# CASE AND COMMENT

CROWN PRIVILEGE — UNITED KINGDOM — EXCLUSION OF EVIDENCE ON THE GROUND OF STATE INTEREST — MODIFICATION IN FUTURE PRACTICE. — The bewailing of bench[1] and bar[2] over the seemingly increasing readiness of the United Kingdom government[3] to claim privilege under the banner of *Duncan* v. *Cammell, Laird & Co.*[4] has at last stirred the government into the announcement of certain concessions, albeit slight, in this matter.[5]

Lest objection be taken to the use of the aphoristic expression "privilege", let me hasten to say at the outset that, because public policy requires that the privilege should not be waived, judicial[6] and authorial[7] exception has been taken to the classification of Crown privilege under the head of privilege at all — rather it should be classified, it is suggested, as "evidence excluded by public policy". However, as Professor Nokes has recently pointed out,[8] "as some aspect of public policy underlies every privilege, the borderline is not clear. In a few cases public policy demands that the privilege shall not be waived, but this is not true of every privilege based on public policy, and thus provides no adequate line of demarcation." For this reason the expression "Crown privilege" is used here in preference to the prolix terminology, "evidence excluded by State interest".

Normally, of course, the Crown, far from seeking to waive the privilege, is insisting upon exercising it — often in the face of misgivings expressed by the judges and perhaps objections expressed by the parties or one of them. And because of the abdication of

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[1] See, for example, the remarks of Devlin J. in *Ellis* v. *Home Office*, reported on appeal, [1953] 2 Q.B. 135.

[2] See, for example, J. E. S. Simon, Evidence Excluded by Considerations of State Interest, (1955) Camb. L.J. 62.

[3] See, for example, *Ellis* v. *Home Office*, *ante*, footnote 1.

[4] [1942] A.C. 624.

[5] H.L. Debates, Vol. 197, June 6th, 1956, cols. 741-747.

[6] See, for example, *Duncan* v. *Cammell, Laird*, *ante* footnote 4, *per* Lord Simon at pp. 641-642.

[7] See, for example, J. E. S. Simon, *ante*, footnote 2, at pp. 66-68, and D. H. W. Henry, Book Review (1956), 34 Can. Bar Rev. 980, at p. 982.

[8] An Introduction to Evidence (1952) p. 147.

judicial control announced by the House of Lords in *Duncan* v. *Cammell, Laird & Co.*,[9] there are no means, in English courts at least, of questioning the Crown's decision. According to the well-known principle laid down in that case, an objection taken by the Crown to the admission of a document on the ground that it would be injurious to the public interest is conclusive: the court cannot itself examine the document for the purpose of determining whether production would in fact be injurious to the public interest. All that is necessary is that the correct procedure should be followed, namely, that the minister himself should take the decision either by affidavit or certificate (followed by personal attendance if the court thinks fit) specifying public interest as the ground of objection. And this is so whether the Crown is a party to the litigation or not.[10]

The parties to the litigation cannot waive the privilege. Can the Crown do so? It would seem that the judge may raise the question of Crown privilege even if no objection is taken. Lord Simon in *Duncan* v. *Cammell, Laird* said:[11] ". . . the rule that the interest of the state must not be put in jeopardy by producing documents which would injure it . . . is a rule on which the judges should, if necessary, insist, even though no objection is taken at all. This has been pointed out in several cases, e.g., in *Chatterton* v. *S. of S. for India*,[12] per A. L. Smith L.J." It seems strange that the courts, having conceded that they will not challenge a minister's statement that disclosure would not be in the public interest, on the ground that the minister is the best judge of such matters, should assume the task of determining that very question without reference to the Crown if the Crown does not take the objection. The logical course in such a case would seem to be reference to the Crown for decision. Furthermore, would the court insist upon non-disclosure in the unlikely event of the Crown, instead of merely not taking the objection, positively affirming that disclosure would not be contrary to public interest? Such a certificate ought logically to be as conclusive as a certificate to the opposite effect. If this logical conclusion be correct, then the privilege can be effectively waived and is properly included under the heading of privilege even if that topic be limited to matters which can be waived.

In *Broome* v. *Broome*[13] the question arose whether Crown pri-

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[9] [1942] A.C. 624.

[10] In *Duncan* v. *Cammell, Laird* itself, of course, the Crown was not a party.

[11] [1942] A.C. 624, at p. 642.

[12] [1895] 2 Q.B. 189, at p. 195

[13] [1955] 2 W.L.R. 401.

vilege extends also to oral communications, the disclosure of which would be contrary to the public interest. This was a divorce petition in which the respondent was a member of the Armed Forces. The petitioner sought to produce in evidence written reports prepared by, and the oral testimony of, a Mrs. Allsop, a representative of the Soldiers', Sailors' and Airmen's Families Association; the Crown sought to exclude this evidence on the ground that it was "not in the public interest that the documents should be produced or the evidence of Mrs. Allsop given orally". The head of public interest specified for the exclusion of the oral testimony was the maintenance of the morale of the Armed Forces, which it was said would suffer if the works of the S.S.A.F.A. concerning matrimonial relations, and in particular reconciliation, were not to be protected from disclosure. Mr. Justice Sachs refused to set aside the *subpoena ad testificandum* directed to Mrs. Allsop on the ground that until the questions were put to the witness it was impossible to tell whether they came within the S.S.A.F.A. activities for which it was stated the Secretary of State for War desired protection. Counsel for the Crown then suggested that the court might listen to the questions, he, counsel, taking objection, if necessary, as they were put. This was rejected by the judge on the ground that the form of the certificate did not enable the court to determine from its wording what was the evidence to which the Crown objected. An adjournment was offered for the purpose of obtaining a clearer certificate or testing the ruling of the judge on the subpoena in the Court of Appeal, but this was refused by counsel for the Crown, and the claim to exclude the oral evidence accordingly failed without the substantive point having been determined.

Mr. J. E. S. Simon has, however, cogently argued[14] that it is clear on principle and authority that oral evidence of facts, the disclosure of which would be contrary to the public interest, is within Crown privilege whether the oral evidence relates to the contents of privileged documents or not, the only difficulty being over the question of machinery—a difficulty to which Mr. Justice Sachs had drawn attention. Clearly a blanket certificate excluding the witness from giving evidence at all would be undesirable. The best solution would probably be that which Mr. Justice Sachs seemed to have in mind, namely, a certificate specifying the evidence to which objection is taken and attendance of counsel for the Crown to object to questions coming within the ambit of that certificate as and when they are put. Before leaving the case of *Broome*

[14] *Ante*, footnote 2.

v. *Broome* it may be noted that, in the result, the evidence given by Mrs. Allsop disclosed "no apparent cause for any intervention by the Crown".

*Broome* v. *Broome* is only one of several cases which have recently caused misgiving. In *Ellis* v. *Home Office*,[15] for example, Mr. Justice Devlin said, ". . . I must express . . . my uneasy feeling that justice may not have been done because the material before me was not complete, and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done". In June 1956 the Lord Chancellor announced in the House of Lords[16] certain concessions in relation to future claims of Crown privilege for documents and oral evidence. Before detailing concessions, it should be pointed out that no change is to be made in the law. It will still be for a minister to decide whether evidence should be privileged; his certificate that disclosure would not be in the public interest will continue to be conclusive. The Lord Chancellor's statement is no more than an announcement of the practice to be followed by government departments in the future in determining whether to claim privilege, and the only sanction for a departure will be political not legal.

Turning to the details of the concessions themselves, the Lord Chancellor pointed out that the power conferred by the decision in *Duncan* v. *Cammell, Laird* to refuse disclosure on the ground of public interest enabled the Crown properly to claim privilege on two grounds: (1) that disclosure would be injurious to public security or good diplomatic relations, and (2) that disclosure would prejudice the proper functioning of the public service. So far as the first ground is concerned, few would question the necessity for a minister to be the sole judge of whether public security (including foreign relations) would be endangered, and to refuse disclosure on this ground, and no changes are envisaged so far as this is concerned. Nor, indeed, has there been any clamour for a change. The concessions relate to the second ground—the ground which has caused concern—and purport to be designed to achieve a balance between the needs of the private citizen and the needs of the public service. Public interest, as distinct from public security, clearly involves, not merely the proper functioning of the public service, but also the impartial administration of justice.

Briefly the main concessions are these: (1) the Crown will no longer claim privilege for reports of employees involved in accidents, and other eye-witnesses, or for subsequent reports into the

[15] *Ante*, footnote 1. [16] *Ante*, footnote 5.

condition of vehicles, machinery or premises relevant to an accident unless the Crown is involved, not as an employer or property owner, but as an investigating agency; (2) privilege will not be claimed for medical records of civilian employees, but still will be claimed in respect of the armed forces and the prison service in proceedings between private litigants; (3) privilege will not be claimed for reports relevant to the issue in government-contract cases where the report deals with facts as distinct from comment and advice provided that "a distinction can be clearly drawn"; (4) the possibility of evolving new categories of documents of a factual nature, the disclosure of which can be permitted without prejudice to the public interest, will be considered.

These conclusions certainly go some way to alleviate the hardship which may be caused to the private litigant, but the fundamental issue is not whether the Crown claims privilege in an unduly wide range of cases, important though this is, but whether the question should be left for decision by a minister alone who need give no reasons for his decision other than "public interest". There appear to be three main arguments in support of the present position. First, there is the necessity for secrecy. This could be satisfied, however, as the Bar Council has pointed out, by the evidence being given, where necessary, *in camera* under pledge of secrecy. Secondly, there is the need for ensuring that frank and full information and advice will be given by servants of the Crown. The mere possibility of disclosure, it is suggested, would lead to this need not being satisfied. For this reason it is vital, so it is said, that classes of documents and oral communications should be privileged rather than that each individual case should be considered on its merits. Whether it is true that civil servants would fail to give honest and frank opinions if they knew that there was a possibility of disclosure is clearly incapable of proof one way or the other, and must remain a matter of opinion. Thirdly, it is suggested that to leave the judge to decide the question of Crown privilege would impose upon him the burden of deciding questions of public administration on which he has neither the experience nor the knowledge to enable him to pass judgment; he would tend to look at the document from the point of view of its contents and their effect on the parties rather than from the wider aspect of the need for ensuring proper functioning of the public service. While it is true that the judge may be biased in favour of the public interest involved in the proper administration of justice, it would seem equally true that the minister may be biased in favour of the public

interest involved in the proper functioning of the public service. Not only may the minister be a party to the litigation, but also he is obviously liable to attach undue weight to the departmental needs of administrative convenience. The proper solution would seem to be the compromise suggested recently by Sir Lionel Heald,[17] that these questions should be decided by a judge assisted by a senior retired civil servant as an assessor. In this way both viewpoints would be taken into account and, one would hope, a proper balance would be struck.

It seems strange that the government, while insisting that questions of Crown privilege cannot be left for decision by English courts, is quite prepared to leave the Scottish courts with the power to overrule claims to Crown privilege. In *Glasgow Corporation* v. *Central Land Board*[18] the House of Lords held that in Scotland the court may overrule the certificate of the minister and order production. In the words of Lord Radcliffe: "The power reserved to the court is the power to order production even though the public interest is to some extent affected prejudicially". In this particular case the power was not exercised, but more recently—indeed, since the Lord Chancellor's statement—the power has been reaffirmed in *Whitehall* v. *Whitehall*[19] and on this occasion was in fact exercised. This case concerned correspondence from the S.S.A.F.A. for which, as in *Broome* v. *Broome*, the Crown had claimed privilege. In the light of this decision, against which no appeal is apparently intended, the government has stated that it could not consistently claim privilege for documents in future cases of a like nature.

The inconsistency between the law in England and Scotland on this subject, and the acceptance by the government of the position in Scotland, provides perhaps the strongest argument of all for a legislative reversal of *Duncan* v. *Cammell, Laird.*

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CONTRACT—CAPACITY OF A LUNATIC—VOID OR VOIDABLE.—It seems to be generally agreed on the authority of *Re Walker*[1] that the contracts of a lunatic so found are void; the accepted view of

[17] House of Commons Debates, October 26th, 1956.
[18] (1956) S.L.T. 41. [19] The Times, December 1st, 1956.
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[1] [1905] 1 Ch. 160.

the contractual capacity of a lunatic not so found is that he is liable upon his contracts unless he can show that at the time of contracting he was so insane that he did not know what he was doing and this was known to the other party. Then the contract will be voidable at the lunatic's option. The text writers admit that the law on the subject has varied,[2] but the leading authorities cited for this formulation seem to be *Molton* v. *Camroux*,[3] *Imperial Loan Co.* v. *Stone*[4] and *York Glass Co.* v. *Jubb*.[5] To these cases can be added *Manches* v. *Trimborn*.[6] In this case an old lady of eighty-six suffering from senile decay was induced to sign a cheque and Hallett J., equating senile decay with insanity, held that she could repudiate liability on the document. The learned judge held that, though she had known that she was signing a cheque, she did not appreciate the larger transaction of which the cheque formed a part and this wider ignorance, being known to the payee, exonerated her from liability.

It will be noted that in none of the three great leading cases on this topic was it necessary for the court to consider the exact force of a lunatic's obligation if his lack of knowledge was known to the other party. In *Molton* v. *Camroux* and *York Glass Co.* v. *Jubb* it was found that the other party did not know of the lunatic's state of mind; in *Imperial Loan Co.* v. *Stone* there was no finding by the jury as to the other party's knowledge and hence the Court of Appeal directed a fresh trial. Thus, though in *Imperial Loan Co.* v. *Stone* both Fry and Lopes L.JJ. spoke of the lunatic's contract as being voidable when his blank state of mind was known to the other party, and though in *York Glass Co.* v. *Jubb* Pollock M.R. (as he then was) said, "It was quite plain that the contract of a lunatic was voidable, but not void",[7] none of this is authority of the most robust kind.

Here it may be appropriate to remark that this rule as to a lunatic's contract being merely voidable seems to create a clear exception to the general principle that contractual obligation should be based upon an objective appearance of consent and on intent to create legal relations. According to Pollock M.R.'s rule, a party has contractual obligations imposed upon him even though the other party well knows that he has no intent to contract.

A further development in this field seems to be marked by the judgment of Lord Goddard C.J. in *Johnson* v. *Simmonds*.[8] The

[2] *E.g.*, Cheshire and Fifoot, Law of Contract (4th ed., 1956) p. 352.
[3] (1849), 4 Ex. 17.
[4] [1892] 1 Q.B. 599.
[5] (1925), 42 T.L.R. 1.
[6] (1946), 115 L.J.K.B. 305.
[7] (1925), 42 T.L.R. at p. 2.
[8] The Times, Nov. 25th, 1953

facts of this case were that an antique dealer called upon an old lady suffering from advanced senility and induced her to hand over to him some pieces of valuable china in pursuance of what he contended was a contract of sale. After reviewing the evidence the Lord Chief Justice continued to the effect that:

> He had come to the conclusion that there never was a sale because for that to have occurred both parties must have had a contracting mind. He was satisfied that the plaintiff had no mind which would enable her to enter into a bargain with a pushing antique dealer determined to coerce her into selling her property. It was a very satisfactory morning's work for him. There was no sale at all. The defendant obtained entry to her house, took the figures which he wanted and gave her some money.

After saying that if he were wrong in this he thought the case a proper one for equitable relief on the ground of undue influence, Lord Goddard continued: "He preferred, however to base his judgment on the fact that there was no sale".

It is suggested that in view of Lord Goddard's insistence on the fact that there was "no sale" he regarded the transaction as void, and not as voidable, as might have been expected had *Imperial Loan Co.* v. *Stone* and *York Glass* v. *Jubb* been strictly followed, and that this decision may be taken as introducing a new, and it is submitted rational, distinction into the law on a lunatic's contractual capacity.

When it is quite plain that a sane person does not intend to enter into legal relations he is not saddled with any contractual obligations, voidable or otherwise, and it seems plain that if he could show that he did not know he was entering into a contract and this fact was known to another person who claimed to have entered into a contract with him, then the transaction would be regarded as a nullity for lack of this fundamental intent. Again, a much slighter degree of misapprehension than total ignorance as to entering into a contract—that is to say, mistake as to the nature of the offer, which mistake is known to the other party—will release a sane person from all contractual liability under the rule in *Smith* v. *Hughes*.[9] It may be that insanity, like illiteracy, is a misfortune and not a privilege, but there would appear to be no good reason why the law should add to the misfortunes of insanity by imposing contractual obligations by way of exception to fundamental general principles and in circumstances when no obligations would be imposed upon a sane person.

Hence it is submitted that the approach of Lord Goddard in

[9] (1871), L.R. 6 Q.B. 597.

*Johnson* v. *Simmonds* has the desirable effect of bringing, or tending to bring, the law on a lunatic's contractual capacity into accord with the basic principles of the law of contract, in that when insanity amounts to clear notice of absence of any intent to enter into contractual relations the lunatic's contracts will now be totally void. Might it be suggested that his contracts will be voidable in the circumstances which occurred in *Manches* v. *Trimborn* where he intends to enter into legal relations with regard to some particular transaction but is ignorant, and known by the other party to be ignorant, of the total complex of transactions of which the one transaction in respect of which he did possess an intent forms a part? This leaves a field in which the rule as stated by Pollock M.R. in *York Glass* v. *Jubb* may operate.

On a practical view it can scarcely be contended that giving a broader scope to the voidable rule would be for the lunatic's benefit, for the advantage of being able to affirm the contract must be a slight matter when set against the far greater probability that his title will be lost to a bona fide purchaser for value. In any case persons who are unscrupulous enough to contract with those whom they know to be so insane as to be ignorant that they are contracting are hardly likely ever to make the sorts of bargain the lunatic would wish to affirm on regaining sanity.

A possible objection to the adoption of Lord Goddard's approach is that, in the analogous case of drunkenness, it was held in *Matthews* v. *Baxter*,[10] disapproving or explaining dicta in *Gore* v. *Gibson*,[11] that when a man contracts in such a state of inebriation that he does not know what he is doing, and this is known to the other party, then the resulting contract is voidable, not void. Though one member of the court in *Matthews* v. *Baxter*, Pollock B., at page 134, professed to base his view on *Molton* v. *Camroux*, it is suggested that a clean line can be drawn between drunkenness and insanity, in that in the case of intoxication the party is overwhelmingly more likely to be the author of his own misfortune and therefore a stricter rule than obtains in the case of insanity is justified. This, of course, does not make the intoxication rule any the less of an anomaly from the point of view of the basic principles governing appearance of consent and intent to contract, but it may be a sufficient reason for refusing to extend it to other fields.

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[10] (1873), L.R. 8 Ex. 132.
[11] (1845), 13 M. & W. 623.

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TORT—LIABILITY FOR ACTS OF INDEPENDENT CONTRACTORS—RELATIONSHIP BETWEEN RYLANDS V. FLETCHER LIABILITY AND NEGLIGENCE.—In the present writer's article last year in this Review on liability under *Rylands* v. *Fletcher*[1] mention was made in a footnote of a decision by Havers J. in *Balfour* v. *Barty-King and Another*.[2] That case has now been before the Court of Appeal[3] and, without going again into all the questions raised in the article, it is worthwhile considering the case in greater detail, particularly on the relationship between *Rylands* v. *Fletcher* and negligence. The facts of the case were as follows.

The plaintiff and the defendants (the defendants were husband and wife) occupied contiguous dwelling-houses, which had been formed from a converted mansion house. A pipe in the defendants' loft became frozen, and at their request two workmen, employed by the third parties, who were independent contractors, came onto the defendants' premises to unfreeze the pipe. To do this the workmen used the flame of a blow lamp. Most of the pipes in the loft were lagged with felt, which was visible to the workmen. Some of the lagging caught alight, ignited other inflammable material in the loft, resulting in a large fire which spread to the plaintiff's property and damaged it. The plaintiff claimed for that damage from the defendants, who joined the independent contractors as third parties. Havers J. held that the defendants were liable to the plaintiff and that the independent contractors were liable to the defendants. His decision was upheld by the Court of Appeal.

Before Havers J. three arguments were put forward on behalf of the plaintiff: first, that the "fire . . . originated on the defendants' premises by the negligent conduct of persons who were there at the invitation of the defendants, and that the fire subsequently escaped to his premises";[4] secondly, that there was liability under *Rylands* v. *Fletcher*; thirdly, that there was liability on the basis of the principle, *sic utere tuo ut alienum non laedas*. This principle Havers J. elaborated as meaning that:[5]

> . . . if a man does work on or near another's property which involves danger to the property, unless proper care is taken he is liable to the owners of the property for damage resulting to it from his failure to take proper care, and is equally liable if, instead of doing the work

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[1] The Rise and Fall of *Rylands* v. *Fletcher* (1956), 34 Can. Bar Rev. 810.
[2] [1956] 1 W.L.R. 779; [1956] 2 All E.R. 555.
[3] [1957] 2 W.L.R. 84; [1957] 1 All E.R. 156.
[4] [1956] 1 W.L.R. 779, at p. 781; [1956] 2 All E.R. 555, at p. 558.
[5] [1956] 1 W.L.R. 779, at p. 782; [1956] 2 All E.R. 555, at pp. 558-559.

himself, he procures another, whether as agent, servant, or otherwise, to do it for him.

So far as the first argument was concerned, the first point to determine was whether the fire had begun accidentally or through negligence. Having decided that there was negligence, Havers J. was faced with a further question. Under the Fires Prevention (Metropolis) Act, 1774 (re-enacting an act of 1707, 6 Anne, c. 31), there would have been no liability for an accidentally started fire. These statutes seriously affected the previous common law, which, as the Court of Appeal pointed out in their judgment,[6] seems to have imposed an *absolute* duty to keep fire safe.[7] The decision in *Turberville* v. *Stamp*[8] does suggest, however, that by the end of the seventeenth century, at least, the idea that liability for damage caused by fire should be imposed only where there had been negligence was beginning to creep into the law. Hence, according to Sir William Holdsworth,[9] who was cited in this connection by the Court of Appeal, the passing of the act of 1707. But even at common law a defence of act of stranger or act of God was permitted.[10] And such a defence was still open after the statutes had intervened. This was established by *Filliter* v. *Phippard*[11] and *Musgrove* v. *Pandelis*.[12] The question in the instant case was therefore whether the workmen were "strangers" for this purpose.

On this point the case is very interesting. For the decision shows that, although for some purposes the law draws a distinction between servants and independent contractors (possibly a dwindling distinction in modern times—as will be seen from what is said later), so far as this head of liability is concerned there is no distinction between them. Havers J. referred first to *Honeywell and Stein, Ltd.* v. *Larkin Bros.*,[13] which has been treated, by Professor Winfield,[14] as establishing the proposition that liability for "dangerous operations" transcends the distinction between servants and independent contractors. There it was held that a person who contracted to take photographs inside a cinema could make his employer liable to the owner of the cinema, even though the photo-

[6] [1957] 2 W.L.R. 84, at p. 88; [1957] 1 All E.R. 156, at p. 159.
[7] Blackstone, Commentaries (1765) Vol. I, p. 419.
[8] (1697), 1 Ld. Raym. 264; 12 Mod. Rep. 152.
[9] History of English Law, Vol. 2 (1923) p. 607.
[10] *Beaulieu* v. *Finglam* (1401), Y.B. 2 Hen. 4, fo. 18, pl. 6.
[11] (1847), 11 Q.B. 347.
[12] [1919] 2 K.B. 43.
[13] [1934] 1 K.B. 191. See also *Pass of Ballater, Owners of the Steamship* v. *Cardiff Channel Dry Docks & Pontoon Co. Ltd.*, [1942] 2 All E.R. 79, *per* Langton J. at p. 84.
[14] Textbook of the Law of Torts (6th ed., 1954) p. 717.

grapher was an independent contractor. The basis of the liability was the "special danger" involved in such an operation as taking photographs with the apparatus actually used. (Was it perhaps necessary to call into being such a principle because *Rylands* v. *Fletcher* was not in point, there having been no escape? In the light of what is said later this may be a valid suggestion.) Havers J. also referred to *Spicer* v. *Smee*,[15] in which it was held that there could be liability in *nuisance* (which has *some*, if not complete affinities with *Rylands* v. *Fletcher*) for the acts of an independent contractor, which caused an electric fault resulting in fire. On that point, though on different facts, there are Australian[16] and Canadian[17] authorities in accord. The Court of Appeal in the *Balfour* case did not refer to any of these authorities, but rested their decision, on this aspect of the case, on the ground that, in Lord Goddard's words,[18]

> . . . if a man is liable for the negligent act of his guest it is . . . difficult to see why he is not liable for the act of a contractor whom he has invited to his house to do work on it, and who does the work in a negligent manner.

It is unfortunate that the opportunity was not taken by the Court of Appeal to investigate at greater length the whole idea of the liability of independent contractors, particularly in respect of "dangerous operations". This was an admirable opportunity for a decision which would rationalize the entire field; but rationalization of the tangled suggestions of the law is not an activity which the courts particularly favour. The case, indeed, is noteworthy for the number of points of great interest raised by it which were not dealt with in the reasons for judgment.

The general effect of this part of the case, however, is that there is at least one (or one more) variety of negligence (for *Dalton* v. *Angus*[19] and the remarks of Denning L.J. in *Cassidy* v. *Minister of Health*[20] show there are others) in respect of which a man may be liable for the acts of his independent contractors, even though the liability is not *otherwise* regarded as "strict". But that raises the issue of what "strict" liability really involves. It has been said

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[15] [1946] 1 All E.R. 489.

[16] *Torette House Pty. Ltd.* v. *Berkman* (1939), 62 C.L.R. 637.

[17] *Achdus Free Loan Soc.* v. *Shatsky*, [1955] 3 D.L.R. 249. See also *Eisert* v. *Rural Municipality of Martin* (1956), 1 D.L.R. (2d) 479.

[18] [1957] 2 W.L.R. 84, at p. 89; [1957] 1 All E.R. 156, at p. 159.

[19] (1881), 6 App. Cas. 740.

[20] [1951] 2 K.B. 343, at pp. 359-366, esp. at p. 363. See also the liability of an occupier for injury to persons coming into his premises: *Thomson* v. *Cremin*, [1953] 2 All E.R. 1185.

by Professor Winfield[21] that "strict" liability in fact means liability for the acts of servants *and* independent contractors. If this is so, then it is possible to see in the scope of liability for independent contractors the real link between negligence and *Rylands* v. *Fletcher* liability. It is here that the *Balfour* case is important—it brings out more clearly this connecting link and shows how the gap between the two forms of liability just mentioned can be said to be narrowing, if not becoming closed.

Another pointer in the same direction can be seen in the part of the case in which *Rylands* v. *Fletcher* was specifically dealt with. The argument on *Rylands* v. *Fletcher* was dealt with by Havers J. thus. First, on the basis of what had been said in *Musgrove* v. *Pandelis*,[22] *Mulholland and Tedd, Ltd.* v. *Baker*[23] and by Parker L.J. in the recent case of *Perry* v. *Kendricks Transport, Ltd.*,[24] the rule in *Rylands* v. *Fletcher* applies apart from the 1774 act where the fire resulted from keeping a "*Rylands* v. *Fletcher* object". But the distinction between liability for "fire" *simpliciter* and liability for fire resulting from a "*Rylands* v. *Fletcher* object" should be noted. The former depends on negligence; the latter on the fact that the thing causing or helping to cause the fire or its spread is a "*Rylands* v. *Fletcher* object". In respect of the latter it would seem that negligence is immaterial. This might suggest that *Rylands* v. *Fletcher* liability and liability for negligence are quite distinct. But it should be remembered that the rule in *Rylands* v. *Fletcher* applies only where the object which involves fire or the risk of fire is on the premises in the course of a *non-natural* user of them. Thus in *Sochacki* v. *Sas*[25] (which was not referred to by Havers J.) the cause of the damage was a spark from a fire in a grate; to have such a grate (with such a fire in it) was a natural use of land; hence there was no liability. In the *Mulholland* case the damage resulted from a fire which ignited a drum of paraffin; that drum was not on the premises in the course of a natural use of the land; hence there was liability. This distinction between natural and non-natural use of land has already been suggested to depend upon negligence,[26] and the decision by Havers J. that the use of the blow lamp was dangerous and was a non-natural use of land,[27] when

[21] Nuisance as a Tort (1932), 4 Camb. L.J. 189, at p. 204.
[22] [1919] 2 K.B. 43. [23] [1939] 3 All E.R. 253.
[24] [1956] 1 All E.R. 154, at p. 160.
[25] [1947] 1 All E.R. 344; the question of the 1774 act was not raised in this case.
[26] Fridman, *ante* footnote 1, at pp. 817-820.
[27] [1956] 1 W.L.R. 779, at p. 791; [1956] 2 All E.R. 555, at p. 566: "It was a special user, bringing with it increased danger to others, and was not merely the ordinary user of the land".

considered in the light of what he had previously said about "dangerous operations" suggests that there is some connection between the idea of negligence and liability under *Rylands* v. *Fletcher*—at least, if not indeed particularly, in respect of fire.

The Court of Appeal, unfortunately, did not deal with the issue of *Rylands* v. *Fletcher* except to say[28] that no doubt the doctrine of that case applied to fire and was subject to the exception of the damage being caused by a stranger—an exception which did not apply to the case because the defendants had "control" over the workmen (presumably therefore they could and should have exercised care over how they performed the work).

So far as *sic utere tuo ut alienum non laedas* was concerned, Havers J. said[29] it was unnecessary for him to determine anything, and the Court of Appeal did not even mention it. That is a great pity; for a discussion of the point might have clarified a considerable number of the difficulties involved in the relationship between liability for negligence, liability under *Rylands* v. *Fletcher*, and liability for the acts of an independent contractor. Such a general principle in the terms already mentioned—recalling as it does the broad sweep of Lord Atkin's famous statement in *Donoghue* v. *Stevenson*—would straddle many branches of the law of torts and show how they all stem from the same source, and all have a common factor, negligence. But the hints contained in the judgments delivered in this case may well be sufficient to show that the scope of negligence is gradually being widened to include *Rylands* v. *Fletcher* and to broaden the basis of liability for the acts of independent contractors. Since, in effect, *Rylands* v. *Fletcher* liability is an instance of liability for the acts of independent contractors it may well be thought that the courts are whittling away the difference between such liability and ordinary negligence liability, whether vicarious or direct.

G. H. L. FRIDMAN*

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UNJUST ENRICHMENT—INJURIES TO SERVANTS—THE LOST RIGHT TO SERVICES.—The points at issue in *Receiver for the Metropolitan Police District* v. *Croydon Corporation* and in *Monmouthshire County Council* v. *Smith* were substantially identical.[1] In the first

[28] [1957] 2 W.L.R. 84, at p. 89; [1957] 1 All E.R. 156, at p. 160.
[29] [1956] 1 W.L.R. 779, at p. 794; [1956] 2 All E.R. 555, at p. 568.
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[1] [1957] 2 W.L.R. 33; [1957] 1 All E.R. 78.

case, a police constable in the Metropolitan Police was injured while on duty by the negligent driving of a motor-lorry owned by the defendants. As a result of the accident, the constable was unfit to resume his duties, and the Receiver of the Metropolitan Police, in pursuance of the statutory duty laid upon him, paid him the sum of £104 as sick-pay during the period that he was incapacitated. In the second case, a police constable employed by the Monmouthshire County Council was injured in similar circumstances by the negligence of the defendant, and the Council paid out some £750 by way of sick-pay and pension as obliged by law. In both cases the plaintiffs sought to recover the sums which they had paid from the defendants.

The most obvious cause of action was one for loss of services. But since the recent decision in *Inland Revenue Commissioners* v. *Hambrook*[2] the action *per quod servitium amisit* is now seen to be confined to the loss of the services of a domestic or menial servant; it does not extend to public servants such as a police constable. A different cause of action had therefore to be found, if it were to be found, in quasi-contract, for money had and received. The police authorities contended that, had they not paid out this money, the constables would have recovered an equivalent amount from the defendants in an action for negligence. The defendants had therefore been unjustly enriched in that they had been thus relieved from liability. They should be compelled to compensate the plaintiffs to the extent of the sums paid out.

The principle relied upon to support this contention was that set out in *Leake on Contracts*[3] and cited by Cockburn C.J. in *Moule* v. *Garrett:*[4]

> Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.

It was applied by the Court of Appeal in *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers.*[5] In that case, the plaintiffs were warehousemen who had undertaken to store certain skins belonging to the defendants. The skins were stolen, and the plaintiffs were called upon to pay the customs duty on them. It was held that they were entitled to recover the duty paid from the defen-

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[2] [1956] 2 Q.B. 641, commented on in (1956), 34 Can. Bar Rev. 598 and in (1956), 34 Can. Bar Rev. 1078.

[3] (8th ed.) p. 46.

[4] (1872), L.R. 7 Exch. 101, at p. 104.

[5] [1937] 1 K.B. 534; see also *Gebhardt* v. *Saunders*, [1892] 2 Q.B. 452.

dants, whose primary liability it was to meet the Customs demand. It had also been applied by Atkinson J. in a situation almost identical with the present in the case of *Receiver for the Metropolitan Police District* v. *Tatum*.[6]

The *Croydon* case was heard at first instance by Slade J.,[7] who gave judgment for the plaintiff for the amount claimed; the *Monmouthshire* case was heard a few days later by Lynskey J.,[8] who refused to follow the decision of his brother judge and dismissed the plaintiff's claim. The two actions were consolidated to be heard on appeal before the Court of Appeal, which reversed the judgment of Slade J. and held that the police authorities were unable to recover.

The reasoning which led the Court of Appeal to arrive at this conclusion is clear and compelling. Two questions were posed and answered:

(1) *What benefit had the defendants received?* It was argued on behalf of the plaintiffs that the damages payable by the defendants to the constable had been reduced by the amount paid as sick pay by the plaintiffs, and that this was clearly of benefit to them. The Court of Appeal rightly rejected this argument. The only obligation of the defendants was to compensate the constable for the loss actually suffered, and no more.[9] They had no liability to pay sums representing hypothetical losses never incurred. As Lynskey J. had put it in the *Monmouthshire* case:[10]

> . . . the policeman cannot claim for a loss he has not sustained. He can claim for damages for personal injuries and he can claim for loss of faculty, but one thing he cannot claim for is loss of wages when he had lost none. Where, in fact, as a result of his injuries, although he has been incapacitated, he has not lost any earnings, one cannot include in a claim for negligence a claim for damages under that head.

Unlike the *Brook's Wharf* case where the defendants were liable to meet the customs dues in full, the defendants in this case were never compellable at any time to pay any more than what they had in fact paid. It could not therefore be said that they had obtained any unjust benefit by the plaintiff's action.

(2) *What loss had the plaintiffs suffered?* The police authorities were bound by statute to pay wages to a constable whether he was on duty or not, so long as he was in the service. The Court of Ap-

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[6] [1948] 2 K.B. 68.
[7] [1956] 1 W.L.R. 1113.
[8] [1956] 1 W.L.R. 1132.
[9] *British Transport Commission* v. *Gourley*, [1956] A.C. 185, at p. 202; see Vineberg, comment (1956), 34 Can. Bar Rev. 940.
[10] [1956] 1 W.L.R. 1132, at p. 1149.

peal concluded that the authorities had not lost these sums while the constable was off duty. What they had lost was the services of the constable, not his pay, which had to be paid in any case. "Their financial position", said Lord Goddard C.J.,[11] "has not been altered by a sixpence." The real cause of action was one for loss of services, but, as we have seen, this is no longer available in the case of police officers.

A point which was not considered by the Court of Appeal in any detail, but which was raised in the courts below, was the question whether the liability of the plaintiffs and defendants could be said to be in respect of "the same debt". In the *Brook's Wharf* case, Lord Wright M.R. said:[12]

> The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff.

The difficulty was that in the present instance the liability of the plaintiffs to the constable was under statute (or by contract) and the liability of the defendants in tort. It was, however, agreed, even by Lynskey J.,[13] that the cause of action need not be the same provided the other requirements were fulfilled. In these two appeals, however, those requirements were not fulfilled and so no action lay.

It should not be supposed that these decisions apply only to the very special circumstances of a police officer or other public official maintained by act of Parliament. It is clear that they also extend to private contracts of service between an employer and employee. The result is that the right to services has, for all practical purposes, been abolished. It has been relegated to the limbo of obsolete actions, such as novel disseisin and the appeal of felony. An employer will now have no remedy for the pecuniary loss which he has suffered by the fact that his servant has been injured. At first sight, it seems illogical that he should be visited by vicarious liability for the acts of his servant on the one hand, and yet be denied the action for loss of services on the other. But the social considerations involved are not completely identical. The rationale of vicarious liability is that a servant's capacity to do harm is enhanced in a commercial and industrial society by the power

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[11] [1957] 2 W.L.R. 33, at p. 39.
[12] [1937] 1 K.B. 534, at p. 544.
[13] [1956] 1 W.L.R. 1132, at p. 1149.

vested in him by his position as an employee. This fact does not seem so relevant where the master's claim is concerned. Nevertheless, there will be cases where the loss of the right to services will work injustice to the employer, and, indeed, even to employees, for there will be one more incentive not to introduce, or continue, sick-pay or pension in a case where the injury arises from the fault of a third party. It was, perhaps, a reflection of this sort which led Vaisey J. to doubt whether the law expressed in these two appeals was altogether satisfactory. It may very well not be.

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## Compensation for Miscarriages of Justice

In England compensation as of right to prisoners who have suffered from a miscarriage of justice was advocated already early in the last century by Bentham and Romilly. When the matter was once again raised in 1869, the then Home Secretary, Bruce, reasoned disingenuously that 'if the principle [of compensation] was applied to criminal cases, it must also be extended to civil cases where loss and suffering had been inflicted'. Ten years later another Home Secretary, Sir Richard Cross, rejected the suggestion with an equally quaint observation. 'The House must remember', he said, 'that in these cases it is not through the action of the executive government but through some unfortunate mistake of the country upon whose judgment the prisoner is put to stand his trial.' Some ex gratia payment has in fact long been customary where a man mistakenly imprisoned is released as a result of prerogative action, but as the present Home Secretary pointed out in the House of Commons on 24th January, 1956, payment is made 'as a symbol of the State's desire to acknowledge the error', and 'is not an acknowledgment of liability in law'. In a written answer two years ago (Hansard, 25th March, 1954), on the other hand, the Home Secretary stated: 'It is not the practice to grant compensation or to make an ex gratia payment in cases where there has been a miscarriage of justice which is corrected by the ordinary process of law and where there has been no failure or misconduct on the part of the authorities concerned'. The distinction seems odd when it is realised that the prisoner concerned, who had been convicted upon mistaken identification, had already been serving his sentence for some time and was able to claim a review of his case when another person convincingly confessed to the crime only because he had not previously exercised his right of appeal. It is in any case difficult to escape the general conclusion that, quite regardless of blame, society is under grave moral obligation to make amends as best it can for a miscarriage of justice and must therefore accept legal responsibility. (The Law Times, London, April 20th, 1956, Vol. 221, at p. 200)

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