of London University, B.A., (Hons.), of Bombay University and of 2450 Teli Khoot, Ahmednagar, Bombay Presidency, India, the third son of Husainsaheb Shaikh of Ahmednagar, aforesaid, deceased.

Admitted 17 November, 1932.

SPELLER, SYDNEY REGINALD, of London University, LL.B., and of 4 Queen Anne's Grove, Bush Hill Park, Enfield, Middlesex, the only surviving son of Edwin Charles Speller of 18 St. George's Road, aforesaid.

Admitted 11 January, 1933.

I beg to add that another Special Council relative to the Calls is appointed to be held at **6.30 o'clock on Thursday, the 14th day of November,** and that the **Publication to the Bar** will take place in the **Hall (before Dinner) on Monday, the 18th day of November.**

I am, SIR,

Your obedient Servant,

R. P. P. ROWE,

Doc. A. 24
November 22, 1946.

UNITED NATIONS WAR CRIMES COMMISSION

"THE MEANING OF NUREMBERG"

Broadcast by Lord Wright on Friday 22 November 1946
by special request of the B.B.C.

In the Middle Ages a terrible pestilence called the Black Death swept over Europe. Historians say that more than 25 million human beings perished - great areas were desolated. In World War II it has been calculated that 22 million human beings perished, devastation on an immense scale was caused and incalculable misery was inflicted on humanity. The Black Death was a visitation of Providence; the war was caused and waged by the deliberate intention of human beings. The purpose of the Nuremberg trial was to establish who these were and to punish them for their evil deeds so far as they could be proved.

After the most thorough and exhaustive trial known to history, the Tribunal has condemned and sentenced certain of the men accused before it, acquitting three. The critics of the judgment appeal to what they say is a rule of law overriding the justice of the result; a super justice. They say that there is no precedent for establishing the crimes and imposing the punishment.

The crimes and atrocities committed by the Axis powers are beyond anything in history both in regard to their range and enormity. They are international in character and are to be judged according to rules of international law. I should think very ill of international law if it provided no means of punishing such crimes. The demandsof the civilised nations for the trial and punishment was not the voice of hysterical passion like the cry "hang the Kaiser" in 1919. It was motivated by the deep and universal sense of humanity that such actions should not escape their just punishment.

No one would, I imagine, deny that murder is a crime. Murder includes the deliberate killing of human beings without justification of law. The killings charged at Nuremberg were killings which the Tribunal has held could not be justified under International Law, that is the laws or customs of war.

Let us take a few examples of crimes and murders done in the conduct of the war. The killing of hostages, the murder of prisoners of war, the extermination of Jews and others, the slaughter of millions in concentration camps and in occupied countries by manifold means, were all accomplished in flat breach of the Hague and Geneva Conventions. These are Conventions which had been solemnly agreed by all the assembled nations including the Axis powers for the humanisation so far as possible of the horrors of war. Are we to accept the old saying "one murder makes a felon, millions of murders make a hero?"

The magnitude and atrociousness of the crimes are so obvious there is no need for precedents. Suppose that in a remote and civilised island no one had committed murder: but one day some man came and murdered an inhabitant - Can it be thought that the man would go scot free because no one had anticipated such an evil deed and the penal code was silent? It is true that it would be against natural justice to punish a man for something which he could not know was a crime. But did any one of the accused really think that he was not committing a crime? Hitler actually told his generals that legality did not matter, success would wipe out every stain. When Keitel confirmed the order to destroy captured commandos, he rejected objections of his colleagues by replying that they were speaking the language of the old chivalrous war. The same may be seen all through

inhumanity

the horrible chain of millions or murders, burning of women and children in the village churches, the murder without trial of four captured English air women who having been injected with some drug were perhaps still alive when wheeled on the trolleys into the cremation furnace. So also of the whole catalogue of infamous atrocities, torturings and slave labour. In the concentration camp at Auschwitz at least four million men and women perished in gas chanbers or by executions or ill usage.

Let me remind you with a brief extract from the Tribunal's judgment:-

"It took from three to fifteen minutes to kill the people in the death chamber, depending upon climatic conditions. We knew when the people were dead because their screaming stopped. We usually waited about one half-hour before we opened the doors and removed the bodies. After the bodies were removed our special commandos took off the rings and extracted the gold from the teeth of the corpses".

I cannot subscribe to the doctrine of the higher justice (as it is called) which would hold immune the men whom the Tribunal has held responsible as leaders and organisers of these atrocious deeds and as parties to the common plan. It is an elementary precept of law everywhere that the man in the background who provides the gun to be fired, is as guilty as the man who pulls the trigger. That is the idea involved when the key men - the organisers of crime at the top levels - are held responsible. No man received the death sentence unless he was found guilty of murder, that is on the counts of war crimes or crimes against humanity.

The modern laws and customs of war, the validity of which so far as I can see has not been denied anywhere, date back to Grotius in the 17th century and earlier. Many hundreds of German military men and administrators, have been tried for specific atrocities committed by them, by Military Courts of the Allies and sentenced to death and executed. These prosecutions have been held under the various Conventions which constitute the International Law on this matter. These are not acts of head hunting but elementary justice. It would be strange and anomalous if the principals who instigated the crimes went scot free while their human instruments were punished. The established penalty under international law is death for heinous offences; for lesser offences a minor punishment may be imposed. I cannot see any departure from precedent or any novelty in the sentences of the Tribunal.

What is to some extent novel is that the heads of the Hitler Inner Council have been individually indicted and punished for initiating and waging a war of aggression. No one disputes that a war of self defence may lawfully be initiated and waged by a state and its heads. It has been said that no court can decide whether a war was one of self defence or one of unjustified aggression. That has been urged as a reason against ever seeking to bring to trial and to punish the leaders of a nation for the crime of war, an apt description of war of aggression. But in this case there can be no doubt that the war was a war of aggression. Hitler and his associates had blatantly and persistently boasted that they aimed at domination: they were the master race. For many years the Nazis had educated the Germans to hold this belief. Their doctrine was that they were completely justified in starting and waging the war for the purpose of German aggrandisement, with all its attendent horrors, at the expense of the inoffensive peoples of the world; and were likewise irresponsible for whatever means, however horrible and atrocious, they thought fit to use. This is the doctrine of the irresponsibility of the sovereign state and the corresponding irresponsibility of its individual agents. A monstrous and inhuman doctrine - the denial of all law, right, and justice between nations, the apotheosis of power politics, divorced from humanity or morality.

The Nuremberg trial has flatly rejected that diabolical theory. It has plainly and squarely held that war is an evil thing, that to start and wage a war of aggression is an international crime and indeed is the greatest of war crimes. Perhaps there may be unjust wars in the future. Human nature is hard to change and evil instincts are hard to eradicate. But it is something to the good to know, that the evil doers become subject to a law which may be enforced against them, individually. It is said that the only effect will be that future wars will be more ruthless; and that a man will fight with a noose round his neck. No war could be more cruel and ruthless than the war which has just ended. All law asserts that a man is answerable for his acts; and I know no reason why war should excuse men for evil deeds committed in war, whether they are politicians, leaders or fighters. It is surely obvious that men who know that what they do or seek to do, is a crime in the eyes of the civilised world, will think twice before they begin, if they know that they will have to answer for it. It is true that fear of the law does not stop crime, but it is a check. Murders would be more numerous if there was no law against murder. There is a further powerful deterrent factor to consider. The establishment of law slowly becomes part of the consciousness of civilised man. A man does not refrain from crimes merely because he is afraid of punishment but because the law which he or his fore-bears have helped to frame reminds him and teaches him that such acts are anti-social and wrong. Law creates an inhibition and a moral sense.

Those who say there is no law against aggressive war ignore the existence of international law. Since 1919 at least the nations have deliberately sought to outlaw war. Their final great pronouncement was the Pact of Paris, the Kellog Briand Pact in 1928. This was a most solemn treaty made by sixty six nations who agreed to renounce war as an instrument of national policy. The aggressors in the last war were among these nations. That pact was a declaration of international law by practically the whole of the civilised nations. The Germans were guilty of a breach of that treaty and of the international law by initiating and waging war. Hitler and his gang were therefore individually principals in the common plan of breaking that international law. As the Tribunal said, the crime against peace was the most atrocious crime of all. They let loose the whole mass crimes of slaughter, terrorism and cruelty. They did so boasting of the ruthless cruelty with which they would wage war. They intended all that happened. They aided and abetted and were responsible for the mass of crimes. That was the common plan of crime which the Nuremberg Tribunal condemned and for which they punished the individuals responsible.

Even if hereafter, unjust wars cannot be prevented, at least after the Tribunal's decision, people will not be able to deny the law laid down by the Tribunal: it will be defended and maintained by the moral sense of humanity.

The responsibility of individuals for war crimes is an old doctrine which was recently reaffirmed by the Supreme Court of the United States of America in the case of the Saboteurs. But it is a very old doctrine. It was approved as long ago as 1474 in a great case in Breisach in the state of Baden where a governor who had been guilty of atrocities was tried by an international tribunal, found guilty and handed over to the executioner with the words: "let justice be done". Even in those days the court rejected the man's defence that he was only a soldier doing what he was told to do. That has been called in our days the defence of superior orders. It has long been held by jurists that the orders of superiors will not justify the perpetration of obvious crimes, though they may sometimes form an extenuation.

I need not remind you that Napoleon was exiled to St. Helena for life by the British Government, and with the assent of the Congress of Vienna - Blucher wanted to shoot him off hand. In 1919 the Versaille Treaty provided for the arraignment of the Kaiser and for his trial by a Tribunal established by the victorious powers as well as for the trial and

punishment of war criminals by Military Courts.

The Nuremberg Tribunal did not differ in principle from the recognised international law, nor did the law of its Charter. No one who has studied the Record can say that the result was a foregone conclusion. The Tribunal made the most careful discrimination between the different men in the dock, acquitting some, sentencing some to death, sentencing some to lesser punishments.

These then are answers to general criticisms made against the Nuremberg judgment. Now I wish to add a few general comments.

In the first place let me remind you that the content of the law is never a fixed and eternal thing. It grows and changes in conformity with the moral sense of the people to whom it belongs. Law is not static, and even precedents are interpreted by judges with modifications according to the spirit of their time.

International law accordingly is not static but developing, and in this as in any other sort of law there must be a moment in which a rule is newly applied. The solemn pacts of the nations are intended in this manner to develop and make international law. There is no other central law making authority such as there is in each state. International law for international crimes must be found in Conventions or treaties like the Pact of Paris, which the nations entered into in order to define the international law on the point. It was expressly intended to put the matter beyond controversy. Customs and decisions of Courts also help to form the law. The novel and arresting thing is that these declarations have now been put into use.

The truth was that the accused men speculated not only on succeeding, but on the chance that the victor nations would, as in the previous war in 1918 not press the criminality of their deeds to a trial. But that does not change the law. They had warnings enough from the leaders of the United Nations that they would be punished for their infamous deeds. They would not pretend, or be allowed to pretend that they did not know the law. Every criminal might say that, but it would not help him, for as you all know, ignorance of the law is no excuse.

Happily they were defeated and destroyed in the field, and the warnings they had received were fulfilled. It has been said, that it is wrong, that the victors in the war should have judged the defeated. But there is no other way in which the law can assert itself. Without strength all law is impotent. With strength, law can take an issue out of the dust of battle and submit it to an arbitration which is as near impartiality as anything which man has been able to invent.

Only by this means is it possible for man thoroughly to examine the causes and conduct of a conflict and decide whether the accused are guilty or not. For the first time on this scale, the Nuremberg trial has done that. It is a landmark in international law. It has established the right of the world to inquire into the acts of military men and into the acts of governments, statesmen and politicians charged with bringing about a war and with concerted and calculated breaches of treaty and of faith and of the laws of war. It was not undertaken to impress the Germans as some seem to believe. One may hope that in time it <u>will</u> impress the Germans; but that was not a primary object. It was undertaken to show that the things charged and proved against the defendants are not lawful, and it will stand for future generations as a proof that they will be punished. It looks to the future not to the past. It is a step, perhaps a big step to know that there is a community of nations, the prime object of which is to secure peace, under which the nations and their peoples, the decent men and women, can enjoy their lives in comfort, and to know that there is a law of that international community; a rule of law among nations, like the rule of law in the national life of citizens. All humanity, sick with contemplating the inexpressible evils of war, cries out for freedom from war, cries for peace.

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[c. 1951]

Prof. & Rt. Hon. Lord Wright of Durley
Durley House, Near Marlborough, Burbage, Wilts.

The appearance of this number of the Law Quarterly Review marks the entrance upon a new ~~half~~ greater Century of the distinguished editorship of it by Professor Goodhart K.B.E., ~~who [illegible]~~ ~~entered a new~~ ~~closed [illegible]~~. It seems appropriate that a brief note should mark this event, which all Anglo American lawyers will agree should be commemorated. The Review was founded in 1885, In 1935 a Jubilee number ~~celebrated~~ celebrated the occasion. Sir Frederick Pollock, Goodhart's predecessor as editor, added prefatory remarks in which he

2/ regarded the foundation of the Review, which so far as I know was the first of its kind, followed shortly afterwards by the Harvard Law Review, & later by many others, all of which They rich a great wealth in the world of the Common Law, their names will be familiar to readers.

Pollock briefly described & the original scheme stating the main objects as being free discussion of current decisions, doing "hand in hand with doctrinal & historical research, & Critical appreciation of legal literature without respect of persons & with as little editorial interference as may be" These main objects have been loyally observed by Goodhart.

The Jubilee number was on a large scale consisting of about 280 pages, & included 14 articles by distinguished

3/ lawyers summarising under the appropriate headings the main categories of the law. While gratifying to observe how many of these contributors are still alive & functioning.

But a student of our law cannot fail to be struck by considerable differences in the law between then & now, even in that short period, although there remains a substantial & fundamental uniformity.

A careful reader of the Review will be able to trace the changes practical & theoretical which have flowed not only from the Articles which have formed the main body of the Review, but from that most valuable part of each number, the Notes. Pollock in 1935 referred to the specific character

These Notes are the special province of the editor, and the minority which do not come from his pen are distinguished by the contributor's name or initials. They are brief & pregnant. They deal with the most significant of the cases decided in the preceding three months, & do so freely without fear or favour. Judgments are public documents, often of great importance either to the Government or to ordinary folk going about their daily business.x [x They are properly subject to comment & at times criticism] The Notes show in little the changes that are constantly going on in our law, as on a larger scale do the Articles, which often discuss important contemporary cases as well as principles. I did think of analysing the Notes in their sequence; such an analysis

might have been instructive, but it is clearly outside the scope of these brief observations. I hope readers will go through them consecutively x. [x & perhaps form their conclusions on the whole sequence.] Let me however briefly quote two recent Notes as typical. In the number for January 1948, the first note is indexed "Vale the doctrine of common employment". After observing that the doctrine is abolished by the recent Act, the writer said "All the learning concerning the doctrine of common employment, which has been so painfully accumulated, will be so much waste paper." He regrets that the fine distinctions of [illegible], which could not be escaped, however anxious the Court might be to avoid them, will no longer fall for decision in the near future "but" he concluded, "it is a comfort to remember that we still

6 have the law relating to invitees licensees & trespassers, the doctrine of respondeat superior, the rule in re Polemis & the law relating to concurrent negligence, & those who enjoy the subtler forms of legal argument." I can only add one more instance, in the hope of whetting the readers appetite for more & sending him back to read the Notes. It is from the number issued in January, 1950. It is from a Note on "The Cricket Ball Case" with which we are all familiar. The Note concludes that it was somewhat surprising that leave to appeal to the House of Lords was granted. "The primary question in the case was whether the hit was so exceptional that the defts could not reasonably have been required to guard against it: this is

7 a pure question of fact which is hardly a matter of such general public importance as to require Consideration by the House of Lords." I think these words are quite worthy of underlining the importance of distinguishing ratio decidendi from the standpoint of precedents. If precedents are to be regarded as of such supreme importance, the whole question relating to precedents should be carefully considered; that has never been done, or even attempted. Precedents from these very notes should lay down principles or involve principles of law. A decision of fact or perhaps even of law cannot create a precedent generally binding, any more than a decision of Parker L.J. or Esher once used a

Convenient term as "exemplification": the decision there is more as instance & illustration of a ruling principle, for which the authority lies elsewhere. What is fetish certainty is elevated into a criterion. The distinction between text & law is vital. My reference generally was that once the facts were ascertained (after a difficult & uncertain matter) the principle of law which applied was one which could be easily established. Generally the principle was easily seen to be applicable e.g. in the cricket ball case. Then there may be sometimes a conflict between earlier authorities which may be difficult to resolve. Then one precedent differentiates another. These & many other questions centre round precedents. If this certainty

which is desiderated, such problems may be very uncertain, as every experienced lawyer knows. I may in passing here mention a learned article in 1931 in three chapters by T. Ellis Lewis, who after exhaustive citations concludes that in the Year Books a doctrine of precedent cannot be traced. This single citation may be pleaded by me in defence of my failure to refer in more detail to the great mass of learned articles, by famous lawyers, in the 25 years in question.

I shd like now to touch upon a rather charming trick which Goodhart took from his predecessor [illegible] attaching to a Note

or an article a homely description, e.g. the housemaid case, the cricket ball case which may be compared with Pollock's "The Snail in the Bottle and Ginger-beer" (Donoghue v Stevenson) or more picturesque [illegible] "The Dog & the Postman," or "Go it, Bob!" (Baker v Snell). And I may add from Goodhart the title of an article "The 'I think' doctrine of precedent – Invitors & Invitees". Law deals with the affairs of current ordinary life & should not resent the use of every day words.

Goodhart is never dogmatic but he does not on occasion shrink from indicating his views. For instance he inculcates a strong dislike of the doctrine that the "Horse of Road" cannot

carried it on errors; (it cried) that was Lord St. Leonards opinion. That monstrous matter has often been dealt with by mere dogmatic assertion coupled with a reference to a certainty which no one has ever found in such litigation. As I have observed most actions depend mainly on issues of fact the eventual finding of which is [illegible]. The great principles of law & even some of the media axiomata have come to us as a heritage, largely from Roman Law.

All precedents (so-called) which are merely primarily decisions of fact, should be expelled from the category of precedent: "exemplifications" should be distinguished from ruling principles. But I fear I have overpassed

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~~the~~ boundaries of a discussion of ~~Prof~~ Goodhart ~~as~~ as editor of the Review. I can however say that he has often demurred to the doctrine that the House of Lords or the Court of Appeal were bound by their own judgments, and has emphasised the distinction between fact and law.

I have written here little about Goodhart's personal position and writings. His Essays in Jurisprudence and the Common Law were published as long ago as 1931 and are familiar to every English lawyer. So also are the numerous articles which he has contributed to the Review and other Reviews.

[Margin note: His long training at Harvard University, at Harvard Law School and his experience in U.S. The attorney general's office [illegible] are known to all.]

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in England and the U.S. He is a Common Lawyer deeply learned in that Law, but he is not insular. Neither for that matter is the Common Law today insular. Its domain ~~[illegible]~~ has now spread over half the world; ~~of course now there is not only the Roman which tried to challenge its rule but also the Oriental systems and the Soviet system~~. His ~~views~~ the Common Law in its broadest with its tentacles over Europe the West and the Commonwealth sense which Goodhart has mastered; and he has brought to his technical learning the broad and practical ~~Common~~ common sense derived from his wide experience of affairs and human life.

All the readers of the Review will wish him a continuance of his work as successful and distinguished as in the past 25 years.

WRIGHT

1 Sinclair v. Brougham 1

The case of Sinclair v Brougham has been generally regarded as an authority of first rate importance. I think properly so regarded though my reasons for so thinking may not altogether agree with the reasons for so thinking emphasised by some lawyers. I regard the case as primarily significant as embodying the leading principles on which the Court acts in exercising its equitable jurisdiction to give relief in order to prevent unjust enrichment, or to achieve restitution; & we accept the useful terms which has been employed in the recently published American Restatement of the Law of Restitution. The word itself is only one of a group of language which will be found in English judgments, indeed in this very case of Sinclair v Brougham. The

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case shows how the Court can do justice by applying equitable principles when the Common law would have been powerless. But since every Court is now bound in the same proceeding to apply both law & equity & both as the circumstances may require, the distinction is only important in the sense that the differences of method & rule must be observed. In the case we are considering a Company had borrowed money which it was ultra vires to borrow. None could in law be no claim for money lent & no claim in law for the repayment on the ground of quasi Contract or what is the obsolete phrase was called Contract implied in law, because to allow such a claim as a merely money claim would be to pardon an invasion of the public

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policy against forbidding ultra vires borrowing by Companies. Further, as the money lent & its products could not be identified in the Company's possession, a claim in law could not be maintained. But the powers of the Court were not exhausted. The problem was complicated by the conflicting claims of the shareholders. The moneys lent had become inextricably mingled with other moneys in myriad transactions. The Court solved the difficulty by a sort of rough justice, in the form of tracing orders, so as (in the words of Lord Dunedin) "to give full effect to the doctrine of ultra vires – for the person receiving is not ordered to pay as a debt the equivalent of what he unlawfully got but ordered merely to surrender what he still has as a

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substantive enrichment which but for the original reception of the money he would have been without". As I read the judgment, if the money borrowed had been either in the original form or in its products, still capable of identification, the claim would be properly brought as a claim in law. The aid of equitable principles had to be invoked because identification had become impossible. It might also have been necessary to invoke the aid of equity in the event of the Company's insolvency to give the claimant the benefit of an equitable charge on the identifiable property or its products in the Company's possession. The importance of the case is that it demonstrates a distinct category of claims separate from Orchard that trust (express or resulting) the

essential principle of which is that the defendant shall not be unjustly enriched at the expense of the plaintiff. The emphasis is on the word "unjustly". There are many positions in which a ~~plaintiff~~ defendant may be enriched at the expense of the plaintiff & yet it may not be unjust for him to retain that benefit. It is therefore important not merely to recognise the existence of this separate head in the law (that is law & equity) but to segregate it, to classify & to distinguish as the American Restatement of Restitution has sought to do. The different positions which may arise, bringing into one conspectus the legal & equitable rights & remedies. The fundamental principal may again be stated in the words of Lord Parker which may be applied beyond the special

fact of the case he was dealing with. "The equity lay in this that it would be unconscionable for the society to claim the amount by which its assets had been increased by the fact that it represented the borrowed money". This language may be compared with the Baron Parke's expression in Kelly v Solari 9 M & W 54, speaking merely as a Common lawyer of the right to recover money paid by mistake "it is against conscience to retain it", which is the phrase explained by Lord Sumner as depending on the fact that the payer had no intention to benefit the payee. Whether the remedy given is legal or equitable or both at once, the underlying principle is the same. In that particular case, Lord Parker

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by pointing out at once that it was already settled law that an ultra vires borrowing by a society does not give rise to indebtedness either at law or equity on the part of the Society. But that forms merely the starting point for the enquiry how ~~justice~~ may be done & unjust enrichment prevented. Incidentally that may be, as shown in this case, a very different thing from the plaintiffs point of view from complete restoration to him. The governing ~~matter~~ is the ~~benefit~~ in the defendant, not the expense to the plaintiff.

The facts of ~~the case are~~ Sinclair v. Brougham were simple. The Birkbeck Building Society had no power to carry on a banking business. It did so, along with its legitimate business as a building society & accepted large

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sums from depositors. Their borrowing ~~was~~ which was ultra vires. Heavy losses were incurred & the Society went into liquidation. Its assets were insufficient to meet the claims of the outside creditors, the shareholders & the depositors. It was conceded that the outside creditors ~~ordinarily~~ came first. As to the depositors ~~creditors as creditors in law~~, but as I have already said their Lordships held they ~~could not~~ claim to rank in law ~~as creditors~~ as creditors; ~~there remained the shareholders & the depositors.~~ But a conflict of claims arose as between shareholders & depositors. One view was that the shareholders were entitled to share in the liquidation in all the assets remaining after the outside claims enforceable at law were paid, which would have given to them ~~at the expense~~ about ~~nine~~ 5 times the amounts ~~with which~~ of their subscriptions. But the assets beyond question represented in some part the sums which had been paid in by the depositors, which were many times larger than the share

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Capital paid up ~~subscribed~~. The House of Lords held that it would be unconscionable that the shareholders should be entitled to repayment to depositors. As all the funds had been inextricably mingled together in the actual transactions of the Society it was impossible to trace the assets found in the Society's possession what part had come from the shareholders & what represented subscriptions which represented sums paid by depositors. Neither shareholders nor depositors could claim priority, as both sets of persons must be deemed to have been cognisant that the ultra vires business was being carried on. It was held that justice could best be done by a rough sort of tracing order, by dividing up the assets among all the claimants shareholders & depositors, pari passu

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in proportion of the sums they had respectively contributed. If the assets had been sufficient to repay all the contributions, the matter would have been simple. But there had been a loss. That loss, it was held, should be borne equally by those whose equities inter se were equal. The House of Lords reversed the Court of Appeal, who by a majority, Fletcher Moulton L.J. dissenting had held that the shareholders were entitled to repayment in full. This was clearly illogical, though apparently based on authority binding that Court. Fletcher Moulton L.J. held that the depositors were entitled to priority over the shareholders. The House of Lords while agreeing with his reasoning up to a point, held that there was no ground for giving priority to depositors over shareholders, or shareholders over depositors.

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There were four speeches delivered in the case in the House of Lords, two by equity lawyers, Lord Haldane (with whom Lord Atkinson agreed) one by Lord Dunedin, one by an English Common lawyer, Lord Sumner. I shall deal first with the constructive portions of these judgments, in which the conclusion arrived at is postponed. I shall later refer to the negative or critical portions, in which they refer to the matter first item already a chose jugée, viz that in the facts of the case there was not a debt either at law or in equity.

and Lord Parker,

Of the four speeches, I have found that of Lord Parker most illuminating, & next to his I put Lord Dunedin's. I shall primarily examine his reasoning, adding at times parallelisms from his colleagues, whose reasoning in substance agrees with him & with each other.

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I find in Lord Parker's speech references more or less complete to every main principle of unjust enrichment or restitution a term used by Lord Dunedin. The most obvious of common claims is in debt, which is put aside as inapplicable in the facts of the case. I shall discuss that aspect later. But an action at law is recognised to be competent in cases of ultra vires loans, so long as the money lent or its products is identifiable, according to the doctrine of Taylor v. Plummer, which is more fully dealt with by Lord Haldane. When identification at law ceases, then equity carries the matter further, as for instance on the principle of Hallett's case. In such cases equity imposes what has been called a constructive trust, to distinguish it from an express or resulting trust, where the

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(intention of the settlor is expressed was to be inferred from the facts of the case. Such trust depends on the cases where the intention to create it are thus distinguishable from those Constructive Trusts which are declared imposed by the Court in order to prevent unjust enrichments. But there are cases in which equity cannot find a Constructive Trust of the property, because that property represents in part only the property which is the subject of the unjust Enrichment. It is the product of that property Combined with the defts own property & that of a third person. Equity in such cases gives a partial right, what has been called an equitable lien, in the total property in the proportion in which that represents the plaintiffs property. And Sadler in one passage speaks of all these rights as being themselves a species of property

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which has created. It is presupposed that the legal property is in the deft, whereas in the Taylor v Plumer type of case, the legal property remains in the pltff. When the property has passed the legal right in law to the deft, the pltff can only claim as beneficial owner, the equity of property, claiming as to on the ground of a Constructive trust when the whole property is the product of the pltffs property, or on the ground of an equitable lien when the property is only in part the product of the pltffs property. The extent to which the Court may carry this equity is strikingly illustrated by the tracing order in the Sir Clarke Brougham where the properties of two sets of claimants had become mechanically mingled as the result of an enormous number of separate transactions over many years,

& may the roughest apportionment ~~division~~ of the ~~ultimate~~ residual property could be attempted. But in effect each individual claimant was given an equitable lien in his proper proportion. Lord Sumner seeks to illustrate what was done by the analogy of a familiar case at Common law where ~~physical~~ material chattels, bales of cotton, belonging to different owners, had become mixed up in a ship's hold as the result of a maritime casualty, & had lost ~~their~~ become incapable of identification as the marks indicating ownership had become obliterated. The Court held that the several shippers or consignees were tenants in common of the indiscriminate bulk. It is a similar principle which equity applies in the more esoteric sphere of financial transactions. But the point here to be noted is that equity

does not stop where law must do. It will follow the plff's property up to the ultimate limit of its identification in any form or in any amalgam, even into the hands of third persons ~~such as~~ not purchasers for value without notice, & even as against persons who have no higher title or equity than the original transferee, such as his ordinary creditors or trustee in bankruptcy. I may here note the third form of relief which may be given that is where a person's money ~~the plff~~ has been used to pay off the past debts ~~of his debts~~ of the recipient but where there can be no direct recovery as for a debt, for instance, ~~where a loan~~ in the case of money borrowed ultra vires. This third method is also noted by the Lords ~~plaintiffs~~ in Sinclair v Brougham, & is described as subrogation. The ultra vires lender (if he may be so

called upon to stand in the shoes of the borrower's creditor, at least as regards the personal debts. In that way, it is said, the ultra vires borrower's total indebtedness is not increased & unjust enrichment is at least in part obviated.X It was strongly urged in Sinclair v Brougham that [subrogation] this was the utmost remedy that equity could give. It would have been futile in that case, as in the inextricable flood of transactions no depositor could have shown that his money had been used to pay any particular debt of the society. But no such limitation on the Court's equity was admitted. Lord Dunedin is particularly instructive on this aspect. He has adduced parallels from Roman [law] & ~~French Law~~ from Pothier.

X Lord Parker put another case somewhat analogous, that is where money borrowed to the lender's knowledge for an illegitimate purpose, was in fact used for a legitimate purpose, which is in part the inducement which induces his new money, that such money would have created the ... as a debt though borrowing was ultra vires.

p 435 He goes on "I have made these citations

(1)

p 436 ... is unanswerable". A little later on the same page he proceeds
But further

p 436

(2)

does not belong to him". This statement is I think, in full accord in substance, though the line of approach may be somewhat different, ~~from~~ with what Lord Parker enunciated. I may also quote

a brief passage in which Lord Dunedin states the practical result as operating in Sinclair v Brougham "The position therefore comes to this

p 437

(3)

p 438 someone must bear the loss".

He finally concludes that the only equitable means is to let each party bear the shrinkage proportionately to the amount originally contributed.

I do not pretend by these brief

extracts to reproduce the full richness of the reasoning of the Lords in the constructive aspects of their judgments. This elaboration which has not indicated explained the full pushing reach of the doctrine of unjust enrichment was rendered necessary by the negative circumstance that there neither was nor could be a contract to repay the sums deposited. The essence of the remedy was not compensation to the plaintiff, but the restitution by the deft of what would be, if not restored, an unjust enrichment. Lord Haldane puts the remedy of law as being based on the fact that no property in the money had passed. A similar view was in a later case suggested in regard to the recovery of money paid under mistake by Lord Sumner. Lord Haldane said "[The

[illegible] 1920 Common Law] looked simply to the question

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p. 420

(21

(4)

further remedy."

The way of looking at the matter which is reflected in the other speeches, particularly that of Lord Dunedin, eliminates any reference to contract, express, implied in fact, or implied in law, & puts the position simply on what Lord Dunedin calls "unjust enrichment", the two cases being possession of the pltffs property or its products & the other words, simply unjust enrichment. On this basis the concept of debt, though convenient in practice, becomes logically otiose. It would apply to the great mass

(22

of cases of restitution, which would cover that important category of cases where a defdt is enriched (or advantaged) because the pltff under legal compulsion has paid in money or chattels or other property, a debt which is properly the debt of the defdt. The defdt has thus been enriched because his liabilities have been decreased & it would be unjust that the burden should be left on the pltff. There must be restitution. Analogous principles apply in other types of cases. But it is difficult to say to apply to such circumstances the whole of a pltffs right of property as in cases of ultra vires borrowing or money made by mistake or under duress. Perhaps however all cases fall under the broad higher equity principle enunciated by Lord Dunedin that no person has a right to keep

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either property or the proceeds of property which does not belong to him. The man who has obtained the release of his liability by means of another's property, cannot keep the proceeds of that property, the release from liability, without making Compensation. However in Sinclair v Brougham the Lords were not thinking of these particular questions. It seems

This line of reasoning seems to assimilate cases of ultra vires borrowing with other cases of restitution, such as money paid by mistake & so on. In one aspect that may be true. But there may be a further aspect peculiar to ultra vires borrowings. The directors of the Society who receive the money do not strictly receive it as agents of the Society, because the Society cannot in law borrow the money. But if in fact it goes

(24

into the coffers or funds of the Society & can be identified, it is even more manifestly than if it were money paid by mistake, not the Society's but the lender's money. And further, touching on this aspect of the case, if the case of such money being used to carry on the ultra vires business. If the gap, the business is a success, the Society anything though entitled to the profits or surplus; it could not be entitled to the profits or receipts from the liabilities on the plea of ultra vires, & for that purpose the borrowed money would be a liability of the business. This would seem to be because a right in such circumstances to a money claim in law, as distinct from ultra borrowed money, though borrowed ultra vires. In truth, a money claim whether based in property or in debt, comes

(25

In all these cases the same thing shd
be done, I think, in the case of monies
borrowed ultra vires or improperly
despite dicta which emerge in Lord
Parker's judgment & elsewhere in the case.
The ultra vires lender can only recover
in form specific if he can show that
the borrowed money is actually in the
possession of the Society, that is that
the Society is enriched. If the directors
acting ultra vires have disposed of the
borrowed money in any way, it may
truly be said that it has never reached
the Society. The mere borrowing
is not the act of the Society so as to
debar it from subrogation, the only cause of action
in law or equity, in respect of the
borrowed monies is showing that at the
date of claim they are in specie or in

(26

the form of traceable products in
the Society's possession. So to hold is
not to invade the doctrine of ultra vires
or to legitimise ultra vires borrowing.
Lord Parker's view in this context is, I
think clear from the passage I have
already cited. In the normal cases, it is
the original receipt of the money (to
quote Lord Dunedin's phrase) which carries
the liability of restitution. But that
idea is simply not applicable to
ultra vires borrowing. The Society is
never ordered "to surrender what
the debt has as a superfluity". Lord
Parker is careful to point out that the
receipt of money in the course of an
ultra vires transaction may & I
rather generally does give rise to a
debt at law. For this he also refers to

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case, 9 A.C. 523, which he thinks is sufficiently explained as depending on failure of Consideration, which seems to be a typical case of unjust enrichment. In that case the Society does actually receive the money, so that the liability can be put on the original receipt. The Lords differed from the admirable dissenting judgment of Fletcher Moulton L.J., which will repay study, simply on the ground that he did not recognise this particular & but vital doctrinal distinction, which illustrates the true nature of the doctrine of unjust enrichment. It is abundantly clear that it has no relation as a juristic Conception with Contract altho it is pertinent to observe that at one time last century it was said that there were only two classes of claim

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known to the Common law, Contract & tort. This classification is no doubt retained for certain statutory purposes, for instance in the County Courts Act in regard to questions of Costs, a matter which leads to difficulties. But the dichotomy does not correspond to any practical classification, & is of no significance for Common law decisions. It is recognised by writers like Pollock that quasi-Contract is a separate head from Contract, which means that even if the term "Contract implied by law" is retained as meaning quasi Contract & the equitable right & remedies are ignored, still 'Contract implied by law' signify a third head apart from Contract & tort. But clear as this

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I might appear, even from a mere reading of Sinclair v Brougham, Certain ~~extracts~~ parts of the observations in the judgments have been rather taken in some quarters to deny the existence of any body of principles, whether described as quasi Contract or restitution. It is necessary to examine this aspect of the judgments, because there has been a tendency to enclose & petrify this branch of English Law & Equity, with the result that even today there is no separate treatise on this most important branch, recognised as such in most Civilised laws.

The trouble has arisen because the Lords, as I think, unnecessarily, reverted to legal antiquarianism in order to explain why an ultra vires borrowing did not give rise to any rights in Debtors in

I law or equity. I say that the explanation was unnecessary because as Lord Parker pointed out the proposition had been already settled by the cases he cites, two of which were in the House of Lords. It was unnecessary to go further & new & separate reasoning would be merely matter of obiter dictum. But all four Lords do refer to the old form of money had & received as based upon an implied promise to pay, which would be a promise which no Society Court would lawfully make. Lord Summer puts the matter broadly. The depositors case was put

at p 452

(5)

mentally award

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Lord Dunedin says "I confess that for a person not used to the Common Law I confess an opinion as to the true meaning & extent of the Common Law action to handle precautionary plenum opus alterae. But to the best of my comprehension & instinct (aided by the case of Hearts Life Assurance Co.) I have come to the conclusion that the action for money had & received cannot be stretched to meet the situation. It is not however necessary that the claim should be one capable of being made good by an action at law. It will suffice if there is an equitable remedy." He then proceeds to discuss the principles of unjust enrichment & he concludes that the doctrine of ultra vires was introduced in order to protect ~~people~~ companies. Keep their own not to appropriate other peoples. In him I concur

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The introduction of any such a test for a form of action (which he seems to approach with some distaste) does not carry us much way further.

Lord Haldane is much more thought-provoking as regards the forms of action. He says that actions arising quasi ex contractu are actions based on a contract which is imputed to the defendant by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed. He proceeds to a historical disquisition, terminating with a passage from Ames with whom he agrees on the history of assumpsit, in which that distinguished professor ends by saying that assumpsit Compiled with equity in the case of the essentially equitable quasi Contracts growing out of the principle of unjust enrichment," Lord Haldane certainly

(33)

seems to indicate a development far beyond any original idea of assumpsit. Lord Holdane having concluded that the defendants claim cannot be in personam & must be in rem to recover property which in equity at all events they have never really parted. He finds the claim therefore in property.

I cannot help regretting the importance which has thus been placed on the old forms of action. I have already shown that the decision of which a series does make a real difference in any claim for unjust enrichment. That was settled by the House of Lords long before Sinclair v Brougham. Why plunge into this unnecessary discussion, which I am far from clear is historically accurate. The House of Lords have not always

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been fortunate in historical discussion, witness Beamish v Beamish & the Amerika. But a discussion on legal history does not as such include a chose jugée. If may determine an actual decision, which as we know was a chose jugée though based on & explained by wrong legal history. It is the decision, which is the precedent. Here no decision was based on the Lords' views about legal history of the old forms of action. It was already settled that in such a case as was before them the legal claim did not lie. The importance of the case & the actual decision lies in the definition of the equity of restitution. Lord Parker found that an action at law lies to recover money paid under an illegal contract where borrowing of it is made before the claim

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money or its products have ceased to be capable of identification, & can be brought if the money bank is used for the legitimate purposes of the Society. I am not sure whether in such cases he means that such an action would be (if old forms are to be regarded at all) as for money had & received. And Dundas says that the action for money had & received 'cannot be founded on a jus in re, for you cannot have a jus in re in currency. It shows that both an action founded on a jus in re, such as an action to get back a specific ~~currency~~ chattel, & an action for money had & received are just different modes of working out the higher equity that no one has the right to keep either property or the proceeds of property which does not belong to him'. The

(36)

Federal Court seems [illegible] more & more, even the ghost of the form seems indeed to have disappeared, the fourteen rules which apply to the claim in respect of which a writ is issued are determined at all by reference to the Federal Court. Indeed Orders has nothing to do with the matter.

But there seem to me many reasons why reference to the Federal Court should now be eliminated even on grounds of history. The fiction of the Court implied in laws was adopted for procedural reasons of convenience which were quite sufficient while the old forms of action continued. The Old Common Lawyers were a robust people & to go on fiction was convenient under the old rigid forms of pleading did not worry about its correspondence to reality or to possible concepts. But it does

and follows that they did not realise the true nature of the concept. We see eminent common law judges stating the rules as to money paid under compulsion of law (Lord Tenterden quoted in 1872 by Cockburn C.J.) & Baron Parke in regard to money paid under mistake in his well known judgment in Kelly v. Solari without any reference to fictional contract. Baron Parke puts the rule on this that it would be against conscience for the recipient to retain the money. He adds that a demand may be necessary in cases where the recipient is unaware of the mistake. That means as later cases have shown, that the retention of the money cannot be a wrong unless or until the recipient is aware of the mistake & is given a chance of making reparation. Lord Sumner in 1926 explained the

cause of action in such cases as based on the circumstance that no property passed; the payer did not intend to enrich the payee. He compares the case with that of goods misdelivered by a tradesman. In all these cases references to contract, actual or fictitious are absent. Nor is it true that even at law an action for money had & received depends on capacity to contract. Such an action could lie against an infant, a lunatic or a drunkard for necessaries supplied. This was so at the old common law & has now been given statutory sanction when the necessaries are goods. The House of Lords cannot have intended to alter these rules even if their expressions taken literally might seem to do so. But they were merely dealing with the

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Special case of ultra vires borrowing. How have the Court of Appeal hesitated to treat a claim for restitution of money or moneys worth as a claim not founded in Contract actual or fictional. In a claim for money paid under Compulsion of law by a bailee in discharge of what was in truth the liability of the bailor, the Court held that the fiction of a Contract was inapplicable. There was an actual Contract of bailment: that did not deal with the matter & the decision was based simply on unjust enrichment. In an earlier case servants had been rendered to a Company on the faith of a Contract which was invalid because the directors who purported to sign it were not qualified. It had been argued that

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Such Contract could be implied because the parties were intending to Contract in an express Contract. The Court held that the claim was simply based in unjust enrichment. It was not a question of breaking even the fiction of a Contract. The true ground might have been expressed in Lord Dunedin's words in Sinclair "it is clear that all ideas

p 431

(6)

when there is no Contract."

Others more learned in restitution than myself may produce a case under the old forms of action in which the fiction of a Contract has been used in order to defeat a claim for restitution

I am at present unaware of any. As I have said the old Common Lawyers did not always take their fictions seriously. They used them for their practical value. The fiction of losing and finding in trover & conversion, if scanned too narrowly, might sometimes have had curious results. But in truth the trover like the assumpsit was not traversable. But these & other forms were peaceably interred by section 49 of the Common Law Procedure Act, 1852, which says "all statements which need not be proved -- the statement of losing & finding & bailment in action for goods or their value; the statement of acts of trespass having been committed with force & arms, & against the peace of our lady the Queen; the statement of promises which need not be proved

as promises in indebitatus Counts --- and all statements of a like kind, shall be omitted". Thus the Common indebitatus Count for money received was or stated in Bullen & Leake in 1867 as "Money payable by the deft to the pltff for money received by the deft for the use of the pltff". As the authors say before 1852 "In assumpsit the declaration stated the debt & then averred the promise by the deft to pay the debt (in debitatus assumpsit & a breach of that promise, such promise being one which would be implied by law from the debt & not requiring proof as a fact" This was a rule in Slade's case, applied to quasi contract about a century later. It is noteworthy that Lord Mansfield does not in Moses v Macferlane speak of a contract implied by law, but a debt

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implied by law, which is a different matter. Lord Mansfield's expressions are accurate rather than others which have been used in regard to quasi contract. But Bullen & Leake go on to say that these dicta have been severed by the operation of the C.L.P. Act. 1852. The authors refer to various sections of the Act, including section 49 (which relieves the pleader from the duty of stating & proceed". There is therefore but one form of indebitatus count which comprises both all the advantages of both the forms under the old procedure & the action of indebitatus assumpsit is virtually become obsolete.

Why then should the Corpus have been disinterred in 1914? The enactment cannot be dismissed as a mere pleading change. It rendered the fiction

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fictione. The claim was equitable & the claim in debt which was never based in promise or breach of promise, but rather in property. However the matter is covered with fiction by the Judicature Act which abolished the forms of action altogether. A pleader now must plead & the jeff must prove the facts (not the fictions) necessary to support his cause of action. I cannot with all respect see any perceptible room (if there ever was) for paying regard to fictions or doing otherwise than applying to the actual facts the appropriate juristic rules & remedies. This view of the Court's duty has been expressed by the Court of Appeal (differently constituted) in two cases as I have explained. If so I think the

established law of England, unless it
is clear the House of Lords declares to
the contrary; it has never done. I do not think
that in a true reading of Sunday v
Brougham, the Court of Appeal in so
deciding has infringed the principle
of stare decisis, the first application
of which is fundamental — English
Law. Decisions are decisions. Views
legal history are not legal decisions.
They may form the basis of decisions,
though they did not in Sunday v
Brougham. They are simply matters
of fact, which change from time to
time as Knowledge grows. But to
repeat, even if the tolerant that the
Common Law will only uphold such
to the effect that quasi contract
is based on the fiction of a promise,

is a binding declaration of what the law
is, though it disregards the fundamental
act & purpose, but stance with
precedent, it is not merely in Sunday
v Brougham merely obiter dictum &
I may venture to recall Lord Simonds
warning against the well of the wish
of the obiter dictum. Secondly, the
dictum is limited to the special case
of ultra vires borrowing, by the
context & not by the express language.
Lastly, it does not touch the real
reach & scope of the doctrine of
unjust enrichment or restitution.
In fact, that doctrine is the same
& called the same application in
the service of justice, whether or
not people talk of the fiction of a
contract implied by law. But I shall

I prefer to do without it. His room is better than its company. Not only is it undesirable that English Law should be defaced by superfluous solecisms & illogical phrases, but the ghost of this fiction has, I fear, actually delayed & hindered the systematic & scientific study of this important branch of law

N? Any Extra Judicial Confession

Rough Notes

I regard Law as being one element in the complex structure of national affairs (I here disregard here international law) as one of the instrumentalities for the promotion of just relations between men living in society. The fundamental base the achievement of is justice but while that is the true motive it is too general for detailed guidance at the practical level, especially in the complicated system of national society. Rules more specific at a lower level are necessary

I have always rejected the merely authoritative of law, by what I mean the mechanical criterion, the merely formal test for construing statutes or applying legal rules except in the more common place cases. In important cases, the judge especially the judge of a court of ultimate appeal is making new law, he is a legislator: his decision is an act of his will. He

Cannot be content to follow like a machine previous decisions except in the very rare & simple cases where there is a governing decision on all fours; he cannot in less obvious cases decide by merely balancing expressions what he finds & picks out from previous judgments [illegible] where in point. He must criticise the premises which he is going to accept. Legal decisions are practical affairs. He must weigh values. He is a pragmatist. He must decide what will work. Instead of examining authorities according to the Common Law ideal he must as far as possible achieve continuity, not merely verbal continuity but continuity of ideas. He must study what the French call "La jurisprudence" or "la doctrine." In construing statutes of contracts his primary aim must be to give effect to the intention. He must reject formal or conventional

prejudices for instance that a statute which changes the Common law should be construed so as to change the common law as little as possible. On the contrary, most modern statutes (which now form the major part of modern law) are intended to make changes, often drastic & revolutionary. The previous law is in such cases of little help, except to emphasise the intended change. The intention to change must receive effect, to the full scope permitted by a broad & commonsense view of the actual language of the act. The books are full of warnings against the evils consequent on inventing or reechoing narrow technical constructions e.g. of the word "money" in wills & other similar eccentricities. The judge should be the master not the slave of the

authorities. The judge faced with an arbitrary or fallacious interpretation can often harden his heart by examining critically the circumstances in which the mischievous rule of construction was first imposed on an astonished but often subservient world & before the premises on which it was based. But in experience it is very rare that identical facts or identical contractual or statutory words repeat themselves. The judge has thus the opportunity & the duty of exercising his act of will (his good deed). If he does not he may help to perpetuate an abuse & to embarrass the development & simplification of the law. The last quarter of a century has seen instances of this salutary process — e.g. the doctrine of unjust enrichment is now established & become to some extent statutory. Much dead

wood has been cut away. Much remains, though many heresies have become respectable truisms. But at least a judge or academic lawyer (for much depends on these latter) is no longer in danger of being treated as heretical because he rejects obsolete rules which introduce unnecessary fictions or presumptions, such as "implied terms" which explain nothing & may mislead like the hypostatized "implied" terms in connection with unjust enrichment or frustration. This latter legal category has now become almost a common place & has found its way into the Statute book. I think it is now realised that the liability in unjust enrichment is treated not as contractual or depending on the introduction

circumlocutory

of a fictitious or pretended agreement. This is a significant example. I have always been an advocate of direct concepts unencumbered by circumlocutory methods. Perhaps I have been helped because for a long time I was mainly occupied on commercial cases. Commercial law in its origin and early development was a spontaneous product emerging naturally (as it were) out of the experiences and needs of merchants, protected by way of the summary practice adopted in other Courts. I once (extra-judicially) referred to "that commonsense practicality which is the vivifying spirit of commercial law". It might be possible to apply with truth that description to law in general and to all law. In various practical respects, there is no doubt a certain

utility in tradition and use and growth of that is the genuine product of human experience and needs as and not engendered by the formularies of technical lawyers, or sprung from unstructured human tendencies. But the idea of precedents, useful in its proper place, must not become a fetish. Nor must legal orthodoxy be inspired with a sort of odium theologicum. Law is not the master, but the servant of mankind.

There are some branches of law in which within limits a stricter adherence to precise rules and precedents may find a place, as for instance real property or predominantly statutory laws like rating. But even in these areas there may be scope for the judicial art.

are generally governed, in framing their relations, by a sense of fairness & broad awareness of what is legal. A man who is constantly demanding to have the law of his fellow, or his pound of flesh, is not usually regarded as an amiable or useful fellow to deal with. But by-and-large people want to act legally & arrange their social & business activities under the guidance of law; all the same recourse to a court of law is a long way from their normal contemplation.

All this is nothing but a truism. But it goes to support my belief & practice that law should, as far as possible, be thought of in broad common sense terms & as according with what the reasonable man would wish it to be, that is if he were [illegible]

Broad common sense is sufficient

adequately instructed; in a difficult technical subject matter that might involve a good deal of instruction. But in simple matters of every day experience, the standard of inferences is less exacting & except in particular circumstances may be [illegible] be described as nonexistent. Thus the word 'money' though to economists it may have an esoteric connotation, has in ordinary life a sufficiently well understood significance & need not have been transformed by the Courts without warrant of either science or everyday usage. I may say that I have more than once had occasion to complain of the darkening of counsel by the introduction of pseudo-Latin words or pseudo-Latin maxims. For instance the pseudo-distinction

between "Causa Causans" (whatever that may mean) & the word "causa" qualified by these equally obscure ~~qualifying~~ adjectives has often seemed to me simply an impediment to clear thinking for the purpose of finding ~~of~~ what was the real question. The same is true of ~~equally~~ [illegible] the various meanings quoted in the decent obscurity of a learned language which have seemed to me to serve as a sort of opiate ~~to~~ the mind. I should be glad to forget them all.

When I casually try to remember in a quiet moment the judgments of some of the judgements I have delivered they seem to come to me like confused ~~obscure~~ shades from an obscure limbo. It is easy to distinguish the cases which I tried ~~decided~~ either [illegible]

without a jury as a single judge during the 7 years I was a King's Bench judge from those which I ~~have~~ heard in Appellate Courts, like the House of Lords, the Court of Appeal or the Judicial Committee of the Privy Council. In the former class I was not helped or hampered by the views of colleagues. But my judgment was my own individual effort, no doubt with the assistance, often of the highest value, of the arguments of counsel. In the latter class of cases I sometimes delivered the judgment or opinion of the Court which generally reflected the course of the ~~my~~ individual reasoning by which I personally reached the conclusion I stated. Of course that is even more obvious in cases where I delivered a separate dissenting judgment or opinion. ~~It~~ The same is also true

where I delivered a judgment which agreed in the result with my ~~Colleagues~~ [illegible] But in a ~~substantial~~ substantial number of cases I simply concurred in general terms. That meant that I concurred in the result & ~~of those~~ ~~who~~ did not consider ~~that~~ there were any differences in ~~the detail of~~ thought or expression which called for a separate judgment. Of course in the Judicial Committee there is only one Advice to the Crown or judgment & no room for dissent: the judgment which is delivered is certainly the opinion of the party who delivers it & also represents the majority view. If there is a dissentient minority, that is inarticulate & secret.

Of the cases which I tried as a

Kings Bench judge the two civil cases which stand out in my memory are Lever v Bell (or in the House of Lords Bell & Lever) & the Bank of Portugal case. In the former, which involved a question of breach of duty by an agent, the Court of Appeal affirmed my judgment but the House of Lords reversed it by a majority of ~~two~~ three to two. I am still unrepentant, but feel it was a difficult question of fact. As to the Bank of Portugal case the real problem was ~~most of the measure of~~ the damages for "duty of breach" [illegible] in effect whether the loss to the Bank ~~was supplemental to~~ was limited to ~~simply~~ the cost of the bogus notes as printed pieces of paper, or was the liability which the Bank had to assume ~~off~~ on the bogus notes which it had issued as its notes (there being nothing to distinguish

I shall only refer to cases in which I believed reasoned judgments or opinions I shall not include judgments or opinions in Mercantile or Shipping cases or Revenue appeals. Of the [illegible] good many of such ~~cases~~ appeals both to Masters of the Rolls & on a Lord's appeal. But they are generally of a technical character. I prefer in the few examples I choose here to limit my selection to cases of more general interest.

My ~~first~~ first point as to which I differed as Master of the Rolls ~~assisted~~ in Bucknall's case where the question was whether the widow of a deliberate suicide who had intended to assure his life for the benefit of a wife & children effected by him, could recover on the policy. It was held that the Court of Appeal on grounds of public policy, the

Court of Appeal. The House of Lords affirmed my judgment. Two other questions of public policy may be mentioned. In Ogden v Ogden decided that a promise to marry given while the wife of a husband was alive but in the interval before a decree of divorce nisi to decree absolute was void. The other public policy case concerned the very different question of restraint of trade. It was the Harris Tweed case in which I was then two steps sought to explain & rationalise the 4 previous decisions of the House of recent years in that topic. In ~~the~~ later appeals it was sought to limit the much attacked rule of public policy against restraint of trade. The Lords held that it did not apply where the employer was under a moral obligation what he had broken to provide for the workers regularly (e.g.

(Caswell's case)

by providing a proper system of work) & (2) where though there was the same employer the men were employed in different & unconnected departments. During the 15 years I sat as a Lord of Appeal there were many important decisions on the nature of negligence. I shall be content to refer to Bourhill v Young, in which the modern test laid down for breach of duty is is that of reasonable foresight of the risk of injury. The case also involved consideration of nervous or mental shock. Negligence is referred to as a modern & developing branch of law. The question of frustration of contract was discussed in Fibrosa Spolka. In Cricklewood Building Society the question was whether a lease was frustrated or capable of being frustrated in law. In Sovfracht

the point detailed was being in an enemy occupied country created the disability attaching to an alien enemy. In the Christina what was in issue was the property in a Spanish ship during the Spanish Civil war. In the Bank of Baroda v Punjab Bank, an appeal from India, was was discussed was the certification of a cheque. In the Liesbosch case the issue was as to remoteness of damage & in particular as to damages incurred because of financial disability. In Lazard's case the question was whether a Russian Bank had ceased to exist by reason of the Bolshevik revolution of 1917. I must however limit this haphazard selection, leaving many interesting & important cases unmentioned

¶ The last opinion I delivered as a Lord of Appeal was the Antivivisection case, where the question was whether the Society was a charity.

AN EXTRA JUDICIAL CONFESSION.

I regard law as being one element in the complex structure of national affairs (I here disgegard international law) as one of the instrumentalities for the promotion of just relations between men living in society. The fundamental basis is the achievement of justice but while that is the true motive it is too general for detailed guidance at the practical level, especially in the complicated system of national society. More specific rules at a lower level are necessary.

I have always rejected the merely authoritative criterion of law, by which I mean the merely formal or mechanical test for construing statutes or applying legal rules except in the more common place cases. In important cases the judge, especially the judge of a Court of ultimate appeal, is making new law, he is a legislator: his decision is an act of the will. He cannot be content to follow like a machine previous decisions except in the very rare and simple case where there is a governing decision "on all fours". He cannot in less obvious cases decide by merely balancing expressions which he finds and picks out from previous judgments more or less in point. He must criticise the premises which he is going to accept. Legal decisions are practical affairs. He must weigh values. He is a pragmatist. He must decide what will work. His task is to examine authorities, because according to the Common Law ideal he must as far as possible achieve continuity; but the continuity he must aim at is not merely verbal continuity but continuity of ideas. He must study what the French call "La jurisprudence" or "la doctrine". In construing statutes and contracts his primary aim must be to give effect to the intention. He must reject formal or conventional prejudices, for instance the prejudice that a statute which changes the Common law should be construed so as to change the Common law as little as possible. On the contrary, most modern statutes (which now form the major part of modern law) are intended to make changes often drastic and revolutionary. The previous law is of little help in such cases except to emphasise the intended change. The intention

to change must receive effect to the full scope permitted by a broad and common sense view of the actual language of the the Act. The books are full of warnings against the evils consequent on inventing or re-echoing narrow or technical constructions: e.g. the word "money" in wills and other similar eccentricities. The Judge has thus the opportunity and the duty of exercising his act of will (his day's good deed). If he does not he may help to perpetuate an abuse and to embarrass the development or simplification of the law. The last quarter of a century has seen instances of this salutary process - e.g. the doctrine of unjust enrichment is now established and even become to some extent statutory. Much dead wood has been cut away. Much remains, though many heresies have become respectable truisms. But at least a judge or academic lawyer (for much depends on these latter) is no longer in danger of being treated as heretical because he repeats obsolete rules which introduce unnecessary fictions or pretences, such as "implied" terms in connection with unjust enrichment or frustration. This latter legal category has now become almost a common place and has found its way on to the statute book. I think it is now realised that the liability in unjust enrichment is direct not circuitous or depending on the intermediation of a fictitious or pretended agreement. This is a significant example. I have always been an advocate of direct concepts unencumbered by circumlocutionary methods. Perhaps I have been helped because for a long time I was mainly occupied on commercial cases. Commercial law in its origin and early development was a spontaneous product emerging naturally (as it were) out of the experiences and needs of merchants and proceeding by way of the summary practice adopted in their courts. I once (extra judicially) referred to "that common sense practicability which is the vivifying spirit of commercial law". It ought to be possible to apply with truth that description to law in general and to all law. In various practical respects, there is no doubt a certain utility in tradition and use and want if that is the genuine product of human experience and needs and is not engendered by the formularies of technical lawyers, but springs from instinctive human tendencies. But the idea of precedents useful in its proper place must not become

a fetish. Nor must legal orthodoxy be inspired with a sort of odium theologicum. Law is not the master but the servant of mankind.

There are some parts of law in which within limits a stricter adherence to precise rules and precedents may find a place, as for instance real property or a law, such e.g. as rating which is predominantly statutory. But even in these areas there may be scope for the judicial act of will. In the anomalous sphere of the law of charity, which is perhaps more appropriate to administration than adjudication, judicial determination may play some part. Statutory law which, as I have said, bulks so largely in modern affairs, is predominantly regulative though more obstrusive in the public eye, is less important than the part which it plays in enabling men to arrange and plan their affairs and to adjust their mutual relations. Men do t is generally without seeking to forecast what a Court would decide if the dispute came before it. They are generally governed in fixing their relations by a sense of fairness and a broad view of what is legal. A man who is constantly demanding to have the law of his fellow or his pound of flesh is not usually regarded as an amicable or useful fellow to deal with. But by and-large people want to act legally and arrange their social and business activities under the guidance of law; all the same, recourse to a Court of Law is a long way from their normal contemplation.

All this is nothing but a truism. But it goes to support my belief and practice that law should, as far as possible, be thought of in broad common sense terms and according with what the reasonable man would wish it to be, that is if he can be adequately instructed; in a difficult technical subject matter that might involve a good deal of instruction. But in simple matters of every day experience, the standard of expertness is less exacting and except in particular circumstances may be described as non-existent; broad common sense is sufficient. Thus the word "money" though to economists it may have an esoteric connotation, has in ordinary life a sufficiently well understood significance and need not have been tortured by the Courts without warrant of either science or everyday usage. I may say that

I have more than once had occasion to complain of the darkening of council by the introduction of pseudo-latin words or pseudo-latin maxims. For instance the pseudo-distinction between "causa causans" (whatever that may mean) and the word "causa" qualified by the equally obscure adjectives has often seemed to me simply an impediment to clear thinking for the purpose of finding what was the real question. The same is true of the various maxims quoted in the decent obscurity of a learned language which have seemed to me to serve as a sort of opiate to the mind. I should be glad to forget them all.

When I casually try to remember in a quiet moment the judgments or some of these judgments I have delivered they seem to come to me like confused shades from an obscure limbo. It is easy to distinguish the cases which I tried with or without a jury as a single judge during the 7 years I was a King's Bench Judge, from those which I heard in Collegiate Courts, like the House of Lords, the Court of Appeal or the Judicial Committee of the Privy Council. In the former class of cases I sometimes delivered the judgment or opinion of the Court which generally reflected the courses of the individual reasoning by which I personally reached the conclusion I stated. Of course that is even more obvious in cases where I delivered a separate dissenting judgment or opinion and the same is also true where I delivered a judgment which agreed in the result with my brethren. But in a substantial number of cases I simply concurred in general terms. That meant that I concurred in the result and did not consider that there were any differences in the detail of thought or expression which called for a separate judgment. Of course in the Judicial Committee there is only one Advice to the Crown or judgment and no room for dissent: the judgment which is delivered is certainly the opinion of the Judge who delivers it and also represents the majority view. If there is a dissentient minority that is inarticulate and secret. Of the cases which I tried as a King's Bench Judge the two civil cases which stand out in my memory are LEVER v. BELL (or in the House of Lords BELL and LEVER) and the BANK OF PORTUGAL case. In the former, which involved a question of breach of duty by an agent, the Court of Appeal

affirmed my judgment but the House of Lords reversed it by a majority of three to two. I am still impenitent but feel it was a difficult question of fact. As to the BANK OF PORTUGAL the real problem was one of the measure of the damages due to the breach of duty of the defendants, in effect whether the loss to the Bank was limited to the cost of the bogus notes which had been issued as its notes and as currency there being nothing to distinguish the bogus notes from the genuine notes of the Bank. I adopted the latter view, which in substance was affirmed both by the Court of Appeal and the House of Lords, by a majority in each court. The criminal cause which stands out in my memory is that of KYLSANT. It was a painful case but the verdict of the jury upheld the standard of honour of which the City of London has always been proud.

When I turn to the hundreds of appeals on which I sat during my 15 years' service as a Lord of Appeal in Ordinary, including 2 years as Master of the Rolls, I feel that any satisfactory selection from the bulk is beyond my powers at this moment as well beyond the spare time at my disposal. I shall be content with the selection of a few instances picked out at random and as unsystematic as the rough ideas I have adumbrated here.

I shall only refer to cases in which I delivered reasoned judgments or opinions. I shall not include judgments or opinions in Merchantile or Shipping cases or Revenue appeals. I decided a good many of such appeals both as Master of the Rolls and as a Lord Of Appeal. But they are generally of a technical character. I prefer in the few examples I choose here to limit my selection to cases of more general interest.

The only judgment I delivered as Master of the Rolls to which I refer here is that in BERESFORD'S case where the question was whether the estate of a deliberate suicide who had intended to secure the state the benefit of a life policy effected by him, could recover on the policy. It was held that on grounds of public policy, he could not. The House of Lords affirmed my judgment. Two other questions of public policy may be mentioned. FENDER v. MILDMAY decided that a promise to marry given while the other spouse was alive but in the interval betwee

(alt.)

a decree nisi of divorce and the decree absolute was not invalid. The other public policy case concerned the very different question of restraint of trade. It was the HARRIS TWEED case in which their Lordships sought to explain and rationalize the 4 previous decisions of the House in recent years on that topic. In other appeals it was sought to limit the much attacked but at present unpregnable rule of common employment. The Lords held that it did not apply (1) where the employer was under a personal obligation which he had broken to provide for the workers' safety (e.g. by providing a proper system of work) (GASWILL'S case) and (2) where though there was the same employer the men were employed in different and unconnected departments. During the 15 years I sat as a Lord of Appeal there were many important decisions on the nature of negligence. I shall be content t to refer to BOURHILL v. YOUNG in which the modern test laid down for breach of duty is that of reasonable foresight of the risk of inquiry. The case also involved consideration of nervous or mental shock. Negligence is here referred to as a modern and developing branch of law. The question of frustration of contract was discussed in Fibrosa Spolka. In CRICKLEWOOD BUILDING SOCIETY the question was whether a lease was frustrated or capable of being frustrated in law. In LOWENACHT the point debated was whether being in an enemy occupied country created the disabilities attaching to an alien enemy. In the CHRISTINA what was in issue was the property in a Spanish ship during the Spanish Civil War. In the BANK OF BARODA v. PUNJAB BANK (an appeal from India) what was discussed was the certification of a cheque. In the LIESBOSCH case the issue was as to remoteness of damage and in particular as to damages incurred because of financial disability. In LAZARD'S case the question was whether a Russian Bank had ceased to exist by reason of the Bolshevik revolution of 1917. My last opinion delivered as a Lord of Appeal was the ANTIVIVISECTION case, where the question was whether the Society was a charity. I must however limit this haphazard selection, leaving many interesting and important cases unmentioned.

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