number of the elect that wise and understanding governor, Sir Henry Moore, who has done so much to bring to fruition this Bill and the admirable agreements which accompany it. As the noble Viscount the Leader of the House has said, in peace and in war, over many years, Ceylon has been a loyal and a valued partner in the British Commonwealth. To-day, true to that tradition, Ceylon of her own free choice has affirmed her determination to take her full and her rightful place in the British Commonwealth. By this Bill we recognize her full Dominion status, a status so well defined by the Prime Minister of another Dominion as "Freedom with something added."

The Throne of Kandy, which by gracious gesture King George V returned to his people of Ceylon during the time I was Colonial Secretary, takes on a new significance of loyalty to his successor. We all welcome this Bill and I am sure that we shall all welcome equally the Defence Agreement which accompanies it. Ceylon is a vital link in Commonwealth communications and in Commonwealth defence, increasingly important as scientific and mechanical advances annihilate distance. That Agreement is vital and I hope that in the operation of that Agreement, which has been so freely and so gladly negotiated, the young men of Ceylon will have an opportunity of finding some place in the Defence Services of the Crown. As the noble Viscount the Leader of the House has said, not only is that Agreement of great importance to us here, but it is of equal importance to the Dominions of Australia and New Zealand, and to the territories of Malaya. All this makes the Commonwealth partnership very wide and very real.

The noble Viscount the Leader of the House said a word about minorities. I think the Government of Ceylon have been wise to preserve in the Constitution the provision for the rights of minorities. I am sure that nothing is further from the mind of that wise leader, the first Prime Minister, Mr. Senanayake, or any of his

[Viscount Swinton.]

colleagues, than any idea of discrimination, and I would add my own tribute of respect and admiration, and indeed of longstanding friendship, to the new Prime Minister. It is fortunate for Ceylon that she is starting off on this maiden voyage with so wise a captain at the helm. I think the retention in the Constitution of this provision about the rights of minorities will give a sense of security and make easier the government of a mixed community. A majority owe a duty to the minority; that goes without saying. But the converse is also true. The minority have their duties as well as their rights, and in any community must play their part. We in this Old Country are ourselves something of an amalgam. Nine hundred years ago Briton and Norman and Saxon learned to dwell together in unity, and it is a proud and practical tradition of the British Commonwealth and Empire that many races can live together and advance and prosper in mutual interest and common loyalty. By this Statute the Mother of Parliaments and the oldest Dominion gives an affectionate and confident welcome to the newest Parliament and the youngest Dominion.

5.25 p.m.

VISCOUNT MERSEY: My Lords, in the absence of my noble friend Viscount Samuel, and on his behalf, I desire to join in the messages of welcome to Ceylon which have been so adequately expressed already. I am extremely glad that the noble Viscount, the Leader of the House, mentioned my noble friend the Earl of Donoughmore, who was Chairman of your Lordships' House and who led the first Commission that initiated this self-government. Those of your Lordships who know Lord Donoughmore know that he seldom touches anything without effecting an improvement. He has a peculiar felicity in a quiet way of dealing with many problems. As the noble Viscount, Lord Swinton, has said, Ceylon is one of our oldest Crown Colonies. We first acquired the sovereignty in 1802, not quite 150 years ago, and we are especially glad to see that after so long an experience of the benefits of association with this country, Ceylon should be one of the first large colonies to adopt the privileges of a Dominion within the Commonwealth. We Liberal Lords send our best wishes to Ceylon for its rapid future development under its new system of government.

5.27 p.m.

LORD SOULBURY: My Lords, like other noble Lords, I have listened with the most profound pleasure and satisfaction to the speech of the noble Viscount, the Leader of the House, and I would add my congratulations to him and to his colleagues in the Government. I am only sorry that the noble Viscount, Lord Hall, is not present. I should like to pay my tribute to the notable contribution he has made during the handling of this matter. I would congratulate the Government not only on the vision they have shown, and the tact and skill they have displayed in handling these problems, but on the speed with which they have carried out their programme. The announcement of Ceylon's new status was made on June 18 last. The questions of defence, of foreign affairs and of the position of public officers had to be negotiated. The agreements resulting from these negotiations were signed on November 11; and last week this Bill passed through the other place. I am sure that it will receive the warmest approval of your Lordships to-day so that in the course of a few days it may become an Act of Parliament.

I and my colleagues greatly appreciate the kind and generous references made to our work. The credit, of course, really belongs to the men who took the final decision and bear the final responsibility, because if anything had gone amiss the discredit would have been theirs. As the noble Viscount the Leader of the House has pointed out, Ceylon is the first Colonial non-European people to reach independence within the Commonwealth. This is a great experiment, and I have not the slightest doubt that the experiment will prove an outstanding success. We are not called upon to consider the prospects and problems of a backward and immature people. Your Lordships are now asked to assent to the emancipation of an ancient people, who were settled in their country long before the Romans occupied Great Britain; a people who have in the past enjoyed independent sovereignty, and who have for centuries known civilized rule; a people who are rightly proud of their history and who, for the last fifty years at least, have been intent on regaining the independence which their ancestors

had lost, and are now firmly resolved to justify their recovery in the eyes of the whole world.

Intimate and friendly relations have lasted between ourselves and Ceylon for the last 150 years. Each of us has made notable contributions to the prosperity of the other, and our interests have been, are, and will be, inextricably interwoven. For a generation or more many of the political leaders in Ceylon have been educated in our country, and they have absorbed our political ideas. Before I went out to Ceylon I was warned by various friends of the danger of transplanting Western Parliamentary forms of government among an Eastern people; but they had already been transplanted, and had taken root. The noble Viscount the Leader of the House will bear me out when I say that the procedure in the Ceylon Parliament is practically identical with our own; they have the same practices, the same usages, and the same rules of order. I had only to close my eyes to imagine myself back in the House of Commons. The members of the Ceylon Parliament are intimately acquainted with our language, our laws, our literature, our history and our traditions. So in no sense are we imposing an alien Constitution on an inexperienced or reluctant people.

When the Sinhalese asked for a responsible Government they meant a Government on our model; and nothing else. Ceylon's circumstances and problems are in a great many respects different from ours. Reference has been made, and rightly, to the minority problem. The Donoughmore Commission—to whose work I should like to pay a warm tribute—found the same problem. Like them, we did not find a homogeneous population; but neither did we, like Lord Durham, find "two nations warring within the bosom of a single State." Far from it. We became aware that the relations between the majorities and the minorities, especially between the Sinhalese majority and the Ceylon Tamils, had been, and still at times were, strained and acrimonious. Your Lordships are aware that there are some 6,500,000 people in Ceylon: 4,500,000 are Sinhalese—one of those races from the North, and Buddhists—and some 800,000 are Ceylon Tamils, who are Hindus and come from the South. Both groups have been settled in the island for over 2,000 years. There are about 700,000 Indian Tamils working on the estates, some 400,000 Moslems, descendants of the Arab traders, 30,000 burghers, descendants of the Dutch colonists, and 5,000 or 6,000 British people. It is by no means a homogeneous population.

Up to the General Election held in Ceylon last August the electoral results normally depended on racial or religious issues. For a long time in the previous Legislatures the ratio of representation has been five Sinhalese to one Tamil, much in the proportion of the population. When we were there we had many representations from the Ceylon Tamils to the effect that they were debarred and, so far as they could see, would for ever be debarred from an adequate share in the responsibility of the government of the country. They said they were subject to the perpetual domination of the Sinhalese, and they expressed to us grave misgivings at the approach of the complete transference of power and anthority from neutral British hands. To meet those not unnatural apprehensions we recommended certain safeguards which, as the noble Viscount, Lord Swinton, mentioned just now, are being retained in the new Order in Council. I am glad they are. We also recommended a Second Senate—and His Majesty's Government agreed with our recommendations—for we felt that the protection of minorities was an important and useful function of a Second Chamber.

I do not, however, place so much reliance on statutory safeguards or on the establishment of some particular institution as a protection for minorities as I do on the good sense and moderation, the tolerance and statesmanship, of the majority. In the long run that is the only real safeguard. Like my noble friend Viscount Swinton, I am absolutely convinced that the Sinhalese Government are making, and will make, the most earnest endeavours to secure the contentment and the welfare of the minorities in their country. They will do that not only in the interests of their country but because of the result of the recent General Election—if only from the much narrower political interests of common political prudence—for the Party supporting the Government in Ceylon have not secured a majority over the other Parties combined.

[Lord Soulbury.]

As regards the recent General Election—which I understand was conducted in a most orderly fashion, and with great fairness—we pointed out in our Report, some two and a half years ago, that there were then definite indications of the growth of a Left Wing movement in the Island, disposed to concentrate more on political and economic than upon racial and religious issues, and already constituting a potential solvent of racial and religious solidarity. The result of the General Election showed that that diagnosis was not very wide of the mark. Of the niney-five elected seats, twenty-five were won by exponents of an extreme Left Wing policy, and nineteen by Independents; the largest Party, consisting of forty-two, is led by the Prime Minister, Mr. Senanayake. The remainder of the House, I think, are Tamils. The Prime Minister, Mr. Senanayake, is a Sinhalese, but he has never thought of himself as a Sinhalese representative. I think he enjoys the trust, and indeed the affection, of all communities in the Island to a degree unprecedented in its history. In his newly-formed Cabinet two Portfolios have been given to Tamils, and one to a Moslem. So I think one may say with some confidence that the days of communal representation are numbered, and are giving place to a division on political and economic issues similar to that in this country.

That means that the stage is now set for the emergence of a Party system suitable to the constitutional reforms of British Parliamentary government. I think I may register my approval of such a development without being suspected by your Lordships of any particularly extreme Left Wing sympathies. If I may quote a very short passage from our Report we said:

"... that communal representation, though superficially an attractive solution of racial differences and to some extent the line of least resistance, will be fatal to the emergence of that unquestioning sense of nationhood which is essential to the exercise of full self-government."

For those reasons, I think there are good grounds for hoping that the dissension between the minority and the majority, which admittedly there has been in the past, will disappear. There is every prospect of an integrated policy and no longer any political danger of racial and religious issues.

I would like to put before your Lordships a few other reasons for my confidence in the successful outcome of this experiment. The foundation of success lies in an educated population and in there being sufficient resources to provide the people with a reasonable standard of life. Those foundations are laid in Ceylon. Primary education has for some time been compulsory in the Island, but there are as yet nothing like enough schools. There are some first-rate secondary schools, but still too few, and an excellent and well-administered university. The urge for the increase of education in the island is tremendous, and I know very well that the Government of Ceylon are making, and will make, every effort to meet it. They are well aware of the importance to the island of a well-educated electorate. Expenditure on education in the last decade has trebled. Literacy is making notable progress. So far as I know, no other Far Eastern country has anything like such a high proportion of literate persons, although substantial illiteracy is still a serious handicap for a country which has enjoyed—thanks to the Donoughmore recommendations—adult suffrage for sixteen years.

There has been a notable advance in the social services. Hospitals and dispensaries are growing apace, and great efforts are being made to spread the knowledge and the practice of hygiene and sanitation. Substantial steps have been taken to promote social security, workmen's compensation, relief for the poor, factory legislation and so forth. Ceylon's resources, as your Lordships know, are mainly derived from agriculture, tea, rubber and copra. In the previous Legislature the present Prime Minister was the Minister of Agriculture, and thanks to his immense drive and energy his influence was felt in every direction in the island, in the expansion of land development, in land colonization, in experimental farms, in cattle breeding stations, in farm schools and, of course, in irrigation, which is one of the main problems. Also, thanks to him, the co-operative movement has been widely extended throughout the island and has been an immense boon to the poorer section of the people. As regards finances, I need only tell your Lordships that the National Debt of Ceylon is just about equal to one year of her revenue. I think your Lordships would appreciate a similar position in this country!

Before I sit down, may I say this? It is for the reasons that I have ventured to put before your Lordships, and with such great interest as we have in each other's prosperity, with such kindly, good-humoured, charming, and courteous people, with such natural resources and with leaders of proved experience, that I feel Ceylon can face the future under the happiest auspices. This is an historic occasion. It is a landmark in the development of the evolution of the British Empire, and it brings another step nearer what I believe to be the ultimate aim of British statesmanship—the fusion of Empire and Commonwealth. Ceylon is the first and will not, I feel sure, be the last of many other communities who will in due course attain the same independence under the Crown, until the British Empire becomes one vast family of self-governing States—to quote the Statute of Westminster:

"United by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

I feel it a very great privilege indeed to have been allowed to make some small contribution towards helping a friendly and loyal people towards the realization of their ideals.

VISCOUNT ADDISON: My Lords, I am quite sure that there is nothing further required from me, after the support the Bill has received and the well deserved tributes which, have been paid to those who have done so much to make this possible.

On Question, Bill read 2ª, and committed to a Committee of the Whole House.

HOUSING (TEMPORARY ACCOMMODATION) BILL.

5.47 p.m.

Order of the Day for the Second Reading read.

LORD HENDERSON: My Lords, I beg to move the Second Reading of this short Bill the purpose of which is to increase by £20,000,000 the sum available to meet the cost of the temporary housing programme. At present the amount which the Minister of Works may spend for this purpose is limited to a total of £200,000,000. Originally, the Housing (Temporary Accommodation) Act of 1944 authorized a maximum of £150,000,000, but this was later raised to £200,000,000 by Section 5 of the Building Materials and Housing Act, 1945. The latest and, it is expected, the final estimate, is £217,000,000, but it has been thought advisable to make an additional allowance of £3,000,000 to cover contingencies. Approval is sought, therefore, for a total of £220,000,000.

Before I go on to deal with the reasons for these successive increases, your Lordships will, I think, be interested in a few facts about the temporary housing scheme itself. The total number of temporary houses being provided is 156,667, of which 124,511 have been allocated to England and Wales and the balance of 32,156 to Scotland. Of the temporary houses 54,500 are of the aluminium type which are manufactured and erected through the agency of the Ministry of Supply. The other 102,117 are made up of seven principal types for which the Ministry of Works are responsible. The programme is now within sight of completion and it will not be extended. The number of houses outstanding on October 31 was only 24,184, and 17,496 of these are aluminium houses, the programme of which is due for completion next May. On the other types work should finish by the end of this year in England and Wales, but in Scotland there are likely to be a few houses remaining for completion next summer.

That is a brief history of the programme. I come now to the principal factors which have given rise to the increase in its cost, which has risen by about £39,000,000 from the comparable estimate in the White Paper of October, 1945. There are four main causes of this increase, and I will deal with each in turn. The first factor is the substantial increase in wage rates and in the price of materials. This has added to the cost of site preparation work and of house erection. Similarly, there have been increases in the costs of fixtures and fitments. The second factor is the additional costs of distribution and transport. The original intention was to complete the temporary housing programme, except for the aluminium

[Lord Henderson.]

house, by the end of 1946. It was, however, not found possible for local authorities to acquire sites and complete road development work in time to enable this to be done. Most of the sites which were readily available were required for permanent housing and additional sites were not easy to obtain, especially in the built-up industrial areas to which most of the temporary houses had been allocated.

After sites had been acquired there were difficulties such as shortages of material and of labour to be overcome; and last winter while local housing authorities were undertaking concurrently site development for both permanent and temporary houses, work was practically suspended for two or three months over a large part of the country owing to the severe weather. Local authorities played their part magnificently but it was inevitable that the organization set up for the storage and distribution of the houses had to be kept in being for at least a year longer than was expected. The number of centres had also to be increased during 1946 owing to unbalanced production and house components and of fixtures and fittings. Factories were changing over from war- to peace-time production, labour was being re-deployed, and there were recurring shortages of material resulting in an accumulation of unbalanced stocks which had to be stored. It became necessary to take over a large number of airfields for this purpose, and this proved to be expensive, as many were far removed from railway and main roads and the costs of loading and handling were further increased by the distances between individual buildings. Moreover, labour had to be brought to these centres at additional expense and there was unavoidably a considerable amount of double handling and inter-depot movement. It is for these reasons that the cost of distribution and of transport has proved to have been under-estimated.

The third increase is in the costs of site erection. The unbalanced production during 1946 of fixtures and fittings often held up the completion of houses. This, combined with delay from occasional labour difficulties and severe winters, inevitably led to extra expense on the sites. The outcome is that the basic price of the principle types of prefabricated temporary houses has increased from about £1,043 to £1,180, the costs ranging from £1,079 to £1,243. To this has to be added capital expenditure incurred on the production of steel fitments and an overall contingency provision to cover extra expenses that have been incurred by site erection contractors owing to delays in the delivery of fitments and other causes beyond their control.

Finally, the fourth main factor in the increase is the rise in the cost of the aluminium temporary house, from the tentative figure of £1,365 to its present one of £1,610. This house is wholly factory built and it was always known that it would be more expensive than the other types of temporary house. The decision to proceed with this house was taken in 1945 when, with the war continuing, it became evident that factory capacity, steel and labour could not be released for the production of the steel temporary house for at least a year, whereas the production of the aluminium house could start much sooner. Moreover, its inclusion in the programme was considered to be justified on broad national grounds, in that assistance would be given during the period of transition from war to peace to the greatly expanded light metals industry and in easing the employment of ex-aircraft workers. The great merit of the aluminium house is that it is wholly prefabricated and can be erected in a few hours with very little building labour. Including it in the programme has meant that, in spite of all the shortages and difficulties which have hindered progress, it has been possible to build two houses per year per man employed in the building industry. This is about double the rate at which it has been reckoned that permanent houses were built before the war, and it has meant that a substantial number of houses has been built which would not otherwise have been provided.

In the debate on this Bill in another place, a number of requests were made for further particulars of the cost of the various types of temporary house and for detailed explanation of the reasons for the increases. My right honourable friend the Minister of Works has promised that before the end of the year a statement will be published, possibly in the form of a White Paper, which will analyse the costs of each type of temporary house and explain where and how the increases have occurred since 1945. Noble Lords may consider in view of this that any inquiries which they might otherwise have

felt impelled to raise to-day can best be left until the detailed information is made available in the promised statement.

I have dealt with the principal factors which have created the need for the Bill. The end of the temporary housing programme is now in sight. When it is completed it will have provided 156,000 families with a new home and within a far shorter space of time than would otherwise have been possible. That it has been costly is true; but from the beginning it was understood that this would be so. But I believe that noble Lords will agree that it has played its part nobly in helping to resolve some of our most pressing housing difficulties. I hope therefore that I may have the approval of your Lordships' House for the additional sum of £20,000,000 which is being sought by this Bill to enable the temporary housing programme to be completed and rounded off. I will only add that the Bill deals solely with finance. I beg to move that the Bill be read a second time.

Moved, That the Bill be now read 2ª. —(*Lord Henderson.*)

5.58 p.m.

LORD LLEWELLIN: My Lords, if I may I should like to congratulate the noble Lord who has just sat down on giving a clearer explanation of this Bill in your Lordships' House than was given in many speeches—in the speeches of Ministers themselves, indeed—in another place. I congratulate the noble Lord on the concise and clear way in which he has brought this Bill before us.

I do not think any of us regret this temporary housing programme. It was started by the Coalition Government, carried on by the Caretaker Government, and is going to be concluded by the present Government. It has made its contribution, and a considerable contribution, to the housing problem since the war. On the other hand, it was known when it was originally proposed that it was put forward only in order to provide houses quickly. It was, however, also thought that it might have a sobering effect on the prices of traditional building; that is to say, one could compare the cost of a temporary house with what the builders charged for the permanent houses they put up. It is regrettable to find that the temporary houses are costing so much more than it was originally thought they would. The original estimate, if I remember aright, in August, 1944, was about £600. By March of 1945, it was realized that those houses could not be built for much less than £800. That was the first time that the aluminium house was thought of, and it was then believed that it could be completed at a cost of £900 per house. In October, 1945, as the noble Lord has said, the price of the other seven types was about £1,100 a house and, if I caught his words aright, it is now up to the £1,200 mark.

It is really a great pity that we have had to spend so much on these houses. I do not know—we shall have to wait and see when this White Paper comes out—whether their costing has been sufficiently well investigated, because it seems to me that one ought to get a house of that type for much less than one now has to pay for it. I know that the fitments are extremely good, and I am glad they are; but, after all, the object in having all standard fitments was that they could be ordered as mass production articles. If you are giving a large order for baths, basins, boilers, or whatever it may be, of the same type, there ought to be not a gradual increase in the charge but a decrease. That is why I would like to know a little more—we shall wait for the White Paper to see it—as to why, in the later stages of the production of the aluminium house, its price has gone up to this huge figure of £1,610, compared with the cost of a traditional house which now, in the Provinces, would be £1,300. To pay £310 more for an aluminium house seems to me the kind of thing that one should not do. The price for a completely factory-made house, especially if it is being built, as indeed this has been, under a continuous process system, ought to have gone down rather than gone up, as the factory gets under way. I am really surprised to see that the price of the aluminium house has risen to the frightfully high figure of £1,610.

But, there it is; we are faced with the fact that all these orders have been given and the programme is coming to its end in May, and we are rather like a person who has incurred some very expensive bills which somebody has to pay for. The Government and everybody in both Houses of Parliament are faced with the necessity, willy nilly, of having to pay

[Lord Llewellin.]

for this programme. I think it has helped to meet a great need, but at much too high a price. Noble Lords on these benches reserve our right to look into and discuss these prices again when we see the White Paper, because I certainly had hoped that they could be kept down more than they have been. I hope that we may, if we investigate them, find out what can be done in future to keep the prices down a little. To-day, however, we have no option but to give a Second Reading to this Bill, for it has helped to meet this need.

I say again that I am sorry that the provision of these houses has been so costly, and it is surprising in these days how easily we bandy about sums of £20,000,000, and so on. I noticed in another place the Minister of Works said: "I may be only a million pounds out." We did not talk like that in the years before the war. We are getting a little loose in the way in which we spend these millions. After all, the estimate put forward of £200,000,000 had £22,000,000 in it for contingencies, and that has all gone. A sum of £22,000,000 for contingencies is a fairly large amount, and now another £20,000,000 has to be provided because the £22,000,000 for contingencies was not enough. I only hope and pray that the paltry little sum of £3,000,000 for contingencies which is included in this estimate will be found to be sufficient.

On Question, Bill read 2ª; Committee negatived.

JERSEY AND GUERNSEY (FINANCIAL PROVISIONS) BILL.

Read 3ª (according to Order), and passed.

BURMA INDEPENDENCE BILL.

Read 3ª (according to Order), and passed.

6.5 p.m.

MINISTERS OF THE CROWN (TREASURY SECRETARIES) BILL.

Brought from the Commons.

LORD AMMON: My Lords, this Bill is one of an urgent character. It passed through all its stages in another place with general approval yesterday, and we hope your Lordships will agree to the suspension of Standing Orders on Tuesday next so that it may be taken as first Order and passed through all its stages. It is a single clause Bill, the object of which is to add to the numbers of Parliamentary Secretaries to the Treasury in order to establish a new post of Economic Parliamentary Secretary to the Treasury. I beg to move that this Bill be read a first time.

Moved, That the Bill be now read 1ª.—(*Lord Ammon.*)

LORD LLEWELLIN: My Lords, perhaps it might be convenient for me to say that we agree with the suggestion that the noble Lord has just put forward about taking the Bill through all its stages on Tuesday next.

On Question, Bill read 1ª, and to be printed.

LONDON COUNTY COUNCIL (IMPROVEMENTS) BILL.

Report from the Select Committee, That the Committee adjourned on Tuesday last and pray leave to stand adjourned *sine die* for the convenience of parties: Read, and leave given accordingly.

House adjourned at six minutes past six o'clock.

Private

Feb 8 1948

DOWDING.
TADWORTH.
SURREY.

TEL. TADWORTH 2300

My dear Goodhart,

Sarkey's death means a new High Steward. Do you think the powers that be, if discretely approached by my friends, might consider me as successor? The post is, I think, normally regarded as suitable for a judicial figure and perhaps servin

to Oxford (Standing Counsel, Royal Commission, Higher Studies Fund etc) comes in. I cannot not, of course, write to the V.C. but perhaps you will forgive me for whispering my ambition.

I continue to press on the H. L., but perhaps the enclosed from the P.C. is more amusing. I want to see what the L.Q.R makes of my debunking of Wood's Leadbitter. With kind appreciation Yours Simon

16th December, 1948.

My dear Goodhart,

I enclose an official report of the debate in the House of Lords yesterday about the status of "citizens of Eire" in this country, when the independent sovereign Republic of Eire comes into being and is recognised by us and the other Dominions, as it must necessarily be. I wish you would read my speech and the attempts made to meet, what is to me, a perfectly obvious point, viz. that the international status of such a Republic is that it is a foreign country vis-à-vis any other State. Of course, we may make such arrangements with another foreign State as we please and I should hope that everybody wants to have the most friendly relations with the Republic of Eire. But it passes my comprehension how anybody, who professes a smattering of international law, can doubt that, internationally, the new Republic is a separate State (which is the very object of its creation) and, therefore, a "foreign State" in relation to any other State. Scandinavia was at one time one country, I believe, but when Norway and Sweden are separate countries each is "a foreign country" t the other.

Will you not consider writing a short letter to "The Times", which shows that the international status of the new Republic of Eire is really beyond dispute, whatever the consequences may be? The thing can be stated, of course, in the simplest terms and your name would carry great weight. Perhaps Brierley, H.A. Smith and Winfield would do the same. I believe it would be a valuable contribution to plain thinking after the Lord Chancellor's temporising excuses.
I hope, in any case, you will have a note in the L.Q.R. I would write it if you wished, anonomously, but would prefer someone else to do it, who has not been in the Parliamentary controversy.

It is really no good to deal with the difficulties that now arise, which are very numerous (National Service, oath of an M.P., benefits under the Insurance Acts, liability for treason and so on), without first getting the actual consequences, internationally speaking, of the creation of a Republic of Eire realised and admitted by all responsible people. Half the trouble that is going to arise is due to "make-believe" and I really begin to doubt whether the present Government have been adequately advised at all.

Will you let me know, as soon as you can, what is your own reaction? I need not say that I should greatly value your opinion.

Yours very sincerely,

Simon

Professor A.L. Goodhart, K.C.,
Whitebarn,
Boars Hill,
Oxford.

16th March, 1949.

My dear Goodhart,

As newspaper reports are so meagre you might be interested to read yesterday's debate in the Lords on the transformation of Newfoundland into a province of the Dominion of Canada. My speech begins at column 319 and I was chiefly concerned to destroy the suggestion, sedulously circulated in some quarters, that the procedure was "unconstitutional" - a word which some people do not seem quite to understand. No doubt it is the proximity of the United States which leads some people who claim to be lawyers in Newfoundland to imagine that a British court can challenge the exercise of legislative powers. You appreciate that, in an exposition on such a question, you have to suit your language to your audience. Perhaps, too, you may be interested in the historic summary on columns 329 and 330.

I am deeply concerned at recent developments affecting the British Commonwealth. It was a sad mistake for Attlee's Government to assure Eire that, if it turned itself into a sovereign independent state and repudiated the Crown, we would not "regard" it as a foreign country. That, of course, is what

it will become before this month is out. This attitude has only encouraged Nehru to go so far as he has in the case of the Dominion of India. I really don't see what the nexus can be, unless it is that of formal allegiance to the Crown and I would sooner see a smaller list of Commonwealth states than adopt a façade which would be a sham. It is very difficult and very fundamental.

Yours ever,

Simon

Professor Goodhart,
Whitebarn,
Boars Hill,
Oxford.

29th July, 1949.

My dear Goodhart,

You will be interested to see the judgments given today in the House of Lords, which overrule the C.A. in Hyams v. Stuart King 40 years ago. I am glad to say that Wilfrid Greene and two others agree with me that Fletcher Moulton was right.

All good wishes for the holiday season,

Yrs ever

Simon

Professor A.L. Goodhart,
Whitebarn,
Boars Hill,
Oxford.

15th November, 1949.

My dear Goodhart,

The October number of the L.Q.R. reached the House of Lords Library today, but I do not see in it any comment on Hill v. William Hill and Sons. That case was decided in the Lords on July 29th and was reported in the All England reports of August 13th. You will remember that I sent you a print of all the judgments as soon as they were delivered.

I am not writing this ~~in~~ with any idea of reproach, for I suppose the explanation is, in part at any rate, the slowing down of printing. (I find it quite impossible to believe the Government's repeated assertion that productivity has increased by 30% in the last few years.) But when at length the L.Q.R. is in a position to deal with the case, I suggest that you might with advantage register a strong complaint at the slowness with which the official Law Reports come out. I feel sure there is a great deal of slackness about this, for I was not sent the proof of my own judgment to revise until long afterwards. It did not require any revision, but only two corrections where the printer had failed to reproduce the text that was before him. The delayed action of ~~modern~~ recent law reporting has grave practical disadvantages

-2-

and not infrequently a subsequent case gets decided without those concerned knowing what a previous decision of importance is. Certainly, the official Law Reports are shockingly behind the times.

Yours ever,

John Simon

Professor A.L. Goodhart, K.C.,
Whitebarn,
Boars Hill,
Oxford.

P.S. I notice that in the April number of the L.Q.R., at p.155, there is a reference to the importance of the issue now decided, with the remark that "the whole question would shortly be considered by the House of Lords". So it was, in July. But how is anyone reading for the Jurisprudence school to know?

DOWDING,
TADWORTH.
SURREY.

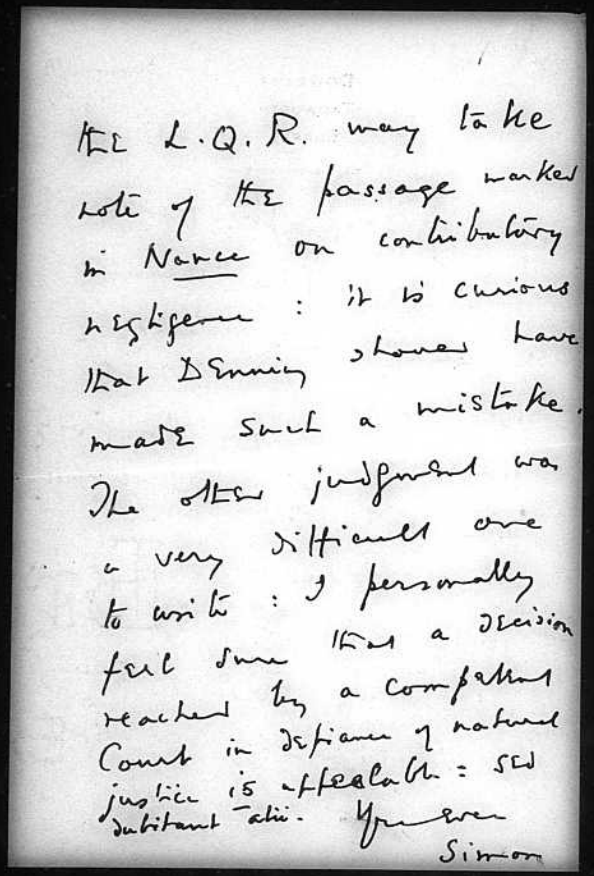
TEL. TADWORTH 3300

June 19
1951

My dear Goodhart,

My warmest congratulations and good wishes: what Univ. gains the University does not lose, I hope.

Here are 2 judgments in the P.C. which I am perpetrating on Wednesday. I hope



The L.Q.R. may take note of the passage marked in Nance on contributory negligence: it is curious that Denning should have made such a mistake. The other judgment was a very difficult one to write: I personally feel sure that a decision reached by a competent Court in defiance of natural justice is appealable: see Subitant-Atii. Yours ever Simon

14th March, 1952.

My dear Goodhart,

On the chance that the Editor of the L.Q.R. has noticed the short account in the Times' Law Report of today of what has happened in the Appeal of Harris v. Director of Public Prosecutions, I enclose a copy of the letter I am writing confidentially to the reporter. One excuses the popular Press for getting these things a bit wrong (I see that the Daily Express reports that it was "Lord Simonds, the Lord Chancellor", and not your humble servant, who made the statement in the House!), but it is important that lawyers should understand exactly what happened.

We shall be delivering our speeches in this case shortly and they will, I think, attract the attention of the L.Q.R., for the "point of law of exceptional public importance" which caused the A.G. to certify, was whether the principle in Makin's case was now extended beyond its original ambit, and on that we have something to say in general terms, but you will find, when our speeches are made justifying the allowance of the Appeal and the release of the prisoner, that the ground is a much narrower one arising on the summing up and the admissibility of evidence on the count on which Harris was convicted. I could wish that the Criminal Justice Act had required the A.G., whenever he found it right to certify a case for Appeal to the House of Lords, to formulate the "point of exceptional public importance". But it does not, and, as we try to dispose of criminal appeals as quickly as possible, there is not even the case for the Appellant and the case for the Prosecutor drawn up and provided beforehand for the consideration of the Court. Still, speedy justice in criminal actions is the thing that matters, and above all in a case where the final decision justifies the discharge of the man who has been sentenced. I hope you agree that in this matter the machinery works much better here than it seems to do in the United States.

Yours sincerely,

Simon

Professor A.L. Goodhart, K.B.E.,
University College,
OXFORD.

52

THE BALMER LAWN HOTEL

Balmer Lawn Hotel,
Brockenhurst,
New Forest

TELEGRAMS: "TALLY HO!"
TELEPHONE: BROCKENHURST 3116.

Aug 22 1952

My dear Goodhart,

Thank you for your appreciative letter. Maugham, in the Times today, also approves, so I hope the true view may be regarded as established. Our dear friend Hankey has gone a bit off the rails.

When the P.C. resumes, I shall be giving the reasons for our decision in the case about the aeroplanes on the Hong Kong airfield — a very complicated matter which may deserve the attention of the L.Q.R.

Yours ever

Simon

53

14th October, 1952.

My dear Goodhart,

I send you the judgment in a difficult case about the sale of aeroplanes which belonged to the Chiang Kai-shek Government. I see in "The Times" that the Communist Government of China says it is "an inferior show"! But I venture to think that the decision is right.

Yours ever,

Simon

The Master of University College,
OXFORD.

~~Confidential~~ 2ND PROOF

Privy Council Appeal No. 15 *of* 1952

Civil Air Transport Incorporated - - - - - - *Appellants*

v.

Central Air Transport Corporation - - - - - *Respondents*

FROM

THE APPEAL COURT OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1952

Present at the Hearing:

VISCOUNT SIMON
LORD NORMAND
LORD OAKSEY
LORD REID
SIR LIONEL LEACH

[*Delivered by* VISCOUNT SIMON]

This Appeal came before the Judicial Committee in most unusual circumstances. It concerns the ownership of 40 aircraft lying on the Government airfield at Kai Tak in Hong Kong. An Order in Council cited as the Supreme Court of Hong Kong (Jurisdiction) Order in Council 1950, made by his late Majesty in Council on 10th May, 1950, which came into operation forthwith, after reciting that the ownership of these aircraft (part of 70 aircraft covered by the Order) was in dispute and that it was just and desirable that the question of their ownership and of right to their possession should be decided by a Court of Law before they are permitted to leave Hong Kong, provided (*inter alia*) as follows:—

> 1.—(1) In any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of the coming into operation of this Order, it shall not be a bar to jurisdiction of the Court that the action or other proceeding impleads a foreign Sovereign State.
>
> (2) If a Defendant in any such action or other proceeding fails to appear, or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall, notwithstanding any rule enabling it to give judgment in default in such a case, enquire into the matter fully before giving judgment.
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> * * * * *
>
> 3. Any person claiming ownership or right to possession of any of the aircraft and aggrieved by the decision of the Court in an action or other proceeding . . . . may appeal therefrom to the Full Court and from thence (*sic*) to His Majesty in Council, and such an appeal shall lie notwithstanding such person has not taken part in previous proceedings.
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> * * * * *
>
> 5.—(1) Until the Governor is satisfied that ownership or right to possession of the aircraft have been finally determined the aircraft shall remain in Hong Kong and the Governor may give such directions and take such steps, whether by way of detention of the aircraft

or otherwise, as shall appear to him necessary to prevent their removal and to ensure their maintenance and protection.

(2) When the Governor is satisfied that ownership or right to possession has been finally determined he may give such directions and take such steps as shall appear to him necessary to give effect to the decision of the Court.

(3) If any person fails to comply with any direction given by the Governor under this section he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding six months or to both such fine and such imprisonment.

* * * * *

6.—(2) The aircraft referred to in this Order are the aircraft mentioned in the preamble to this Order together with any spare parts, machinery and equipment for use in relation to any of the aircraft, and the Governor may in case of doubt give directions designating more particularly the aircraft spare parts, machinery and equipment referred to.

On 19th May, 1950, the present appellants, Civil Air Transport Incorporated, a Corporation formed under the laws of the State of Delaware, U.S.A., issued a writ in the Supreme Court of Hong Kong against the present respondents, Central Air Transport Corporation (hereinafter called C.A.T.C.) claiming a declaration "that the 40 aircraft now on the Government airfield at Kai Tak in the Colony of Hong Kong formerly the property of the defendants together with all spare parts, machinery and equipment for use in relation thereto wherever situate within the jurisdiction of this Honourable Court are the property of the plaintiffs and/or that the plaintiffs have the sole right to possession thereof".

C.A.T.C. are not an incorporated body but are an organ of the Government of China. Service of the writ was attempted upon the Central People's Government of the People's Republic of China (which, for brevity, it will be convenient to call "the Communist Government", and which may be taken as claiming these aircraft as its property) and subsequently an order was made for service by leaving a sealed copy of the writ at the office of the C.A.T.C. in Hong Kong. No appearance or notice of intention to appear was filed and, were it not for the Order in Council referred to above, the action might have proceeded no further, (although the Communist Government and C.A.T.C. had notice of it) since it might be regarded as impleading a foreign Sovereign State which enjoyed jurisdictional immunity. The Order in Council however expressly required the Hong Kong Court to entertain the action, even in the absence of the defendant, "enquiring into the matter fully before giving judgment".

The action was tried before Sir Gerald Howe, then Chief Justice of Hong Kong, on the 27th and 28th of March, 1951. On 21st May, 1951, he delivered a reserved judgment dismissing the claim and, in view of the importance of reaching finality in the matter as soon as possible, directed that any appeal from his decision should be brought within two months. Notice of appeal to the Full Court was given within this time and the appeal was heard by the Full Court (Gould and Scholes JJ.) on the 21st and 22nd of August, 1951. On the 28th December, 1951, the Full Court dismissed the appeal, and it is from this decision that appeal is now brought to Her Majesty in Council.

C.A.T.C. are a State-owned enterprise operating under Ministerial control which provided Air-Services (including communication to and from Hong Kong) by means of civil aircraft belonging to the Government of China. This enterprise came into existence under the previous Nationalist Government of China and continued as an organ of that Government until it passed to the Communist Government which at a certain date, in the view of H.M. Government in the U.K., succeeded it. It is beyond dispute that the 40 aircraft which are the subject of this

case originally belonged to the Nationalist Government and formed part of the fleet of civil aircraft operated by C.A.T.C. as an organ of that Government. By September, 1949, these 40 aircraft were already lying on the Kai Tak airfield at Hong Kong, where they have remained up to the decision of this Appeal. They had been flown there by the orders of the Nationalist Government. That Government, under increasing pressure from Communist forces in China, had moved its headquarters in the preceding April from Nanking, its capital, to Canton; thence it moved to Chungking on 12th October; thence to Chengtu on 29th November; and thence to Taiwan (Formosa) on 9th December, 1949. By this last date nearly the whole of the mainland of China was under the control of Communist forces acting for the rival *de facto* Government, which on 1st October had proclaimed itself to be the Government of China and had purported by decree to dismiss the ministers of the Nationalist Government and to appoint new ones.

On 5th December, 1949, two citizens of the United States, Chennault and Willauer, in partnership, wrote to the Minister of Communications in the Nationalist Government at Taiwan, a letter offering to purchase from that Government (*inter alia*) the physical assets of C.A.T.C. "a major part of which are now located in the Colony of Hong Kong". The letter also included an offer to buy the Nationalist Government's interest in a Chinese Company called the Chinese National Aviation Corporation hereafter referred to as "C.N.A.C." (the owner of the other 30 aircraft referred to in the Order in Council), but this does not affect the point now immediately in issue. The consideration for the sale, so far as assets of C.A.T.C. were concerned, was to be $1,500,000 in promissory notes and the purchasers were to organise a corporation to which the assets would be transferred and whose promissory notes would be substituted for those of the purchasers. The terms of the letter are elaborate and had evidently already been the subject of negotiation and informal agreement between the partnership and the Nationalist Government, for the letter ends with signatures of acceptance by Liu Shao-Ting, Vice-Minister of Communications and concurrently Chairman of Board of Directors of C.A.T.C., and also by the Deputy Secretary-General of Executive Yuan and concurrently Chairman of Board of Directors of C.N.A.C. Any doubt as to whether these signatures amount to an acceptance by the Nationalist Government of the partnership's offer is set at rest by a letter of confirmation dated 12th December, 1949, signed for the Nationalist Government by the Premier, Yen Hsi-Shan, and notifying the partnership that the sale is final and complete on the terms agreed. One of these terms was that the assets sold would not be used for transport to or from the Communist areas of China.

On 19th December, 1949, the partnership of Chennault and Willauer by Bill of Sale transferred these assets, including these 40 aeroplanes, to the Appellant Company. There cannot be any doubt that if the bargain of 12th December conferred on the partnership a good title to these specific goods, that title duly passed on 19th December to the Appellant Company.

It is now necessary to recount certain events which occurred before the alleged sale in December.

On 9th November, 1949, the then President of C.A.T.C., one Mr. Chen, flew from Hong Kong to Peking and transferred his allegiance to the *de facto* Communist Government. About the same time the majority of the C.A.T.C.'s employees in Hong Kong also defected from the Nationalist Government, though they remained in Hong Kong. In consequence of these occurrences the Chinese Civil Aeronautics Administration (a department of the Nationalist Government) on 13th November suspended the registration certificates of all C.A.T.C.'s aircraft, the result of which would be that the authorities at Kai Tak aerodrome would not have permitted the machines with which this case is concerned to leave the ground. On the same day, one Ango Tai, an employee of C.A.T.C., who had remained loyal to the Nationalist Government, was appointed

by that Government to be acting President of C.A.T.C. with full power to deal with all its affairs. On 16th November, Ango Tai, in exercise of this power, dismissed the defecting employees of C.A.T.C. and suspended the rest of C.A.T.C.'s Chinese staff in Hong Kong; and also appointed one Parker, to be Chief of Security for C.A.T.C. at Hong Kong and to take all necessary measures permissible by law to ensure that the property of C.A.T.C. was not removed or injured by unauthorised persons. Parker was to engage special guards and to take other precautionary steps, such as roping off the areas where the 'planes were located on Kai Tak aerodrome, provided that the Hong Kong officials, viz., the Commissioner of Police and the Director of Civil Aviation, approved. Parker acted accordingly and by next day 75 special guards were appointed with police approval and duly posted. A few days later, however, for reasons not explained at the trial, the Commissioner of Police informed Parker that the guards at Kai Tak must be withdrawn and without Parker's consent certain of the defecting ex-employees took physical control of these assets. Thereupon Ango Tai commenced proceedings in the name of C.A.T.C. in the Supreme Court of Hong Kong against the principal ex-employees who had thus acted and on 24th November the then Chief Justice, Sir Leslie Gibson, granted an interim injunction against them prohibiting this interference, restraining them from entering or remaining upon the C.A.T.C.'s premises or removing or tampering with the C.A.T.C.'s property. Next day the defendants in that action obtained from Gould J. an interim injunction restraining C.A.T.C. from removing the property from the premises concerned. The injunction granted by Sir Leslie Gibson was, after some difficulty, duly served—but it was disregarded and the physical control of the aeroplanes by these ex-employees for the time being continued.

One other set of facts must be put on record, in order to complete the picture of the situation at about this date. On 12th November, 1949, Mr. Chow En-loi, acting as Premier of the *de facto* Communist Government, issued the following document:

"To
General Manager Chi Yi Liu,
General Manager Cheuk Lin Chen, and
All Officers and Workmen of
China National Aviation Corporation and
Central Air Transport Corporation.

My hearty welcome to you who rise gloriously to uphold the cause under the guidance of the two General Managers Liu and Chen.

I hereby accept in the name of the Cabinet of the People's Central Government of the Chinese People's Republic the telegraphic request made by you on 9.11.1949, declare the China National Aviation Corporation and the Central Air Transport Corporation to be the property of the Chinese People's Republic and exercise (the right of) control of the said China National Aviation Corporation and the said Central Air Transport Corporation on behalf of the People's Central Government.

I hereby appoint Chi Yi Liu to be General Manager of the China National Aviation Corporation and Cheuk Lin Chen, General Manager of the Central Air Transport Corporation.

I hope all officers and workmen of the said two Corporations remaining in Hong Kong and Specially Liberated Areas will hereafter unite in a body under the guidance of the two General Managers Liu and Chen, heighten their precautions, shatter the secret plots of the reactionaries, bear the responsibility of protecting the assets and wait for further instructions (from me). The (cost of) living for all the officers and workmen shall be borne by the People's Central Government. I again hope that you will stick to the position of patriots, strive to make progress and exert yourselves in the cause of establishing the civil aviation enterprise of New China.

Dated the 12th day of November, 1949.

(Sgd. & Chopped) Chow En-loi."

Cheuk Lin Chen is the Mr. Chen who had gone to Peking three days before to put himself under the *de facto* Government.

Two months later, the following instructions were issued:

"For the perusal of
Chi Yi Liu,
General Manager,
China National Aviation Corporation,
Des Voeux Road, Central, and
Cheuk Lin Chen,
General Manager,
Central Air Transport Corporation,
Queen's Road, Central.

Hereby appoint Chi Yi Liu, General Manager of China National Aviation Corporation, to undertake the responsibility of taking over all assets of China National Aviation Corporation in Hong Kong (and) appoint Cheuk Lin Chen, General Manager of Central Air Transport Corporation, to undertake the responsibility of taking over all assets of the Central Air Transport Corporation in Hong Kong. Apart from sending order by mail (the said officers concerned) are requested to act in accordance herewith and report as soon as possible. Chung Chik Ping, Head of Civil Aviation Bureau of the People's Central Government of the People's Republic of China. 13th January, 1950."

It is to be observed that the earlier of these documents, which was issued before the recognition *de jure* of the Communist Government, does not contain directions to "take over" the assets of the C.A.T.C. in Hong Kong, but enjoins officers and men of the Corporation to bear the responsibility of "protecting the assets" and to wait for further instructions. The later document, which was issued after *de jure* recognition, gives the further instructions to "take over all assets of the C.A.T.C. in Hong Kong". If, however, the contract of 12th December, 1949, had the result of transferring the property in the 40 aeroplanes effectively and finally to the partnership on that date, these aeroplanes would have ceased to be assets of the C.A.T.C. thenceforward.

Before reaching a decision in the present action, the Hong Kong Courts required to know what Government was recognised by His Majesty's Government in the United Kingdom as the Government of China, whether *de jure* or *de facto*, and between what dates, and this information was, as is usual (see the case of *Arantzazu Mendi* [1939] A.C. 256 at p. 264), obtained from the Foreign Office in London. A series of questions for this purpose had been propounded and answered before trial of the present action and Their Lordships thought it well to address an additional question to the Foreign Office during the hearing of the Appeal in order to clear up any possible ambiguity that remained.

The information thus obtained (which is to be regarded as matter of which British Courts take judicial notice) may be set out as follows:

(*a*) referred to at the original hearing:

Questions.

"1. Does His Majesty's Government recognise the Republican Government of China (the Nationalist Government) as the *de jure* Government of China?

2. If not when did His Majesty's Government cease so to recognise that Government?

3. Is the Central People's Government or any other Government recognised as the *de jure* Government and, if so, from what date?

4. Has the Republican Government ceased to be the *de facto* Government (either at the time of moving seat of Government to Formosa or otherwise) and, if so, from what date?

5. Is any other Government recognised as the *de facto* Government and, if so, from what date?

6. What is the status of Formosa? Is Formosa part of China or is it Foreign territory vis-à-vis China? "

Replies to above by Foreign Office on 11th February, 1950.

" 1. H.M.G. in the United Kingdom do not recognise the Nationalist Government (Republican Government) as *de jure* Government of the Republic of China.

2. Up to and including midnight of the January 5th/January 6th, 1950 H.M.G. recognised the Nationalist Government as being the *de jure* Government of the Republic of China and as from midnight January 5th/January 6th, 1950 H.M.G. ceased to recognise the former Nationalist Government as being *de jure* Government of the Republic of China.

3. As from midnight of the January 5th/January 6th, 1950 H.M.G. recognised the Central People's Government as *de jure* Government of the Republic of China.

4. H.M.G. recognise that the Nationalist Government has ceased to be the *de facto* Government of the Republic of China. It ceased to be the *de facto* Government of different parts of the territory of the Republic of China as from the dates on which it ceased to be in effective control of those parts.

5. H.M.G. do not recognise any Government other than the Central People's Government of the People's Republic of China as the *de facto* Government of the Republic of China. Attention, however, is invited to the second sentence of the answer to question 4.

6. In 1943 Formosa was part of the territory of the Japanese Empire and H.M.G. consider that Formosa is still *de jure* part of that territory. On December 1st, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared that all the territories that Japan had stolen from the Chinese including Formosa, should be restored to the Republic of China. On July 26th, 1945, at Potsdam, the Heads of the Governments of the United States of America, the United Kingdom and the Republic of China reaffirmed 'The terms of the Cairo Declaration shall be carried out.' On October 25th, 1945, as a result of an Order issued on the basis of consultation and agreement between the Allied powers concerned, the Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon, with the consent of the Allied Powers, administration of Formosa was undertaken by the Government of the Republic of China. At present, the actual administration of the Island is by Wu Kou-Cheng, who has not, so far as H.M.G. are aware, repudiated the superior authority of the Nationalist Government.

I am advised that the effect of recognition by H.M.G. as stated in answer to Questions 1 to 5 and in particular its retroactive effect (if any) are questions for the Court to decide in the light of those answers and of the evidence before it."

(It will be appreciated that Reply No. 6 was given before the Treaty of Peace with Japan of December 1951, when Japan renounced any claim to Formosa.)

(*b*) referred to on appeal to Full Court:

Further question

" Does H.M.G. recognise the People's Government as having become the *de facto* sovereign Government or the Government exercising effective control on the 1st October, 1949, when it was proclaimed, or any other date between that date and the 5th January, 1950, of the part of China of which the Nationalist Government had ceased to be the *de facto* Government? "

Reply of Foreign Office on 13th March, 1950

" H.M.G. in the United Kingdom recognise that in the period between October 1st, 1949 and 5th-6th January, 1950 the Central

People's Government was the *de facto* Government of those parts of the territory of the Republic of China over which it had established effective control and if control was established after October 1st, 1949 as from dates when it so established control."

(*c*) *Additional question addressed by Judicial Committee to Foreign Office*

" Referring to the above reply of the Foreign Office on 13th March, 1950, was there any declaration or other formal act by H.M.G. in the U.K. on October 1st, 1949, or on any and what later date, recognising the Central People's Government as the *de facto* Government, or is the reply to be understood as meaning that H.M.G. in the U.K., answering on March 13th, 1950, assert that their view was as stated in this answer but that there had been no declaration or other formal act of H.M.G. on October 1st, 1949 or during the period mentioned which announced or implied *de facto* recognition? "

Reply of Foreign Office dated July 28th, 1952

" The only communication relevant to this question made by His Majesty's Government to the Central People's Government during the period October 1st, 1949, to January 6th, 1950, was the following Note, which was delivered by His Majesty's Consul-General in Peking on October 5th, 1949.

'His Majesty's Government in the United Kingdom are carefully studying the situation resulting from the formation of the Central People's Government. Friendly and mutually advantageous relations, both commercial and political have existed between Britain and China for many generations. It is hoped that these will continue in the future. His Majesty's Government in the United Kingdom therefore suggest that, pending completion of their study of the situation, informal relations should be established between His Majesty's Consular Officers and the appropriate authorities in the territory under the control of the Central People's Government for the greater convenience of both Governments and promotion of trade between the two countries.'

This communication was not intended at the time when it was made either to constitute or to convey *de facto* recognition. Nevertheless the answer made by the Foreign Office dated March 13th, 1950, to the questions addressed to it by the Hong Kong Courts and quoted in your letter is to be understood as meaning that His Majesty's Government in the United Kingdom answering on that date asserted that their view was as stated in that answer."

Her Majesty's Government in the U.K. is the Sovereign Government of Hong Kong and the effect of the above replies is to establish that, at any rate in the Courts of Hong Kong and in the present Appeal, the former Nationalist Government must be regarded as the sole *de jure* Sovereign Government of China up to midnight of January 5th-6th, 1950; that the present Communist Government was not the *de jure* Government until that time; and that, while the Foreign Office, in its answer of March 13th, 1950 acknowledged that from October 1st, 1949 onwards the *de facto* Government of those parts of China in which the Nationalist Government had ceased to be in effective control was the Communist Government, H.M.G. had not announced or communicated their recognition of the Communist Government as the *de facto* Government over any part of China before they recognised the Communist Government as the *de jure* Government of China on January 5th-6th, 1950.

The argument of the appellants before the Trial Judge was conveniently summarised by Sir Gerald Howe C.J. as follows:

(*a*) The C.A.T.C. was wholly owned and controlled by the Nationalist Government and there was a valid sale on December 12th,

1949 by that Government to the partnership, a condition being that the partnership should organise a Corporation to which the physical assets were to be transferred ;

(*b*) the partnership duly transferred the assets by a sale valid in American law to the appellants ;

(*c*) a change of Government is by succession and not by title paramount and accordingly the Nationalist Government was empowered to enter into this transaction, being still recognised as the *de jure* Government by H.M.G., and the doctrine of retroactivity did not apply.

The Trial Judge rejected this argument on two main grounds, which call for the most careful examination.

The first ground (which was also adopted by both the Judges of the Full Court) is that the situation of the Nationalist Government on December 12th, 1949 was such that it could not validly enter into such a sale, and that the terms of the purported sale were not such as the Government could lawfully impose. In order fully to appreciate the learned Judge's view on this point, it is necessary to quote two passages from his judgment :

" The position on the 12th December, 1949, when this contract was made, was that the Nationalist Government no longer exercised any effective control over the mainland of China ; that Government was established outside Chinese territory ; the aircraft were in Hong Kong and the members of the staff and employees had attorned to the Central People's Government. Subsequently the Courts of Hong Kong held, and, with respect, in my opinion rightly held, that these aircraft, were and had been in the possession and control of the Central People's Government. I will refer here to certain extracts from the document of sale : —

'(D) The Government is unwilling to sell or otherwise dispose of said physical assets or stock except upon the most binding assurances that after such sale or disposition they will not be used in any way for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China ; and

(6) Chennault and Willauer agree that the said assets shall not be used, directly or indirectly for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China.'

" By normal diplomatic usage, and indeed to be inferred from the terms of the contract quoted above, the then Nationalist Government must have been fully alive to the probability of the withdrawal of recognition by His Majesty's Government in the near future and in fact this took place as from midnight 5-6th January, 1950, and it is evident that this transaction was a device entered into with full knowledge by both parties, by which it was hoped that the aircraft might be prevented from passing to the Central People's Government on its recognition *de jure* for the references to 'Communist Areas of China' must relate to the areas controlled by that Government, recognised as the *de facto* Government of those areas.

" It is a transaction inimical to the Central People's Government and indeed, as the aircraft were used for a public purpose within and without China, inimical to the interests of the Chinese people."

* * * * *

" In the transaction now before this Court, I have no hesitation in reaching the conclusion that not only was it one designed to embarrass the Central People's Government, but it was against the interests of the Chinese people and that it was a transaction incompatible with that trusteeship which every Government must assume.

The loss of these aircraft in a country so large as China and with poor communications would be severe. The majority of the staff and employees had already attorned to the Central People's Government, and the aircraft were only at any time owned by the Nationalist Government solely in its capacity of trustee. I cannot hold that at the time of the transaction the Nationalist Government may properly be said to have sold these aircraft for the purposes of fighting to regain its former territory. In my opinion, this was an act of members of the Nationalist Government done not in good faith as trustees but for an alien and improper purpose."

With great respect to the former Chief Justice, their Lordships are unable to accept this view of the facts and the inferences drawn from them as leading to the conclusions stated, or to regard them as justifying a denial of the appellants' title.

For the purpose of judging the correctness of this first ground (the second ground will be considered later) the validity of the transaction must be judged as at the date when it was entered into, and not in the light of subsequent events, which might have turned out differently. On 12th December, 1949, the Nationalist Government was the *de jure* Government of China, of which C.A.T.C. was an organ, and therefore the property in these aeroplanes was in the Nationalist Government. The machines had been moved to Hong Kong two months before and it was open to their owners to sell them, and thereby to pass the property in them to the purchasers. No doubt the motive for making the actual sale was to secure that, if they were flown to an area where the Communists were able to capture them, they should not be added to Communist resources, and the conditions of the contract make this abundantly clear. The Nationalist Government was in retreat and was by this time all but driven out of China, but it was still resisting its opponents and in their Lordships' view the impeached sale was no more " a device " adopted for an " alien and improper purpose " than would have been the blowing-up of a store of ammunition in an arsenal in China from which Nationalist forces were on the point of being driven out. Whether the Nationalist Government on 12th December, 1950, were " alive to the probability of the withdrawal of recognition by H.M.G. in the near future " is at best a matter of speculation : other foreign Governments did not take this course and there is no evidence of any warning by H.M.G. in the U.K. that they were themselves likely shortly so to act. The reference to " normal diplomatic usage " presumably points to the undoubted fact that by international law an established and recognised Government may be so completely overthrown by insurgent forces which claim to supplant it that the recognition hitherto afforded to it by foreign countries may properly be withdrawn—but when and by whom only the future can show. A Government's policy in buying or selling chattels which it owns is not subject to the review of foreign tribunals and whether its action in this regard is against the interests of those it is supposed to serve is a political question. British courts cannot take it upon themselves to pronounce whether a foreign Government, recognised by H.M.G., is acting contrary to the interests of its people, and a Government is certainly not a trustee in these matters in any legal sense. The right in municipal law to follow property which is subject to a trust into the hands of third parties cannot have any application here.

It appears to their Lordships that the view under this head adopted by the Trial Judge, and by the Full Court, really is that on 12th December, 1949, the Nationalist Government knew that it was on the point of being succeeded by a Communist Government, which would be recognised as the *de jure* Government of China, and that, without any regard to public interests or to any injury it was doing to the Chinese people, it got rid of these aeroplanes out of spite, merely to embarrass its inevitable successor. Such a view involves assumptions which their Lordships are not prepared to make. The Trial Judge claimed to found himself on a sentence in the judgment of Lord Justice Denning in *Boguslawski* v. *Gdynia Ameryka Linie* [1951] 1 K.B. 162 at p. 182. That sentence was

not necessary to the actual decision, and it was the decision which was confirmed by the House of Lords. The sentence occurs in a passage where the Lord Justice was emphasising the paramount importance of the principle of continuity, i.e., of a succeeding Government accepting what has been done by its predecessor, and if the qualification introduced by the Lord Justice were to be read as authorising a Court to treat as a nullity political decisions and actions of a former Government which have resulted in the transfer of property to third parties in circumstances like the present, their Lordships would respectfully disagree. At the same time, their Lordships must not be understood to reject the possibility of our Courts refusing, in a conceivable case, to recognise the validity of the disposal of state-property by a Government on the eve of its fall, e.g., by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with state assets for some private purpose.

The second ground upon which the decision appealed against was based in the Hong Kong Courts (Gould J. dissenting) depends upon the alleged retroactive effect of the recognition by H.M.G. in the U.K. of the Communist Government as the *de jure* Government of China as from 5th-6th January, 1950. This argument assumes that up to 12th December, 1949, the aeroplanes were the disposable property of the Nationalist Government and that it validly transferred them as specific and ascertained goods by the contract of that date to the appellants' predecessors in title. On this assumption, the appeal can fail only if the subsequent recognition *de jure* of the Communist Government annulled the passing of the property.

Subsequent recognition *de jure* of a new Government as the result of successful insurrection can in certain cases annul a sale of goods by a previous Government. If the previous Government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a *de facto* new Government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old Government. But if the old Government never regains the goods and the *de facto* new Government becomes recognised by H.M.G. as the *de jure* Government, purchasers from the old Government will not be held in Her Majesty's Courts to have a good title after that recognition.

Primarily, at any rate, retroactivity of recognition operates to validate acts of a *de facto* Government which has subsequently become the new *de jure* Government, and not to invalidate acts of the previous *de jure* Government. It is not necessary to discuss ultimate results in the hypothetical case when before the change in recognition both Governments purport to deal with the same goods. The crucial question under this branch of the analysis in the present Appeal is whether anything that happened in Hong Kong to these aeroplanes at the instigation of or on behalf of the *de facto* Communist Government before the change of recognition on 5th/6th January, 1950, is retrospectively validated, so that the title conferred by the contract of 12th December, 1949, is extinguished.

It might be too wide a proposition to say that the retroactive effect of *de jure* recognition must in all cases be limited to acts done in territory of the Government so recognised, for the case of a ship of the former Government taken possession of by insurgents on the high seas and brought into a port which is under the control of the *de facto* Government would have to be considered (see *Banco de Bilbao* v. *Sancta* [1938] 2 K.B. 176). But the actual question now to be answered concerns chattels in the British colony of Hong Kong, which at the time of the sale belonged to the Nationalist Government. Whatever the degree of physical control over these chattels maintained by the defecting ex-employees, this control was in defiance of the injunction granted by the Supreme Court of Hong Kong on 24th November. Moreover, if these persons could be regarded as acting on behalf of the *de facto* Communist Government, their action would be a direct infringement of

the Representation of Foreign Powers (Control) Ordinance of 4th November, 1949, and would be a criminal offence by the law of Hong Kong. This Ordinance provided that no person should "function on behalf of any foreign power" without the consent of the governor, and "foreign power" was defined to include "the government whether legal or *de facto* of any foreign state". The governor gave no consent. In such circumstances the action of those who illegally took control of these aeroplanes cannot give ground for the principle of retroactivity. Mr. Justice Gould pointed out that Lord Wright's proposition in the *Christina* case [1938] A.C. 485 at p. 506 that it did not matter by what mode possession was obtained

> "was in relation to a claim of sovereign immunity arising from the independent status in international law of the foreign Sovereign. In the present case no such question can be considered and the Court must make a declaration of legal rights. If those rights are dependent to any extent on possession of the subject-matter of the dispute, I think that acquisition of possession by a wrongful act cannot confer upon the party so acquiring it any benefit which he did not previously enjoy. In other words, the question must be settled with reference to the right to possession.
>
> * * * * *
>
> My opinion therefore upon this aspect of the case is that the Central People's Government could not show any superior title or right to possession; nor can it rely upon any rights arising out of actual possession acquired in the way it was; therefore it had no possession which could bring into effect the doctrine of retroactivity. That doctrine, I think, relates to the acts of a Government which has already acquired jurisdiction through possession and cannot include the actual act of taking possession if that act be wrongful. On this point I hold therefore that the ordinary principle of continuity was not displaced by any consideration of retroactivity and that it follows that the Nationalist Government was entitled to possession of and had jurisdiction over the aeroplanes."

Their Lordships agree with the argument and conclusions of Mr. Justice Gould on this point.

The learned Trial Judge attached importance to the announcement of 1st October, 1949, the authors of which proclaimed themselves to be the Government of China, and to the decree issued on that date purporting in the name of that Government to dismiss the ministers of the Nationalist Government. Their Lordships cannot accept the view that this is any reason for saying "that as from the 1st October, 1949 these aircraft were owned by the Central People's Government". They adopt on this point the opinion of Mr. Justice Gould, who observed:—

> "The purported dismissal on October 1st, 1949 of the ministers of the Nationalist Government . . . can only be deemed effective within the territory and as regards assets from time to time in the control of the People's Government. Elsewhere, and as long as the Nationalist Government retained *de jure* recognition, such a decree could have no effect."

For the above reasons, Their Lordships have reached the conclusion that the Appeal should be allowed. They have already humbly advised Her Majesty, as announced on 28th July last, to this effect and the Order in Council allowing the Appeal was made next day. No order is made as to costs.

(16740) Wt. 8096—1 7, 7 10/52 D.L./PI/3

In the Privy Council

CIVIL AIR TRANSPORT INCORPORATED

v.

CENTRAL AIR TRANSPORT CORPORATION

DELIVERED BY VISCOUNT SIMON

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.
1953

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28th January, 1953

My dear Goodhart,

Thank you for your letter giving the reference to what Bagehot wrote on the subject of life peers. It is very much in point and I shall wind up my speech on Tuesday next with this quotation.

Yours sincerely,

Simon

The Master,
University College,
Oxford.

[found in file of Pedestrians' Association correspondence and removed 17.iii.1992]

9th July, 1953

My dear Goodhart,

Here is a Judgment of mine which deals with the niceties of the British North America Act.

I am meditating a paper on the tenure of a High Court Judge. Supposing that he announces when trying a case that he must decide in favour of one party because he has been bribed to do so, cannot the Executive remove him for bad behaviour, for he only holds office during good behaviour, or must he continue to draw his salary and claim to be a Judge until Parliament has time to adopt an Address to the Crown? There is a good deal to be said both ways.

Yours ever,

Simon

The Master,
University College,
OXFORD.

23rd October, 1953

My dear Goodhart,

I do not know whether the L.Q.R. is writing a paragraph about the Middle Temple dinner, which you were kind enough to attend. A great many people have asked for a copy of my speech and I enclose a typescript for you in case you wanted to use it.

It was a great occasion for me and all of you were tremendously kind.

I had a letter from Lady Holdsworth saying how glad she was that you brought her to my High Steward's Party in All Souls Library.

Yours ever,

Simon

Professor [redacted] Arthur Goodhart, Q.C.,
Master of University College,
Oxford.

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11th December, 1953

My dear Goodhart,

Thank you for your letter. I have sent a copy of my Middle Temple discourse to Judge Frankfurter.

I have been preparing two judgments dealing with revenue points, each of which contains some quotable material, one of them insisting that the judicial duty is to interpret statute law and not to create a new enactment according to a Judge's notion of what Parliament ought to have said, and the other laying down what is the true basis of estate duty in the sort of language which Lord Macnaghten employed in L.C.G. v. A.G. to define the nature of income tax. I will send them both to you as soon as they are delivered.

Yours ever,

Simon

The Master,
University College,
OXFORD.

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Sept 30

My dear Goodhart

Any comments?
We shall deliver
unanimous opinions
in 10 days time

Yrs ever

Simon

House of Lords,
S.W.1.

My dear Goodhart,

Thank you very much for your letter about my pending Judgment in Read v. Lyons. Acting on your advice I have cut out the sentence referring to Nichols v. Marsland. I am much tempted to embalm in my Judgment your excellent proposition that "an occupier of land must not subject his neighbour to an unreasonable risk" which, properly expounded, seems to cover the matter, but perhaps it is wiser for the House of Lords to stick close to what is absolutely necessary for the decision.

I think our Judgment will do a good deal in the future to set proper limits to Rylands v. Fletcher. We shall probably be giving Judgment on October 18th.

I read your article about Nuremberg with much interest. You may have seen a survey of the matter which I wrote for the last issue of the Sunday Times.

Yours very sincerely,

SIMON.

Professor A.L. Goodhart, K.C.,
University College,
OXFORD.

ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

14. 11. 39.

My dear Goodhart.

Many thanks for your letter of yesterday enclosing that from Morris, which is particularly interesting. You will soon hear, if you have not already heard, that I have fixed March 2nd for our first meeting. It is I believe a date that suits you. I am very glad that you are a member of the Committee.

Yours

Gavin Simonds.