CURRENT LEGAL PERIODICALS

International Law in Practice. Sir Arnold D. McNair, C.B.E., K.C., LL.D., F.B.A. 1 International Law Quarterly: 4–13.

A new legal periodical, the International Law Quarterly, has just commenced its career in England, with a sub-title "the British Journal of Public and Private International Law". For its first article the editors have printed an address delivered by Sir Arnold McNair, a member of the International Court of Justice, at a meeting of the Grotius Society in November 1946.

The sphere of operation of international law, said to be "the legal relations between states", is constantly being enlarged by means of judicial decisions, treaties and the writings of international lawyers "at the expense of the residuary sphere of non-legal relations". Matters are continually being removed by treaty from "the domain of domestic jurisdiction".

A hundred or more decisions by international or national tribunals are reported every year in the Annual Digest and Reports of Public International Law Cases. Just as rights and duties of individuals may depend on common-law rules or contract, so those of states may arise from customary rules or from treaties into which they have entered. The majority of decisions of the Permanent Court of International Justice "turn on treaty obligations". For example the court decided cases on the status of the Kiel Canal, Minority Schools in Upper Silesia and Albania, the navigation of the Oder and the Danube, and the constitution of the International Labour Organization.

Many extremely important decisions have been handed down, such as that in *The Lotus*, on the extent of criminal jurisdiction of states under international law, and in the *Eastern Greenland* case where Denmark's claim to the whole of Greenland was upheld. In spite of the absence of sheriffs and bailiffs "there is not a single instance of a party declining to carry out a judgment of the Permanent Court".

Sir Arnold calls on English lawyers to take a deeper interest in international law, first because the common law and principles of equity are not exerting their proper influence there and, secondly, because of "national duty". A good citizen must not confine his civic interests to his own parish or country; "he must spare some part of his time to be a citizen of the world".

The Lords of Appeal in Ordinary. The Right Honourable the Lord Macmillan, P.C., G.C.V.O. 97 Law Journal: 541–2.

This is an article of unrivalled authority and of historical interest to lawyers practising in jurisdictions where the judgments of the House of Lords receive the respect to which they are so justly entitled. Lord Macmillan, who has recently resigned as a Lord of Appeal in Ordinary, sketches the history of the office and sheds light on the nature of the judicial functions of the House of Lords. The final appeal still prays for review before His Majesty the King in "His Court of Parliament" but, since the time of Charles II, the House of Lords alone has exercised the judicial function of Parliament as a court of review.

Lord Macmillan mentions the efforts of some lay peers to act as judges, and the extraordinary arrears that piled up and brought the jurisdiction into disrepute, before trained peers were provided on the present basis. From *In re Lord Kinross*, [1905] A.C. 468, he extracts a gem of boyhood recollection. There at page 476 Earl Spencer, a lay peer, said "I remember very well when I was a mere boy I was called in one morning to make a quorum, and I recollect sitting here and hearing appeals". He also reports an incident in *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, when the second Lord Denman, another lay peer, "who was present when judgment was being given, sought to vote by holding up his hand. He was simply ignored and the report of the case in the Law Reports makes no reference to the incident." Since that time only law lords have sat or sought to vote on the judicial business of the House.

Lord Macmillan deals with the customary Scottish and Irish representation among the law lords in terms reminiscent of the unwritten Canadian law. "The invariable practice has been to allocate one of the appointments to Scotland . . . it is now recognised that Scotland should have two representatives."

Finally he performs a service of historical value to practising lawyers by listing the forty-one Lords of Appeal in Ordinary appointed since the creation of the office, together with the dates of their appointment, resignation and death and the dates when certain of them were appointed, while Lords of Appeal in Ordinary, to other offices. He refers to them, in terms that on another lawyer's lips would be reverent, as "almost all the most illustrious legal names of the last three generations representing a remarkable diversity of legal gifts". (Peter Wright)

Central London Property Trust Ltd. v. High Trees House Ltd. G. C. Cheshire and C. H. S. Fifoot. 63 Law Quarterly Review: 283–301.

In this article the learned authors examine the recent decision of Denning J., reported at [1947] 1 K.B. 130, and consider its effects, first, upon the rule in *Pinnel's* case and, secondly, upon the common commercial practice by which a contracting party promises that he will not insist upon the strict performance of one of the contractual terms.

In the case discussed, the landlords, having agreed without consideration to forego half the rental of a block of flats, subsequently demanded the whole. From some points of view, discussed in the same issue of the Law Quarterly Review at page 278, the case is an unsatisfactory one, being in the nature of a "friendly" action and a great many of the observations of Denning J. being mere dicta.

Broadly, he held that if A, presumably contemplating legal consequences, makes a promise to B upon which B reasonably assumes he is to act and does act, B may use that promise as a defence to any action brought by A to enforce his original claim. At first blush one wonders why a judgment merely to that effect, containing as it does nothing beyond what appears just and equitable, should form the basis for an article from such distinguished writers; but the very excellent and complete review of the cases, for which the present decision really serves only as a springboard, indicates how difficult the path has been for judges, to whom *Pinnel's* case, fortified as it was with the heavy hand of the Lords in *Foakes* v. *Beer*, stood as an invitation to improper dealings between parties.

The point at issue arises chiefly in two ways: where a creditor agrees to accept in settlement of his debt a sum less than the actual amount due, and again where a contract of sale has been entered into, whose terms (most commonly, as to delivery or acceptance) are at the request of either the vendor or vendee amended. The position of the defendant, should an action follow, based on the original dealing between the parties, is an awkward one at common law. Apparently the rule of estoppel does not provide a complete answer, and the rules as to consideration or the requirement of a written memorandum of the new agreement must be carefully considered. In this latest case, Denning J. considers the rules developed through the earlier decisions and finds that where a promise is made which was intended to create legal relations and which, to the

knowledge of the person making the promise, is going to be acted upon by the person to whom it is made and is in fact acted upon, the promise so made must be honoured. (J. E. Wilson)

Res Ipsa in the Air. Charles F. O'Connor. 22 Indiana Law Journal: 221–234.

The *res ipsa* doctrine is employed in accident cases where, first, the accident was such as does not usually occur without negligence, secondly, the defendant was in exclusive control, thirdly, the plaintiff was not in a position to know the cause of the accident and, fourthly, the defendant has greater knowledge or means of knowledge concerning its cause than the plaintiff. Courts have refused to apply the doctrine in aviation cases where all these "necessary circumstances" have not been present.

It has been argued that it should not be applied in aviation cases because it is, as yet, impossible to say what are the causes of air accidents. They may occur without the existence of any negligence. On the other hand, a plaintiff's difficulties in air carrier cases are greater than those involving surface carriers. Generally all occupants of a plane that crashes are killed and the plane itself is destroyed; even if there are survivors, their evidence is of little value because "the operation and navigation of aircraft are so technical". Also, government regulations "are such that accidents are not likely to happen in the absence of negligence".

There seems to be no objection to the application of the doctrine in cases where damage is caused to persons or property on the ground, nor in cases of collisions between airplanes. It was first applied, in a case involving injury to passengers, in 1931 and has since been given effect to in many, though not all, such cases in the United States. In England and in Canada, and in some American cases, it has been applied even though a plaintiff has relied on specific acts of negligence as well as on *res ipsa*.

It is suggested here that the doctrine does not solve the problems arising out of airplane accidents and that a "well planned statute" would be preferable. The Warsaw Convention, adopted by thirty countries, and the Rome Convention contain provisions as to the liability of air carriers. Under the former the burden of proof is placed on the defendant. The Uniform State Law for Aeronautics does not make any provision as to liability with respect to passengers or property carried, nor

does the Civil Aeronautics Act. However, the Civil Aeronautics Board has recommended that a "comprehensive federal aviation liability statute" should be passed, which would "define liability in aircraft accidents" and compel aircraft operators to carry insurance.

For the present, "plaintiffs in most jurisdictions and in most types of aviation accident cases (where the cause of the accident is unknown) will be forced to invoke *res ipsa loquitur*" and they "can only hope for but cannot depend on" its application, since this "follows no jurisdictional pattern" and the doctrine "is rejected as often as it is applied".

The Case of Decastro Earl Mayer and Mary Ellen Smith. Hayden H. Hilling. 22 Washington Law Review: 79–109.

In 1928, in the State of Washington, James Bassett disappeared and was never seen again, alive or dead. Overwhelming evidence was discovered to connect the accused, Mayer and Smith, with whatever may have happened to him, but until a confession was obtained from Mrs. Smith in 1938 there was practically nothing to show that he was dead. The purpose of this article is to discuss the rules as to proof of the *corpus delicti* when no body is found.

The rule requires "that the fact that a crime has been committed and the fact that the accused committed it each be established as independent facts, and beyond a reasonable doubt". Is evidence which merely tends to prove that the defendants may have killed the missing person "precluded from bearing on the *corpus delicti*" by the requirement that it be established as an independent fact? If so, murderers, sufficiently clever to dispose of the bodies of their victims, may escape. On the other hand, many who have been absent for long periods return. It is argued that the *corpus delicti* can be proved by evidence of this class. It has been established that such evidence may be used to prove criminal agency as the cause of death, once the death is proved; also in some cases it has been admitted to help in proving the death as well as the criminal agency. The author suggests that the rule might be stated thus: "the *corpus delicti* must be established by evidence, some substantial part of which proves the fact of death as an independent fact, and all of which, taken together, proves the killing of the alleged victim by the criminal act of another beyond a reasonable doubt, to a moral certainty and to such a degree

that there is no reasonable hypothesis consistent with the contrary".

The only circumstantial evidence in the *Mayer and Smith* case that did not depend on an inference of their guilt, that of a man who saw them driving the car of the deceased on the evening of his disappearance and observed stained sacks in the car and a shovel attached to it, "might well be deemed substantial". In another case the disappearance of an eight-day old child was deemed sufficient, the child being incapable of going anywhere by itself.

The rule has long been relaxed in cases where its strict application would render the law helpless, for example in cases of murder at sea, but in ordinary cases of disappearance such relaxation of the rule "is not yet general". It is submitted that this is necessary in view of the "increasing facility of disposition of a victim's body", provided that, for the protection of innocent persons, some "substantial independent evidence of the *corpus delicti* must be required".

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EVEN IN A FÜHRER STATE

My first endeavour was to save the core of the German system of justice: the independent judiciary. My idea was that even in a highly developed Führer State, even under a dictatorship, the danger to the community and to the legal rights of the individual would at least be lessened if judges who did not depend on the State Leadership could still administer justice in the community. That means to my mind, that the question of a State ruled by law is to all intents and purposes identical with the question of the existence of the independent administration of law. Most of my struggles and discussions with Hitler, Himmler and Bormann during these years were more and more focussed on this particular subject. Only after the independent judiciary in the National Socialist Reich had definitely been done away with, did I give up my work and my efforts as hopeless. (Dr. Hans Frank in the course of his direct examination at Nuremberg)