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JUDICIAL PROSE: A LITERARY ANALYSIS

BY

STUART L. DOLLAR 

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Arts.

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UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommended to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled Judicial Prose: A Literary Analysis here submitted by Stuart L. Dollar in partial fulfillment of the requirements for the degree of Master of Arts.

Dr. J.G. Marino

Dr. L.N. McKill

Dr. J.T. Hogan

April 19, 1994
Date

For my parents, Gordon and Marilyn.

ABSTRACT

This thesis examines judicial decisions but uses the techniques of literary analysis.

Chapter One examines Murdoch v. Murdoch using Foucault's idea of discourse as an exercise in institutional power. Through rhetorics of neutrality and impartiality, judges present an impartial appearance of relative powerlessness. They exercise power by controlling the discourses that law recognizes and by excluding other discourses.

Chapter Two examines Donoghue (or McAlister) v. Stevenson using James Boyd White's idea of democratic conversation to explain how law changes yet maintains its respect for precedent. Judges must balance their duty to obey precedent with their duty to decide cases independently of precedent when society's needs require creative decisions from them. Democratic conversation helps explain how judges serve the seemingly inconsistent demands of both requirements.

Chapter Three examines Brown v. Board of Education and Plessy v. Ferguson through the critical techniques of deconstruction. Deconstruction shows that reasons can support inconsistent positions, suggesting the inadequacy of reason as a guide to action. Instead, the construction of the human subject, in Plessy, Brown, and in the criticisms of Brown, provides a way to assess the success of a particular decision and an approach for future decisions.

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The responsibility for the content of this thesis, of course, is mine alone.

TABLE OF CONTENTS

INTRODUCTION

This thesis will examine judicial writing, not from a legal perspective but from a literary one. I shall examine four judicial decisions, each a landmark case from the highest courts of Canada, England, and the United States. Chapter I, Murdoch v. Murdoch,[1] will view the idea of legal discourse as an exercise in institutional power. Language is the instrument through which judges obscure and exercise power. They hide their power behind a seemingly neutral and impersonal discourse, yet through that discourse empower or diminish those subject to their authority and shield the judiciary from ideological conflict. Chapter II, Donoghue (or McAlister) v. Stevenson,[2] will examine legal discourse as an instrument of legal change. Using a model of democratic conversation, we will see how judges respect the decisions of their judicial predecessors, thereby respecting law's antiquity, at the same time that they maintain their freedom to decide cases independently of precedent, thereby maintaining law's relevance to contemporary society. Finally, Chapter III will deal with Brown v. Board of Education[3] and its predecessor, Plessy v. Ferguson,[4] using the critical techniques of deconstruction. Although Plessy

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[1] [1975] 1 Supreme Court Reports 423.

[2] [1932] All England Reports 1.

[3] 347 United States Supreme Court Reports 483 (1954).

[4] 163 United States Supreme Court Reports 537 (1896).

and Brown reach opposite conclusions, one supporting segregation, the other integration, both rely on reasons that support either result. Deconstruction forces us to look beyond reason for an explanation of how each decision works. Each decision's construction of the human subject, Plessy's as race, Brown's as individual, helps account for whatever success or failure each decision achieves. When all four decisions are considered, one discovers that a decision's success or failure depends more on its consideration for the individual human subject, as expressed through its discourse, than on the power of its legal reasoning.

Murdoch reveals how judges obscure their power behind a rhetoric of neutrality and impersonality. Judges achieve an impression of neutrality by restricting the apparent scope of their function to that of deciding cases. They take no part in the preparation or presentation of cases. Furthermore, they structure their decisions to impart a sense of scientific objectivity to the decision making process. Judges also use passive constructions and nominalizations to suppress the human actor in their judgments and achieve an impression of impersonality. Both the majority and dissenting opinions in Murdoch use passive constructions to privilege action over actor (to reinforce a judicial value of assigning responsibility for actions), to assert rhetcrical control over events, and to obscure the

judicial interpretive power. They also use nominalizations to enhance or diminish each litigants' credibility or to diminish the trial judge's standing in the reader's mind. Together, both aspects of judicial rhetoric, neutrality and impersonality, help render invisible the judicial exercise of power.

Murdoch shows, however, that judges still forcefully exercise that power. Judges rename those over whom they have power of decision, the litigants and the trial judge, assigning names to them that reflect only their limited status before the Court. They exclude from consideration discourse that the law does not recognize. Mrs. Murdoch must translate her dispute into legal terminology to gain access to the courts, losing much of her own narrative power in the process. Judicial discourse also suppresses litigants' narratives to better suit judicial analytical methods. Finally, in their written decisions appellate judges individually control the discourse of litigants and lower court judges to achieve their own rhetorical purposes. Behind their rhetorics of neutrality and impersonality, therefore, judges exert a powerful cortrol over those subject to their authority.

In Donoghue I move from a discussion of power to one of interpretation. If law uses rules from yesterday's cases to decide today's disputes, how does the law grow and develop to meet society's changing needs? The fact that law does

grow and develop, yet maintains its respect for the past, suggests a process of interpretation whereby previous decisions are reinterpreted to better serve the present without at the same time altering our respect for them or their ancient or immutable character.

This process can be described using James Boyd White's idea of "democratic conversation." According to White, cases are not to be read as rules to be followed until overruled, but represent "complex struggles to come to terms with real difficulty, to be read in light of the Court's perception of that difficulty, and to be given weight reflecting both the Court's confidence in its judgment at the time and our sense of its wisdom" (169). Donoghue provides two judgments, Lord Buckmaster's and Lord Atkin's, representing respectively the failure and success of White's idea. Lord Buckmaster reads the cases as rules "to be followed until overruled," whereas Lord Atkin negotiates with the past to create from past decisions rules suited to the needs of the present. Through his efforts, Lord Atkin maintains respect for the law's antiquity and ensures its continued relevance to society.

The last cases, Brown and Plessy, will be examined through the critical techniques of deconstruction. Plessy enunciated the "separate but equal" doctrine justifying the

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[5] James Boyd White, Justice As Translation: An Essay in Cultural and Legal Criticism (Chicago and London: U of Chicago P, 1990) 101-102.

segregation of Whites and Blacks in American life. Brown ended that doctrine in favour of integration. When both decisions are examined, however, one finds that the reasons supporting integration also support segregation, and vice versa. One also finds that both terms bear the trace of the other and depend on the other for their respective meanings. In the end one cannot justify a privileging of either term using any argument based on reason.

This could mean the end of law, unless one conceives of law as existing independently of reason. If possible, one must find different ways of explaining each decision and of articulating one's concerns and preferences for each. One way is to consider each decision's construction of the human subject, Plessy's as race, Brown's as individual. When this is done, one sees that Plessy's generalized construction of humanity allows it to ignore more easily the interests of Black Americans, while Brown's more individualized construction directs our concern to those interests. Brown's construction of the human subject is not perfect, however: Blacks lose the strength and support of their own cultural identity as they become integrated into the dominant White culture. As one explores the construction of the human subject, one sees that judicial decisions sustain themselves or draw our criticism more from their respect and empathy for people than from the force of their logic.

Each different analytical technique carries us to the same conclusion: our praise or condemnation for judgments stems largely from judges' treatment of the people over whom they exercise the power of decision. In Murdoch, one can evaluate the majority and dissenting judgments by evaluating each judge's exercise of power over the Murdochs and the trial judge. In Donoghue, one can consider how Lord Buckmaster's and Lord Atkin's interpretive strategies affect the plaintiff and others similarly situated. Finally, one can praise Brown for its repudiation of Plessy but still criticize Brown's failure to consider the cultural differences between Black and White Americans, and its failure to encourage respect and tolerance for those differences. Judicial decisions persuade us only partly through their logical reasoning, therefore; they also persuade us through their treatment of the people whose lives they affect.

CHAPTER ONE

THE EXERCISE OF POWER IN JUDICIAL DISCOURSE: MURDOCH v. MURDOCH[1]

Introduction

When the late philosopher Michel Foucault examined a written work, he looked more to what the piece said about its author than what it said about its subject. Foucault examined the prose that people within powerful institutions produce wher they write about those subject to their authority. He considered the status of the people most capable of writing, the positions from which they write, and the positions of those about whom they write. Such writing, he thought, was an exercise in power over others.

Foucault identified a will to dominate that resides in the governors of society's institutions, and operates through institutional discourse, a will which is more a power of the institution itself than of its members, and which asserts itself through the languages of neutrality, rationality, truth, knowledge, and so forth. The will aspires to the language of science and achieves power by excluding competing discourses. Society's institutions maintain their power when people see them as ideologically

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[1] Reproduced in Appendix I.

[2] The following discussion about Foucault's ideas on institutional writing and power comes from Daniel Williams, "Law, Deconstruction, and Resistance: The Critical Stances of Derrida and Foucault," Cardozo Arts & Entertainment L.J. 6 (1988): 379-385.

neutral. Institutions therefore isolate themselves from ideological conflict through neutral discourse.

This chapter will consider judicial discourse as an exercise in the institutional will of which Foucault wrote, using the Supreme Court of Canada's decision in Murdoch v. Murdoch as an example. The majority and dissenting opinions in Murdoch ensconce the activity of judgment within a rhetoric of neutrality and impersonality. This rhetoric imitates scientific style in suppressing agency. Judicial discourse of this sort also excludes competing discourses by forcing disputes into its own language and by controlling witnesses' narratives. Combined, these features of judicial discourse isolate the judiciary from ideological conflict.

Overview of Murdoch v. Murdoch

Irene and James Murdoch were married in Alberta in 1943.[3] Like most young couples, they had few assets. For the first four years of their marriage they worked as a couple for a succession of ranchers. Mr. Murdoch broke horses and tended cattle while Mrs. Murdoch cooked for the work crews and helped her husband with his work. They made $100.00 per month in total, paid to Mr. Murdoch, plus room and board.

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[3] I have condensed the facts of Murdoch from the factual summaries contained in the judgments of Mr. Justice Martland and Mr. Justice Laskin. I use the same approach in my factual summaries of the cases I discuss in Chapters Two and Three unless a note appears to the contrary.

Over the next fifteen years, the couple worked hard in the ranching business and improved their fortunes. In 1947 Mr. Murdoch and Mrs. Murdoch's father jointly purchased a guest ranch near Bragg Creek. Mr. and Mrs. Murdoch worked on it, then sold it at a profit four years later. This pattern continued, Mr. Murdoch buying successively better ranches as the couple's wealth grew. Mr. Murdoch also worked for a stock association during this time, which kept him away from home for up to five months a year. While he was at home, the Murdochs worked together on their ranch. While he was away, Mrs. Murdoch kept the ranch productive on her own.

However, by the early to mid 1960's the Murdochs' marriage was in trouble. In 1964 Mrs. Murdoch filed a caveat against land registered in her husband's name, claiming an interest under The Dower Act. When her husband asked her to remove the caveat in 1968, so that he could sell the land, she refused. The couple had a violent argument and separated. Mrs. Murdoch left with nothing. In the end she got nothing beyond custody of their son and maintenance. Even though she had helped her husband buy and maintain their properties with her work, she received no share in them.

Mrs. Murdoch sued for half of her husband's ranching business. At trial she based her claim unsuccessfully on an alleged partnership between the two. The Alberta Court of

Appeal dismissed her appeal because she had accepted maintenance payments. In the Supreme Court of Canada, she abandoned her partnership argument and advanced her claim in trust law. She argued for a share in her husband's property based on the work she did to acquire and maintain it. Mr. Murdoch denied any financial contribution on her part, acknowledging only her labour towards the upkeep of the properties. He argued that she did only what a normal ranch wife was expected to do. Of the five justices who heard the case, four accepted Mr. Murdoch's arguments, with Mr. Justice Laskin dissenting.

The Rhetoric of Neutrality

Judicial neutrality requires that judges take no part in preparing or presenting cases, that they only decide them. Although trial judges may supplement the parties' legal research with that of their own, they must determine the facts of the case solely from the evidence each side presents. Appellate judges seem even more confined. Although they too can independently research the law, they almost always accept the trial judge's findings of fact as conclusive.[4] Since they cannot interpret the facts, and

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[4] Laskin's judgment in Murdoch is a rare exception to this rule. However, appellate judges can disagree with a trial judge only to a limited extent. Laskin bases his factual conclusions solely on undisputed evidence. He could not use disputed evidence, nor evaluate a witness' credibility, because the transcript denies him the opportunity of personally observing the witnesses, an

must accept the law as it is, appellate judges convey an image of neutrality, their power seemingly limited to evaluating decisions that others have made, using materials which they as judges have neither gathered nor evaluated themselves.

When they come to write their decisions, judges structure them to establish and enhance an impression of neutrality. Most judges divide their decisions into distinct sections, each dealing with different aspects of the case. Judicial style manuals and articles encourage this approach.[5] George advises a step-by-step method, moving from facts to law (3-4, 85), while Douglas sets out a five-part format for opinions (4-6). This rigid, iterated structure presents a firm control over the material, emphasizing the impression of a logical, orderly, and dispassionate mind.

In Mr. Justice Martland's judgment in Murdoch, for example, the case's procedural history appears in paragraphs one through six. Paragraph seven contains the issue of law that the Court must decide. Paragraphs eight through

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opportunity the trial judge uses to resolve those kinds of disputes.

[5] Joyce J. George, Judicial Opinion Writing Handbook, 2nd. ed. (Buffalo: Hein, 1986).
Charles G. Douglas, III, "How to Write a Concise Opinion," The Judges' Journal 22 (1983): 4-7, 47-49.
Michael Kirby, "On the Writing of Judgments," The Australian L.J. 64 (1990): 697.
The above-noted authors are all judges.

sixteen summarize the facts. The disposition of the case in the lower courts takes up paragraphs seventeen and eighteen. Martland summarizes the applicable law in paragraphs nineteen through twenty-five. The Court's legal reasoning occupies paragraphs twenty-six to thirty six, and a brief conclusion follows in paragraphs thirty-seven and thirty eight. Not every legal decision follows this pattern exactly. Some include different sections and emphasize those sections in different ways. Nevertheless, most legal judgments will show a distinct patterning similar to Martland's, arranging sections in a rigid block like structure.

Judges also enhance their appearance of neutrality by arranging the order in which different sections appear in their judgments. Earlier sections limit the scope and content of later sections. The issue of law limits the number of facts a judge must discuss. Both in turn limit the amount of law that applies to the case. The judgment proceeds as if by scientific method: judges state the issues they must decide, or the theories they will test; they then set out the facts, or data; they state the law that applies to the facts, then apply that law, and a conclusion results from this process as if it were the only conclusion that could result. The scientific format allows judges to decide cases in ways that suggest that an

objectified reasoning process leads them to their conclusions entirely outside their personal inclinations.

Martland follows this format in Murdoch. He initially recounts all the claims Mrs. Murdoch made against her husband in the two lawsuits she filed against him, the first for judicial separation, custody of their son, alimony, maintenance, and sole possession of the family home, the second for a one half interest in her husband's assets. Martland then says, "We are concerned . . . only with the issues raised in the second of the appellant's two claims" (Murdoch 427). He omits from his ensuing discussion of the facts any material that could relate to the first claim, such as Mrs. Murdoch's continuing financial requirements, the Murdochs' respective parenting skills, the best interests of their child, and so forth. Instead, Martland's discussion of the facts concentrates on the property the Murdochs accumulated during their marriage. Martland then assembles and discusses the legal authorities (all of which discuss property division between spouses on marriage breakdown) before discussing how those authorities apply to the facts. Martland's presentation of his decision suggests that the decision results from his following the process itself: the rigid format eliminates any personal biases he may bring to the case through the discipline imposed on him by its structure.

The Rhetoric of Impersonality

Judges also achieve an appearance of neutrality by using an impersonal, formal language, which creates its impression of formality by using passive constructions and nominalizations.[6] Martland and Laskin use both, though we will examine the passive construction first. Setting out the facts in Trueman v. Trueman,[7] Martland writes:

> The down payment of $435 *was financed* by a bank loan to the husband. A house *was built and moved* onto the land. The land *was farmed* for nine years. The stock and machinery *were then sold* and the farm *rented*, the husband receiving the rent. (Murdoch 433, italics added)

In discussing the facts in Murdoch, Laskin writes:

> The Ward property *was sold* in late 1958 for $8,000 and the Brockway property . . . *was bought* for $25,000. A down payment *was made* of $10,000.

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[6] See George Orwell, "Politics and the English Language," in George Orwell, The Orwell Reader: Fiction, Essays, and Reportage, comp. Richard H. Rovere (New York: Harcourt, Brace, 1956) 363. See also Bob Hodge and Roger Fowler, "Orwellian Linguistics," in Fowler, Hodge, Kress, and Trew, Language and Control (London: Routledge & Kegan Paul, 1979) 14-18, and Roger Fowler and Gunther Kress, "Critical Linguistics," in Fowler 208, cited in Dennis R. Klinck, "Style, Meaning, and Knowing: Megarry J. and Denning M.R. in In Re Vandervell's Trusts (No. 2)," U of Toronto L.J. 37 (1987): 377.

[7] [1971] 2 Western Weekly Reports 688 (Alberta Court of Appeal).

> . . . The balance of the purchase price *was payable* in annual instalments. (Murdoch 442, italics added)

Both passages suppress the human actor. Of course we could infer human agency from the context and rewrite both passages to recover that agency. We could render Martland's passage in the following language:

> A bank loan to the husband financed the down payment of $435. Mr. Trueman arranged with contractors to build a house and move it onto the land. Mr. and Mrs. Trueman farmed the land for nine years. They then sold the stock and machinery and rented the farm, the husband receiving the rent from the tenants.

Laskin's passage would appear as follows:

> Mr. Murdoch sold the Ward property in late 1958 for $8,000. He then bought the Brockway property for $25,000, making a $10,000 down payment and arranging to pay the balance of the purchase price in annual instalments.

Rhetorical privileging of action over actors by judges reveals an important judicial value, that judges assess people by their conduct. Since people control their conduct and must take responsibility for it, judging people by their actions seems like a fair way to proceed. Each time a judge

emphasizes the action over the actor, therefore, he also rhetorically asserts his own idea of fairness.

Judges also privilege the activity over the actor to assert their rhetorical control over the events they describe. One example is Laskin's description of the assault that preceded the Murdochs' separation. Laskin describes the assault in a curiously detached way: "Subsequently there was a physical clash which resulted in the hospitalization of the wife. The parties separated . . ." (Murdoch 443). The passive voice eliminates Mr. Murdoch as producer of the physical violence. The term "physical clash" substitutes for him. Although no one could expect such a violent event to produce predictable consequences, it nevertheless "resulted" in Mrs. Murdoch's "hospitalization." The term "resulted" suggests an order to the events that neither participant could have intended. Furthermore, the term "hospitalization," though it suggests the severity of Mrs. Murdoch's injuries, suggests also a resolution in her convalescence and recovery. Laskin's presentation of the assault shifts our attention from the actors to their actions, and, in so doing, captures an irrational and violent event within the confines of judicial discourse's dispassionate, neutral rhetoric. Judicial thinking will rule the passions, this presentation says, not the reverse.

Judicial discourse's privileging of action over actors applies also to judicial actions. In discussing the caselaw surrounding the Married Women's Property Act and the circumstances under which a trust would operate in the matrimonial context, Laskin writes, "It is this second matter [the circumstances under which a trust would operate] that controls the disposition of the present appeal" (Murdoch 453). Martland refers to the trial judge in the Trueman case, who "felt obliged to dismiss the wife's claim for a declaration that she had an interest in the family home, in view of the Thompson case"[8] (Murdoch 434). In both examples judicial discourse personifies the law as an autonomous subject empowered beyond the judge. By personifying trust law, Laskin gives it volition, as if the law of trusts acts independent of human agency. By writing that he finds himself constrained by Thompson, the trial judge in Trueman gives the law the appearance of power over him.

The reality, of course, is that judges' interpretations govern the law. Laskin may describe trust law as independent, but he and Martland disagree as to how it should act. The trial judge in Trueman finds himself constrained by Thompson, but the Alberta Court of Appeal finds itself not so constrained; they reverse his decision. If different judges can interpret the law in different ways,

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[8] Thompson v. Thompson, [1961] Supreme Court Reports 3.

the law cannot exist apart from human agency. Nevertheless, the strategy of assigning volition to the law obscures a judge's interpretative powers and adds to the impression of neutrality. If a judge presents the law as something beyond his or her control, then he or she can deflect suggestions that personal bias influences the decision.

In addition to passive constructions, Martland and Laskin also use nominalizations. Nominalizations result when writers or speakers use nouns to express concepts when they could have used verbs or adjectives (Fowler and Kress 207). Martland uses a nominalization when he discusses Mr. Murdoch's denial that he received any monies from his wife towards the purchase of their various properties: "[Mr. Murdoch] said he did not receive money from his wife, by way of contribution, but that he borrowed the funds from Mrs. Nash" (Murdoch 429). When Martland writes that Mr. Murdoch borrowed the funds, he uses the past perfect tense to show a direct, uncomplicated action which enhances Mr. Murdoch's credibility by simplifying the transaction. Martland fails to mention in this passage that while the money came from Mrs. Nash, it went through Mrs. Murdoch's bank account. On the other hand, when Martland reports Mr. Murdoch's denial of his wife's contribution, he complicates the action with the nominalization "contribution." Mr. Murdoch, the passage suggests, would not only have had to have received the money from his wife, but received it by way of contribution. Her

credibility dwindles because anyone evaluating a story's veracity tends to prefer the simple proposition to the complicated. When we rewrite the passage to remove the nominalization, however, Martland's complication vanishes: "[Mr. Murdoch] said he did not receive money from his wife, by way of *her contributing money [to him]*." Whatever Mr. Murdoch received Mrs. Murdoch contributed; receiving and contributing are two sides of the same action. By describing Mrs. Murdoch's action with a nominalization, Martland stylistically complicates her action to diminish her credibility. By using the past perfect tense to describe Mr. Murdoch's activity, he enhances Mr. Murdoch's credibility by collapsing two actions into one.

Laskin uses nominalizations as part of his effort to diminish the trial judge. He writes:

> The only sentence in his brief reasons that could conceivably relate to the issue [of alleged partnership] as argued in this Court was one coupling his rejection of the allegation of partnership with a refusal to find that (in his words) "a relationship existed which would give the plaintiff the right to claim as a joint owner in equity in any of the farm assets". (Murdoch 439)

Laskin uses nominalizations to suggest a state of confusion in the trial judge's mind. Laskin's description of the

trial judge coupling "rejection" with "refusal" demonstrates this confusion. Mrs. Murdoch's claim does not rest on coupling the conclusion that the Murdochs were partners with the conclusion that she has an equitable claim to half her husband's assets, as Laskin's passage suggests the trial judge believes. Rather, the conclusion that the Murdochs were partners *supports* Mrs. Murdoch's equitable claim to half her husband's assets. A judge can only conclude that Mr. Murdoch holds half the assets in trust for his wife after he concludes that they were partners, because the basis for establishing the trust rests in the partnership relationship. Laskin's passage suggests that the trial judge fails to appreciate the relationship between the two legal conclusions.

When we eliminate the nominalizations in Laskin's passage we also eliminate the impression of disorder in the trial judge's mind:

> The only sentence in his brief reasons that could conceivably relate to the issue [of alleged partnership] as argued in this Court was one *where the trial judge rejected* the allegation of partnership *and refused* to find that (in his words) "a relationship existed which would give the plaintiff the right to claim as a joint owner in equity in any of the farm assets".

This passage not only changes the nominalizations "rejection" and "refusal" into verbs, but also omits the verb "coupling," which requires at least one direct object to complete its action. The nouns "rejection" and "refusal" serve as those objects in Laskin's passage; without them, the verb "coupling" must also be eliminated. The rewritten passage now suggests a temporal relationship between the actions of rejecting and refusing where (correctly) the trial judge's act of refusing to find a relationship to support Mrs. Murdoch's claim does not occur in the passage until after he rejects the allegation of partnership.

Laskin's characterization of the trial judge's confusion on this point suggests that the trial judge did not understand the nature of Mrs. Murdoch's claim. Laskin gives us only part of the trial judge's sentence, however, so we cannot determine from Laskin's judgment alone whether the trial judge expresses himself as Laskin suggests, or whether he correctly expresses the relationship between partnership and trust. Laskin's characterization diminishes the trial judge in the reader's mind, but denies the reader any opportunity to independently assess the fairness of Laskin's criticism of the trial judge.

The Power to Rename

If judges hide their power to decide behind a neutral rhetoric of relative powerlessness, they adopt no such pose

in relation to those over whom they exercise that power. Judicial discourse reduces people through renaming. In Murdoch, this applies to the Murdochs and the trial judge. Neither Martland nor Laskin ever refers to Mr. or Mrs. Murdoch or to the trial judge by their given names. Instead, they refer to them by their legal function or status. Martland calls Mrs. Murdoch *the appellant* twenty-four times in thirty references.[9] He calls Mr. Murdoch *the respondent* thirty-six times in thirty-two references. Laskin uses the terms *wife* and *husband*. He calls Mrs. Murdoch the *wife* in thirty-four of forty references, and Mr. Murdoch the *husband* in twenty-six of twenty-nine references. Both judges refer to the trial judge only as the *trial judge*, save on one occasion where Martland calls him the *learned trial judge*.

The terms *appellant*, *respondent*, and *trial judge* carry restricted meanings, referring, in turn, to one who appeals a judgment, one who responds to that appeal, and to the judge who first heard the case. No one could properly name either Mr. or Mrs. Murdoch a respondent or appellant at any other time than while their dispute is before the appellate courts. While the trial judge could be a trial judge in any number of cases, he could only be *the* trial judge in one. The terms *appellant*, *respondent*, and *trial judge* therefore

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[9] All counts exclude pronouns.

describe each participant in limited ways, for a limited time, and for the limited purposes of one appeal.

Laskin's names, *wife* and *husband*, do not expand the Murdochs' identities either, although his terms seem at first more open. When the Murdochs appear before the Supreme Court of Canada, their marriage has broken down, but they are not divorced; they are "judicially separated" (Murdoch 426). They live apart, with Mrs. Murdoch having custody of their son, and Mr. Murdoch under an order to pay maintenance. Technically, one could still call them husband and wife, but only technically. Those terms, as Laskin uses them, would not accurately describe their social status, nor evoke any connotations of family, love or duty between two people. The names *husband* and *wife* here describe only a legal status, and have relevance only to the legal rights and duties that flow between the Murdochs.

The act of naming carries mythical significance. In some cultures, naming a person conjures that person into one's presence.[10] In Judeo-Christian culture, naming implies control over the thing named. Adam's first task in Eden is to name all the creatures over which he will have dominion (Gen. 2:19-20). For similar reasons, God forbids the ancient Israelites to speak His name (Exod. 3:13-14, 6:3); for them to do so implies a control over God which

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[10] Bernhard Grossfeld, "Language and the Law," Journal of Air Law and Commerce 50 (1984-85): 796.

humanity cannot have. Names are therefore important for the control they imply over the thing or person named.

Both justices rename the Murdochs and the trial judge but show great respect for the names of the judicial authorities they cite in their judgments. They name them individually, complete with judicial titles. Both Laskin and Martland refer to Judson J., the "J." standing for "Mr. Justice," and to Johnson J.A., the "J.A." standing for "Appellate Justice." Laskin refers to Kerwin C.J.C., the "C.J.C." meaning "Chief Justice of Canada." Martland quotes a passage from Sir Raymond Evershed, M.R. (Murdoch 431), the "M.R." denoting Evershed's rank as "Master of the Rolls," the position held by the chief justice of the English Court of Appeal. Both justices refer to Lords Reid, Diplock, and Denning, the term "Lord" denoting membership in the British House of Lords, England's upper legislative chamber and also its highest court.

While it may be helpful for the reader to know which judge stated which legal proposition, as a matter of pure law only the words of a judge carry legal authority, not the judge himself. No one can ignore, however, the wisdom and experience of the judges Laskin and Martland cite. By naming them, Laskin and Martland augment their own arguments with the persuasive authority of the judges to whom they refer.

The difference in naming also reveals a difference in control. Neither Laskin nor Martland can overrule the decisions they cite because of stare decisis.[11] At most, they can creatively interpret or evade the authorities. On the other hand, Martland and Laskin can overrule the trial judge and decide how to dispose of the Murdochs' appeal. Through renaming, judges rhetorically control those over whom they exercise legal power, and respect those over whom they have none.

The Rhetoric of Exclusion

Judicial discourse also excludes forms of discourse that it does not recognize. It forces those who use the legal system to translate their disputes into a language that judicial discourse uses. Mrs. Murdoch's claims in partnership and trust law are attempts at such translation. Both areas of law seem better suited to solve business, not matrimonial, disputes.[12] However, in the late 1960's,

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[11] The only exceptions are Trueman, an Alberta Court of Appeal decision, and the Ontario Court of Appeal decision in Thompson before that case reached the Supreme Court of Canada. Neither Martland nor Laskin refers to any judge from the Thompson Court by name.

[12] In the discussion of partnership and trust law that follows, I take the law exclusively from the decisions of Mr. Justice Martland and Mr. Justice Laskin, both from the statements they make and from the authorities they cite. Legally, this is questionable practice. The law has changed in the twenty years since Murdoch was decided, and the few decisions from which both justices quote cannot fully describe the law as it stood at the time. However, since my study is a rhetorical one of the law as it was applied to a

judicial discourse recognized no better causes of action. Neither cause of action, however, allows Mrs. Murdoch to bring the full range of her dispute before the courts; in different ways, each requires her judges to consider her claim within a discourse of business inappropriate to her context.

The trial judge looked for evidence that showed or did not show that the Murdochs held their assets as partners. He mostly considered documents. The registered documents showed Mr. Murdoch as the sole owner of the land and proved his sole ownership of the cattle and farm equipment. He filed all the tax returns under his name. Mrs. Murdoch produced her own bank account statement, recording contributions towards her husband's purchase of the Sturrock farm, but Mr. Murdoch produced account ledgers showing those contributions as loans from Mrs. Murdoch's mother. His ledgers suggested that the contributions only moved through Mrs. Murdoch's account but did not originate with her. Finally, the trial judge noted that no document declaring a partnership had ever been filed under The Partnership Act.

When considered from a documentary point of view, Mr. Murdoch not only had the volume of documents on his side, he also had documents that conveyed believability. The registered documents reflected the integrity of the

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particular case, I believe that it is necessary to restrict the essay's legal scope in this way.

institution or institutions with which they were registered. Revenue Canada backed the integrity of Mr. Murdoch's tax returns under threat of penalties for false or misleading information. Mr. Murdoch's account ledgers showed entries against his own financial interest, entries he likely would not have made unless he were compelled by their truth. Mrs. Murdoch's bank account statements were ambiguous, depending only on her word against the proven integrity of her husband's ledger statements. Finally, the lack of a partnership declaration added more official weight to Mr. Murdoch's side. As Laskin noted, Mrs. Murdoch could not produce "any effective writing to support a division in her favour" (Murdoch 446).

We may wonder why these documents would matter so much. After all, very few (if any) married couples file declarations of partnership or worry about creating a paper trail documenting such a partnership. Most business partnerships do worry about these things, though, and they comprise almost all the partnerships that exist. Partnership law, since it deals almost exclusively with business, favours written records to record business activities and establish legal positions. It assumes that most partners are roughly autonomous individuals, that they are motivated by profit, and that they leave the partnership when they think they are not getting enough out of it. However, partnership law ignores at least some of the

reasons why married people (at least from the 1940's to the 1960's) would arrange their affairs differently from businesses: mutual love and trust, societal pressures to put property in the man's name, and avoidance of divorce. Partnership law, then, favours a discourse of business over that of marriage regardless of the context within which it is applied. Mrs. Murdoch's case failed in Alberta because her relationship could not be defined as a partnership.

Mrs. Murdoch achieved no greater success when, in her appeal to the Supreme Court of Canada, she tried to translate her dispute into trust law. Martland relies on two authorities in ruling against her: Thompson and Trueman. In Thompson, the Supreme Court of Canada held that a wife cannot claim an interest in property just because of marriage; she would have to have made a financial contribution to her husband's acquisition of assets before the Court would impose a trust on him. The Alberta Court of Appeal in Trueman relieved the severity of this doctrine. It held that the contribution does not necessarily have to be in money as long as it can be translated into money. If, in addition to her normal duties as a farm wife and mother, the wife contributes labour towards her husband's acquisition of assets, the Court may impose a trust on the husband to the extent that her labour saves him the expense of a hired worker. Trust law, therefore, unlike partnership law, does not require a judge to list the factors that would

allow him to impose a trust, then decide whether the case includes those factors. Instead, it establishes a juxtaposition between facts that support a trust and those that do not. Nevertheless, trust law, like partnership law, still requires Mrs. Murdoch to translate her case into financial terms to obtain relief.

Thompson demonstrates the juxtaposition. There, Mr. Justice Judson notes that the authorities go no farther than allowing the wife to share in the matrimonial home if she proves that she made a financial contribution to its acquisition. In arguing against extending the principle further, Judson says:

> Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application and the exercise of the same discretion when there is no financial contribution when the other attributes of the matrimonial partnership are present. (Thompson 13-14; cited in Murdoch 431)

The juxtaposed terms in this passage are "financial contribution" and "other attributes of the matrimonial partnership." The former can be precisely quantified and converted into money so that a judge can easily compare it with the value of the property the wife claims. In contrast, "other attributes of the matrimonial partnership"

means something less precise, and more subject to an individual judge's personal values and biases.

A similar juxtaposition occurs in Trueman. There, the Alberta Court of Appeal equates some of the wife's labour to labour the husband would have had to hire. To the extent that the wife's labour has saved her husband some expense in hired hands, the Court finds that she made a financial contribution. The juxtaposed terms are "services which the appellant rendered [that] relieved the respondent from employing extra help" and "her work as a farm wife and mother." The rhetoric of precision and vagueness is again noteworthy: the former term is quite precise in that it allows a judge to measure the value of the wife's services against an objective standard, the value of a hired hand's services. The latter term, however, provides no such standard.

A serious difficulty arises when courts speak of the wife's labour as if it were a financial contribution. If we equate her farm labour with that of a hired hand's, we can similarly equate every aspect of her work as a mother and housekeeper to paid labour. Yet, Judson specifically excludes that result in Thompson. As the Alberta Court of Appeal reasons in Trueman, though, if a wife's labour conveys the same financial benefit to her husband as a direct financial contribution, a Court must recognize her labour as a contribution. Neither Court wants to reach that

result, though, so they limit the doctrine by excluding the duties that a woman performs as a wife and mother from the range of contributions that will support a trust. The distinction shows again the judicial preference for the business relationship over the marital. Those aspects of the marital relationship that resemble business activities will support a trust, while those that resemble marital activities will not.

Both the list of factors of partnership law and the fine distinctions of trust law exclude Mrs. Murdoch from the judicial process. Both areas of law favour business interests, not those of married women, by focusing narrowly on the financial relations between people in a business setting. Neither recognizes the validity of any other setting within which individuals could have financial relations. Trust law specifically excludes such settings while partnership law simply ignores them. One reason Mrs. Murdoch loses, therefore, is because she cannot translate her dispute into the language of either partnership or trust law. She cannot do that because her dispute arose in a matrimonial, not a business setting. Both discourses exclude it.

Controlling Discourse

The judicial process also suppresses individual narratives by structuring peoples' evidence into a form

better suited to judicial analysis than to litigants' everyday language. O'Barr and Conley note that litigants in Small Claims Court feel more satisfied about the process when judges allow them to tell their stories in everyday language.[13] This satisfaction comes at a price however: everyday narratives do not satisfy "the deductive, hypothesis-testing structure with which judges are most familiar" (O'Barr 662), and produce results inferior to what litigants could achieve if they were to structure their narratives to suit judges' requirements better (O'Barr 662). In the higher courts, lawyers present their clients' cases with judges' requirements in mind. No one questions whether the judicial narrative structure excludes legitimate claims from judicial consideration. People conform to the judicial narrative structure to suit judicial analytical requirements, not necessarily to enhance their cases.

Since most people do not know how to structure their narratives to satisfy judges' needs, they surrender narrative control to their lawyers, who structure their narratives for them. Even though lawyers are restricted to asking only open-ended questions of their own witnesses (to dispel any impression that the evidence has been contrived), they still control their clients' narratives with questions designed to introduce and develop topics relevant to the

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[13] William M. O'Barr and John M. Conley, "Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives," Law and Society Review 19 (1985): 662.

case, and to conform to the requirements of judicial analysis.[14] Cross-examining lawyers exert a different form of control. They ask leading questions designed to suggest the answers they want and to provoke simple yes or no responses. Furthermore, the cross-examining lawyer's ability to question a witness without revealing the purpose behind the questions, and the judge's power to force witnesses to answer under threat of contempt proceedings, help the cross-examining lawyer extract damaging information even from an opposing litigant, and to create a counter-narrative from that litigant's own testimony. The courtroom creates a setting, therefore, where litigants lose control over their own discourse, submitting it to a structure which others control, not necessarily in their own best interests.

Witnesses lose more control over their discourse when a case goes to appeal. At trial, a court reporter records everything anyone says, and produces a written transcript. The Supreme Court of Canada, when it considers the parties' evidence, uses the transcript. While this transcript preserves what people say more accurately than notes or memories, it nevertheless alters the manner in which people

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[14] See generally James W. McElhaney, "Witness Control," in McElhaney, Trial Notebook; A Practical Primer on Trial Advocacy (Chicago: ABA Section of Litigation, 1981) 125-137. Some of these techniques include: directing a witness' attention to a specific time and place before asking if they were doing anything at that time and place, or whether anything unusual happened; or directly introducing a topic ("I would like to discuss your husband's farm with you, now.").

speak. It naturally omits variations in pitch or tone, fails to record body language, gestures, or facial expressions, and skips pauses and interruptions, giving the impression of continuous discourse. In sum, it removes the emotional content from speech.

Only a reduced portion of a person's entire discourse is reviewed by an appellate judge during his consideration of the case. In writing their decisions, however, judges use an even smaller part. Finally, judges manipulate even that reduced corpus by their rhetorical strategies. In Murdoch, Laskin uses portions of the Murdochs' evidence to diminish the trial judge. Laskin's disagreement with Martland centres on the majority opinion that Mrs. Murdoch made no financial contribution to Mr. Murdoch's acquisition of assets, and that her contributions did not entitle her to a share of those assets. He takes issue with the majority, in part, by raising Mrs. Murdoch's status to that of an actor in his judgment, and by diminishing the trial judge's status. Laskin quotes extensively from Mrs. Murdoch's evidence to show that she made a contribution in physical labour to the couple's ranching operations:

> Q. Could you tell the court, as briefly as you can, the nature of the work you did?
>
> A. Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the

> reserve, dehorning, vaccinating, branding, anything that was to be done. I worked outside with him, just as a man would, anything that was to be done. (Murdoch 443)

Three intervening questions establish that Mr. Murdoch was away from the properties for five months out of every year.

> Q. So that you would do the chores and other work around the farm?
>
> A. I did help until our son was old enough, then he helped, but until we had him I did it on my own, except for the few, you know, two or three weeks in the summer time when we would hire extra help then for stacking, but I was always still out there helping to rake and take lunches and gas out into the field. (Murdoch 443)

Laskin then quotes Mr. Murdoch's evidence in chief on the same issue:

> Q. Over the years what were your wife's activities around the ranch?
>
> A. Oh, just about what the ordinary rancher's wife does. Most of them can do most anything. (Murdoch 444)

The juxtaposition of Mrs. Murdoch's detailed evidence with her husband's casual dismissal of her contributions encourages the reader to conclude that Mrs. Murdoch's

contribution went far beyond the ordinary. By using her words, not his own, to demonstrate the inadequacy of her husband's position, Laskin adds her voice to his own and empowers her as an actor in his decision.

Immediately after Mr. Murdoch's quotation, Laskin reduces the trial judge's status with the following comment:

> This answer [Mr. Murdoch's] appears to be the basis of the trial judge's conclusion that the wife made only a normal contribution as wife to the matrimonial regime, a conclusion carrying the legal significance that it gave her no foundation, upon the breakdown of the marriage, to claim an outright interest in the assets, standing in her husband's name, which were accumulated during the cohabitation of the spouses. (Murdoch 444)

Laskin's phrase "appears to be the basis" contains a measure of caustic incredulity which diminishes our respect for the trial judge: either he missed Mrs. Murdoch's evidence completely, or he preferred Mr. Murdoch's sweeping generalization to her detailed responses. His failure means that he did not appreciate the legal significance of the evidence he used in making his findings of fact. If he had, he would have taken more care in coming to his factual conclusions, as the legal consequences to Mrs. Murdoch demanded he do. Laskin's assessment and the stinging way in

which he makes it diminishes our respect for the trial judge and the decision he made.

In contrast to Laskin, Martland diminishes Mrs. Murdoch's role in his judgment. He paraphrases one passage from Mrs. Murdoch's evidence, and never quotes her directly at all. Further, he subsumes Mrs. Murdoch's arguments entirely within his own lexicon, syntax and grammar.[15] In one passage he writes:

> The appellant contends, however, that, in the light of the *Trueman* decision, a claim can be founded, apart from financial contribution, on the work performed by the appellant in connection with her husband's ranching activities. (Murdoch 433)

In the passage Laskin quotes, Mrs. Murdoch uses forceful, active verbs ("Haying, raking, swathing," etc.). Martland's passage uses the less forceful verb "contends." Martland also uses weak passive constructions such as "a claim can be founded," which makes her argument seem tentative. A second passive construction, "work performed by the appellant in connection with her husband's ranching activities," subordinates her work to her husband's by characterizing it as work done only "in connection" with Mr. Murdoch's work, not as an independent activity in its own right. In the passage Laskin quotes, Mrs. Murdoch also uses a passive

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[15] Elizabeth Mertz, "Consensus and Dissent in U.S. Legal Opinions: Narrative Structure and Social Voices," Anthropological Linguistics 30 (1988): 378-379.

construction, "anything that was to be done," but one which preserves an impression of activity by suggesting that she did still more work than what she discloses in the passage. Martland diminishes Mrs. Murdoch's role in his judgment by paraphrasing her instead of allowing her to speak with her own voice.

In contrast to his treatment of Mrs. Murdoch, Martland quotes exactly, and in blocks set apart from the text of his judgment, the trial judge, the Alberta Court of Appeal, and, with one exception, all seven passages that he uses from other judges. By quoting directly, and sufficiently to warrant a block quotation, Martland gives respect and independence to the judges whom he quotes, a respect he denies to Mrs. Murdoch.[16] Martland's pattern of quotation suppresses Mrs. Murdoch's voice and empowers those of the judicial actors in the case, both those who have decided the case at trial and appeal, and those who have written judgments to which Martland refers.

Conclusion

Judicial discourse shields itself from ideological conflict through rhetorics of neutrality and impersonality.

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[16] Mikhail Bakhtin writes that "the stronger the feeling of hierarchical eminence in another's utterance, the more sharply defined will its boundaries be. . . ." Volosinov, V.N. [M. Bakhtin], Marxism and the Philosophy of Language (Cambridge Mass.: Harvard UP, 1973) 123, cited in Mertz 379.

The judicial system creates a passive, seemingly limited role for the appellate judge, evaluating other judges' decisions, confined by the law and facts of the individual case. Judges structure their decisions in such a way to reinforce this impression of limited power. They organize the material of their judgments in a logical way to eliminate legally extraneous materials and to suggest an inevitability to their conclusions. Decisions make themselves, this structure implies, based on the dispassionate application of law to the facts.

Stylistically, judges favour action over the actor, to reinforce the impression that neutral factors such as peoples' conduct influence judicial decisions. Judges also stylistically control irrational behaviour within their own reasoned discourse to further the impression of impartiality. Furthermore, judges stylistically place themselves beneath the law as its servants, not its masters. Both the rhetorics of neutrality and impartiality admit that judicial discourse asserts power, but power impartially applied and restrained by law.

However, this appearance of neutral, disinterested judicial power breaks down as we consider other exercises of power within judicial discourse. Both judges rename those over whom they have power, the Murdochs and the trial judge, yet respect the names of those over whom they have no power, other judges. By renaming, Martland and Laskin exclude

everything about the person except what they need for their decisions. Rhetorically, both judges make the Murdochs and the trial judge subject to their own discourse, either by ignoring Mrs. Murdoch and approving the trial judge (Martland) or by empowering Mrs. Murdoch and diminishing the trial judge (Laskin).

Judicial discourse also excludes the financial aspects of marriage from the range of legal fields and remedies it considers. Mrs. Murdoch failed partly because judicial discourse would not recognize the financial dimensions of marriage. It treats her marriage as a partnership or trust without allowing for any difference between those relationships and marriage. The legal process also controls how much of a person's discourse reaches a judge, through the questioning and transcribing process. Mrs. Murdoch's claim threatened to expose the contradictions between the judiciary's claims to impartiality and its reality of differential treatment of married women. Instead of acknowledging the difficulties that Mrs. Murdoch's claim presented, the majority in the Supreme Court of Canada ignored those difficulties through their manipulation of discourse.

CHAPTER TWO

A CONVERSATION WITH THE PAST: DONOGHUE v. STEVENSON

Introduction

In the previous chapter we examined judicial discourse as an instrument of power. In this chapter we shall examine it as an instrument of change, using the House of Lords' decision in Donoghue (or McAlister) v. Stevenson[1] as our example.

In formal terms change should not occur. Judges are bound to follow precedent, and the highest courts almost never overrule their own or their predecessors' decisions. As a result we perceive law as ancient and enduring, respecting it in large part because of its immutability.

Yet this immutability and antiquity is an illusion; law does change. For example, in products liability law before Donoghue, if a person under contract made or repaired a product for someone, he owed a duty to take care in his work only to the person with whom he had his contract. If he were careless, and injured someone else as a result, that person, as a stranger to the contract, had no recourse against him. A duty to take care flowed from, and was limited to, the contract.[2] Donoghue changed that. Now

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[1] Reproduced in Appendix II.

[2] There were two exceptions to the rule: fraud and inherently dangerous articles, neither of which appreciably extended the negligent party's liability. Outside of contract, the remaining grounds of liability for negligence were:

people owe a general duty to take care to avoid acts that could injure someone. They owe this duty to anyone they can reasonably foresee suffering from their negligence, not just to those with whom they have a contract.

Yet Lord Atkin, who wrote the majority judgment most often cited from Donoghue, would deny that the law itself changed because of his judgment. Noting that "the assumed state of the authorities" would compel him to a perverse result, he rejects that assumed state in favour of a different interpretation (Donoghue 12-13). His judgment implies that law does not change, only our interpretation of it. After noting that the authorities provide few general statements of the duty of care, but many applications of that duty in specific circumstances, he says:

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1) ownership, possession or control of real property.
   This applied to the duties imposed (or not imposed) on owners and occupiers of land to people who would come onto their land, such as tenants, invitees, licencees or trespassers.
2) ownership, possession or control of goods, animals or things.
   This duty imposed liability for items that were or could be dangerous, such as fire, water, and animals.
3) proximity to or coming into contact with other persons or their property.
   This duty imposed liability in relation to highways, vehicles, and wharves and docks, including tackle and goods landed at a wharf or dock.
4) statutory liability.

Source: The Right Honourable The Earl of Halsbury, and Other Lawyers, The Laws of England Being a Complete Statement of the Whole Law of England (London: Butterworth, 1912) c.f. "Negligence."

> And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. (Donoghue 11)

By showing the general duty's presence in the specific cases, Lord Atkin changes our interpretation of the specific cases, from isolated examples of separate, doctrinally unconnected duties, to small components within a large system of law connected by their expression of a general duty. In doing so, he maintains the integrity of each case but changes our interpretation of it. In effect he changes law (our interpretation) without ever changing the law (the decisions).

The key to understanding how law changes is to understand how precedent works. For James Boyd White, the concept of democratic conversation explains the process. Conversation requires tolerance and respect for those with differing views (White 121). Conversation sustains a democracy, just as rule by decree weakens it. If judges decide cases independently of precedent, they ignore the law, and rule by their own decree. If, on the other hand, judges follow precedent unquestioningly, they surrender their own right to decide, and rule by a different decree, that of the past. To maintain their legitimacy in a democracy judges must reject both approaches. They must follow precedent to maintain a consistent, equal application

of the law, and must reject it when society's needs require unique solutions from them.

Democratic conversation demands that judges locate their authority to decide cases between the constraints of the past and the freedom of the present (White 172). To locate their authority, they must mediate between past and present, or, to use White's phrase, translate the past for the present. White deliberately uses the term "translation" because it captures the fact that we risk misunderstanding the past when we examine it only through our own cultural lens. Even if we lose some of the past in the translation, only through translation can we approach an understanding of the past, and only then can we decide whether and to what extent to follow it (White 173).

Lord Buckmaster's dissenting judgment in Donoghue exemplifies the failure of White's concept. Lord Buckmaster refuses to engage the past, accepting its words as decrees. He fails to translate the past, directly applying its rules instead. Lord Atkin's majority judgment exemplifies the success of White's concept. He respects his judicial predecessors' interpretations of the law but rejects the suggestion that their interpretations inevitably control his. He searches for a unifying theme in the actions and words of his judicial predecessors. His interpretation of the past preserves precedent and our respect for it, but in a different form, translated for a different society.

Overview of Donoghue (or McAlister) v. Stevenson

Donoghue v. Stevenson originates from a simple set of facts. The plaintiff and a friend went to a cafe where the plaintiff's friend bought her a ginger-beer and ice cream float. The shopkeeper brought out a tumbler, filled with ice cream, and an unopened bottle of ginger-beer. The ginger-beer bottle was made from darkened glass, which protected its contents from the light, but also prevented anyone from seeing inside it. Further, the bottle had a metal cap on it which could not be reattached after opening. The shopkeeper opened the bottle at the table, then poured part of its contents into the tumbler. He then left the opened bottle at the table, still partly full.

After the plaintiff drank the ginger-beer from the tumbler, her friend poured the rest of it for her. Along with the ginger-beer, however, emerged a partially decomposed snail. In her statement of claim the plaintiff said she suffered from shock and severe gastro-enteritis. She sued the ginger-beer manufacturer for negligence.

The plaintiff said that the manufacturer owed her a duty to take care, to see that people who bought his ginger-beer would not be injured from his carelessness in bottling it. The problem with her case was that she did not obtain the ginger-beer by buying it directly from the manufacturer; she had no contract with him. This fact was not lost on the manufacturer, who moved right away for an order dismissing

her claim as disclosing no cause of action. He argued that even if the plaintiff proved all the allegations in her statement of claim she would still lose because those allegations did not give her a remedy at law. To make the manufacturer liable, she had to prove that he owed her a duty of care. To do that, she had to prove that she had a contract with him. The plaintiff succeeded before the judge at first instance, but lost on appeal. She then appealed further to the House of Lords. Lords Atkin, Macmillan, and Thankerton decided in the plaintiff's favour. Lords Buckmaster and Tomlin dissented.

Lord Buckmaster's Judgment

Lord Buckmaster locates the authority for his legal principles in the past, in the common law, which he finds in the "judgments of judges entrusted with its [the common law's] administration" (Donoghue 5). He excludes the writings of law book authors, living or dead. The works of the living, he says, are not authoritative; those of the dead are not helpful. For Lord Buckmaster the law exists in the past, expressed by judges.

Lord Buckmaster's location of his authority for the law influences his attitude towards legal change. Since Lord Buckmaster's authority for the law is, in effect, the law itself, he must resist any challenge to the law, including suggestions for law reform, as a challenge to the law's

authority. The need for law reform, or change, implies the existence of a flaw in the law, which implies also a flaw in the authority for the law. Change therefore represents a threat to Lord Buckmaster's location of legal authority which he must resist.

No one would seriously suggest that we resist legal change only to maintain legal authority. Laws must serve society and must themselves change as society changes. If laws fail to adjust, they lose society's respect as they lose their relevance to people's lives. Law cannot maintain its authority over society if maintaining that authority requires legal stasis. Lord Buckmaster therefore phrases his resistance to change in ways that try to overcome this difficulty.

Lord Buckmaster's first attempt comes early in his judgment. He says:

> The law applicable [to this case] is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, yet themselves they cannot be changed [sic] nor can additions be made to them because any particular meritorious case seems outside their ambit. (Donoghue 5)

Lord Buckmaster's reference to the law's capacity to meet new situations suggests a tempered willingness to accept

change. If we focus, however, on the difference between principles "capable of application to meet new conditions" and principles which "cannot be changed [or added to]," we find ourselves in a rhetorical morass. At what point does a legal principle's ability to meet new conditions become so flexible that it really amounts to a change or an addition to the law? Or, to reverse the equation, to what extent does a restriction on change or addition destroy the law's capacity to meet new conditions? We really cannot tell, because Lord Buckmaster's concepts are too general to produce meaningful rules. They serve a different purpose: to obscure resistance to change behind an apparent openness to it.

Lord Buckmaster's resistance to change appears also in his concept of the "meritorious case." In the abstract, and by definition, legal principles must include the meritorious case within their ambit. Further, the meritorious case must derive its meritorious status from the same legal principles which include it within their ambit. Law cannot afford to admit that any other mechanism confers meritorious status on a case. Such an admission represents an intolerable challenge to the law's authority. The effect of this line of reasoning is that no meritorious case can exist beyond the ambit of legal principles, even though Lord Buckmaster asserts the opposite. The only way one could recognize the merit in a case and the fact of the case not conforming to

legal principles would be to admit also the possibility that one's conception of legal principles could change. Lord Buckmaster's refusal in the abstract to acknowledge that possibility signals resistance to change as his way of maintaining legal authority.

Lord Buckmaster's use of the meritorious case hints at another, more serious, contradiction in his reasoning. Cases are meritorious or not depending on how well they conform to our notions of justice. Judges express these notions in the common law. If Lord Buckmaster excludes a meritorious case from his concept of the common law, yet still sees the merit in such a case, the case must have merit according to a different concept of the common law. That different concept must have a different location for its authority than Lord Buckmaster's because Lord Buckmaster's authority for law is law itself. Therefore, while Lord Buckmaster professes allegiance to one location for the common law's authority he betrays another, different location for that authority.

Stanley Fish can help us understand how Lord Buckmaster can profess to locate his authority for the law in one place yet also recognize another location.[3] According to Fish, readers generate the meaning of texts, in this case judgments, not as individuals but as members of interpretive

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[3] Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (Durham and London: Duke UP, 1989).

communities (9-10). These communities create meaning by forceful interpretive acts. They maintain the ascendancy of their interpretations by constraining the boundaries of interpretation. Any interpretation beyond the boundaries of their own represents unprincipled reasoning, or anarchy. An interpretive community's power to constrain interpretation is so great that individuals may never even perceive their constraints, finding nothing problematic in their interpretation of the world. In the same way, Lord Buckmaster rejects any interpretation of the common law different from an unquestioning acceptance of the past yet simultaneously and unconsciously acknowledges a different authority.

Fish's analysis would argue that Lord Buckmaster constrains differing interpretations by rhetorically suggesting anarchy as the alternative. While the first two precedents that Lord Buckmaster cites support his legal position that no duty to take care arises beyond the scope of contract, they also hint at anarchy if interpretations other than their own prevail. In Langridge v. Levy, Baron Parke says:

> We should pause before we make a precedent by our decision which would be an authority for an action against the vendors . . . at the suit of any person whomsoever into whose hands they [the goods

> sold by the vendors] might happen to pass, and who should be injured thereby.[4]

A similar sentiment appears in Baron Alderson's decision in Winterbottom v. Wright:

> The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.[5]

Both Barons Alderson and Parke express a fear of liability for negligent conduct uncontrolled by legal rules. Baron Alderson even resorts to a rhetorical fallacy, the slippery slope, to constrain interpretation. From fear of anarchy both Barons Alderson and Parke restrain the right to recover to rules already established, and resist attempts to extend them. In Langridge, Baron Parke confines his decision by specifically excluding an unlimited right to recover. His warning in the passage quoted above to those who would use his decision as a precedent, "We should pause before we make a precedent," suggests that he had such a reading of his words in mind. In Winterbottom, Baron Alderson confines the right to recover damages to those in contract, fearing an inability to control the right to recover without that limit. Neither judge envisions a world different from his

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[4] (1837), 150 English Reports 863, 868; cited in Donoghue 5.

[5] (1842), 152 English Reports 402, 405; cited in Donoghue 5.

own, where the constraints each sees as necessary are removed and different constraints withstand the threat of anarchy. By choosing both judgments as his first precedents, Lord Buckmaster signals his agreement with their interpretive constraints.

Fear of anarchy also motivates Lord Buckmaster in choosing his line of precedents. Theoretically, if the authority for the law rests in the law itself, there is no way to decide which cases to follow or ignore. If all cases from a given level of court represent the law, then each case must carry equal authority. Yet Lord Buckmaster concludes that two cases with which he disagrees, George v. Skivington[6] and Heaven v. Pender,[7] "should be buried so securely that their perturbed spirits shall no longer vex the law" (Donoghue 9). Lord Buckmaster's reasons for disapproving both cases stem from a fear of unprincipled decisions arising from a law without constraints.

Both cases were decided by appeal courts, the Court of Appeal in Heaven, and the Court of Exchequer Chamber in George. In Heaven, a ship owner contracted with a ship painter to paint the outside of his ship. The defendant, the owner of the dock where the ship was berthed, supplied staging materials under contract with the painter so that the painter's employees could carry out their work. The

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[6] (1869), 5 Exchequer Chamber 1.

[7] (1883), 11 Queen's Bench Division 503.

staging was defective, however, and the plaintiff, one of the workers painting the ship, fell and was injured. Brett, M.R. (later Lord Esher), gave his interpretation of the law as follows:

> [W]henever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. (507; cited in Donoghue 7)

In George, the defendant was a chemist who compounded and sold a hairwash to a man knowing that the man's wife would use it. She was injured when she used it, and sued. The Exchequer Court allowed her suit because the chemist knew she would use the product, even though she had no contract with him.

The fact that both Heaven and George conflict with Winterbottom does not give Lord Buckmaster sufficient reason to disapprove of them after he has located his source for legal authority within the law itself. Nor can the judges Lord Buckmaster cites disapproving both cases dislodge that authority. If the source of the law is law itself, authority depends only on the fact of judicial decision-

making, not on the approval or disapproval of subsequent judges of equal authority. Lord Buckmaster disapproves of Heaven and George not because other judges disapprove of them, but because both cases argue for liability unconfined to the rule in Winterbottom. They represent threats of liability unrestricted by the confines of judicial control, a situation Lord Buckmaster sees as anarchy.

Lord Buckmaster's decision fails as an example of White's democratic conversation because Lord Buckmaster fails to engage in conversation with the law. By taking past decisions as his authority, Lord Buckmaster makes the past speak to him as if by decree. His decision also fails because of the many difficulties it forces on his argument: it forces him to resist change, by which he risks the law's relevance to society's needs; he must deny the meritorious case, which denial implies a contradiction in his thinking or a different, suppressed location for law's authority, and finally he must choose a line of authorities not because it best expresses the law, but because it best restricts it. The failure of Lord Buckmaster's judgment implies not only that he makes the wrong choice in locating his authority for the common law, but that such a choice cannot by itself be correct.

Lord Atkin's Judgment

Lord Atkin locates the authority for his legal principles in society. He conceives of a "general conception of relations giving rise to a duty . . . based upon a general public sentiment of moral wrongdoing for which the offender must pay" (Donoghue 11). He distinguishes the ideal, moral standard that this sentiment creates, however, from a practical standard that legal rules must obey:

> But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. (Donoghue 11)

Lord Atkin locates the law's authority in the general public sentiment of moral wrongdoing but limits the scope of that authority so that law can translate the sentiment into practical rules.

If we consider this limit on the scope of moral rules from Fish's perspective, we can see that the legal rules function as an interpretive constraint. Lord Atkin's fear of a moral code freed from legal restrictions exemplifies Fish's idea that interpretive constraints are a fear of anarchy. Without legal rules, each person would be governed by a moral code. Since each person's idea of what conduct

the moral code allows and does not allow differs, we would have chaos if different people defined the moral code in different ways. Lord Atkin therefore does not express a necessary limitation, but a fear that unless interpretation is constrained to favour his interpretation, anarchy results.

James Boyd White's analysis applies also to Lord Atkin's location of authority for legal principles within a general public sentiment (White 138). A moral standard of conduct, though it may motivate a legal standard, cannot provide rules to govern society adequately. Since not everyone agrees on the content of a moral code or its limits--some putting the limits higher, others lower--the legal rules by which society expresses the code's ideal must represent a lower standard than the ideal itself. Because the law must respect diverse points of view, therefore, it always falls short of the ideal. No one should consider this a failure, however. In striving for the ideal, the law comes as close as it can to achieving that ideal at the same time that it also respects the ideal of democracy.

Lord Atkin's idea of legal authority emanating from a general public sentiment instead of from legal decisions frees him from some of Lord Buckmaster's reliance on interpretive constraints. While Lord Buckmaster must resist change to the common law, Lord Atkin can use the authorities to find different interpretations. Since judicial decisions

provide only examples of the general principle, and since judges express only enough of the principle to decide the particular case before them, the fact that no precedent entirely expresses the general principle for which Lord Atkin argues does not mean that the cases do not support his position, or that they were wrongly decided; it only means that the principles from the cases must be brought together to form a single principle.

Lord Atkin finds most of his general principle in Lord Esher's judgment in Heaven. Lord Esher decided the case for the plaintiff on the ground of a general duty of care: one owes a duty to people not to do that which could injure their person or property. However, Lord Esher's colleagues, Lord Justices Cotton and Bowen, while they concurred in the result, disagreed with Lord Esher's reasons. They thought that Lord Esher's general principle was unnecessarily wide, and impliedly disapproved by other cases. Lord Esher's statement of the law, then, is not authoritative in the formal sense, because it lacks majority support. It is authoritative for Lord Atkin's purposes in partly expressing in legal terms the moral sentiment from which he draws his general principle of the law.

Lord Atkin refrains from entirely dismissing Lord Justices Cotton and Bowen. He shares their first concern about the breadth of Lord Esher's principle (as to their second concern, Lord Atkin's entire judgment argues against

the idea that other cases impliedly disapprove of Lord Esher's principle). If the duty applied without any restrictions, there would be no end to the liability a person could face. Lord Atkin therefore combines Lord Esher's principle in Heaven with his comments in a later case, Le Lievre and another v. Gould,[8] wherein Lord Esher limits his original remarks in Heaven with a concept of nearness, or proximity. One would owe the duty only to those nearby. In this way, the law could limit and control the duty.

In Le Lievre Lord Esher expresses his notion of proximity in this way: "If one man is near to another, or near to the property of another, . . . [he owes that other a duty of care]" (497; cited in Donoghue 11). This statement helps Lord Atkin by limiting the duty of care with a concept of proximity. Lord Esher's statement could be interpreted, however, to apply only to physical proximity, which would restrict the principle too severely. People such as the defendant in Donoghue would escape liability because they were not physically near to the plaintiff. Lord Atkin therefore needs a concept of proximity that captures the idea of a person's actions affecting someone whether they are physically near or not. He says:

> [The duty is] not confined to mere physical proximity, . . . [but extends] to such close and

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[8] [1893] 1 Queen's Bench 491.

> direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. (Donoghue 12)

To obtain support from Lord Esher for this wider expression of the concept, Lord Atkin must generalize from Lord Esher's words. But he must not distort Lord Esher's meaning or expose himself to the criticism that Lord Esher's words cannot support his wider interpretation. He must, in effect, translate Lord Esher.

Lord Atkin begins his translation with Lord Esher's hypothetical case from Heaven. In Heaven, Lord Esher illustrated his judgment with the example of a good supplied to another:

> This [the duty of care] includes the case of goods, &c., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause

> danger to the person or property of the person for whose use it was supplied, and who was about to use it. (510; cited in Donoghue 12)

Lord Esher excludes the case where it would be chance as to who would use the good, if anyone used it at all, and chance as to whether anyone would use the good before a reasonable opportunity to discover a defect, or where the good would not be dangerous if defective.

Lord Atkin interprets the concepts of immediate use and of use before an opportunity of inspection to exclude the possibility of a good's condition altering with time, and "to call attention to the proximate relationship" (Donoghue 12). According to Lord Atkin, Lord Esher's exclusion of the proximate relationship, when either time or another person interposes between the manufacturer and the person consuming the good, shows that Lord Esher means that the interpositions break the proximate relationship. By expressing Lord Esher's concept in this way, Lord Atkin draws attention away from the idea of physical nearness and emphasizes the relationship between manufacturer and consumer. Lord Atkin's phrasing of the relationship suggests that the relationship, though it exists in cases of physical nearness, does not depend on physical nearness, and can apply to a case such as Donoghue.

Lord Atkin achieves his translation of Lord Esher within a framework of democratic conversation: he maintains

respect for Lord Esher's words at the same time that he translates the meaning of those words. Lord Atkin shows his respect by illustrating his wider interpretation of proximity using Lord Esher's example, rather than applying Lord Esher's statement of law to an example of his own. This strategy weakens the suggestion that Lord Atkin has somehow misconstrued Lord Esher's words, because Lord Atkin submits his concept not only to Lord Esher's words but also to his example. Lord Atkin's main point, however, that Lord Esher had the wider concept of proximity in mind when he gave his example, is likely untrue. If Lord Esher had the wider concept in mind he probably would have covered it with a wider example. Nevertheless, Lord Esher's example still fits Lord Atkin's concept, which indicates that Lord Atkin has taken from Lord Esher's words a wider meaning than what Lord Esher originally intended without doing violence to Lord Esher's words. Lord Atkin has, in effect, translated Lord Esher's words into concepts useful for Lord Atkin and his society.

Having established the foundation for his general principle within Heaven and Le Lievre, Lord Atkin provides specific examples of it in five other cases. Each case represents an anomaly to the order established in Winterbottom. In each case the plaintiff recovered from the defendant without a contract or any other way of proving

that the defendant owed him or her a duty of care.[9] George dealt with the negligently compounded hairwash, which the husband purchased but the wife used. The court allowed the wife's lawsuit in spite of the fact that she had no contract with the defendant. Even though its decision conflicted with Winterbottom, the court did not elaborate on its reasons, holding without explanation that the duty to take care extended to the person the defendant knew would use the product. Hawkins, Elliot, and Chapman, like Heaven, all dealt with workers injured by defective tools or equipment supplied to them by their respective defendants, none of whom had contracts with the plaintiffs. According to Lord Atkin, later courts suggest that the defendant's liability rests on an invitation to use the defective tool or equipment (Donoghue 14). The law does not recognize that exception, though.[10] Lord Atkin finds that the cases really depend on his formulation of a duty to take care.

Grote concerned a passenger on a train who was injured when the bridge over which his train passed collapsed. The bridge's owners had leased the use of the bridge to the railway line on which Grote was travelling. Grote had no

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[9] George v. Skivington (1869), 5 Exchequer Chamber 1.
Hawkins v. Smith (1896), 12 Times Law Reports 532.
Elliott v. Hall (1885), 15 Queen's Bench Division 315.
Chapman (or Oliver) v. Saddler & Co., [1929] Appeal Cases 584.
Grote v. Chester and Holyhead Rail. Co. (1848), 2 Exchequer Chamber 251.

[10] see Halsbury's, n. 2 above.

contract with the bridge's owners, but he successfully sued them anyway. Francis v. Cockrell explains Grote as a case of implied contract to take care that the bridge was soundly built, and this contract exists between the bridge owner and everyone who uses the bridge.[11] That explanation stretches the doctrine of contract to the breaking point. If Francis' explanation were sound reasoning, a contract could be implied wherever the courts thought there should be a duty. Lord Atkin finds that his general principle best explains the result.

In his use of these five cases, Lord Atkin contributes to his conversation with the past by refusing to accept without question what the cases say or what their commentators say about them. He looks to what they decided. In the same way that Lord Buckmaster located his source of authority for the law in one place, yet simultaneously obeyed another, Lord Atkin's five cases obey his authority for the law without expressly saying so. By extracting a common theme from their actions, Lord Atkin translates their actions, inexplicable under the prior conception of the law, into an intelligible expression of the law.

Lord Atkin continues his conversation in his analysis of Winterbottom. To this point, he has extracted the general principle and found examples of it in the cases. Winterbottom stands for the antithesis of his proposition of

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[11] (1870), 5 Queen's Bench 501, 505-506.

law. In Winterbottom, a carriage maker repaired the wheels on a carriage for its owner, but did so negligently. The owner had a contract to deliver the mails between two towns. The carriage driver was thrown when one of the wheels broke. He was permanently lamed, and sued the carriage maker. The court held that he could not recover because he had no contract with the carriage maker. If this decision correctly states the law, Donoghue must fail in her lawsuit.

Just as he interpreted Heaven and Le Lievre to find some room for his own wider principle, Lord Atkin interprets Winterbottom narrowly in order to confine it tightly to only those legal principles it can firmly support. He notes that the plaintiff framed his action in contract alone; he alleged no other ground for liability. Since the only contract was between the carriage maker and the plaintiff's employer, the only contractual duties were the ones flowing from that contract. Since the plaintiff was not a party to this contract, he could not receive any of those duties. One of those duties was a duty to take care, but it could not extend to the plaintiff. So, in Lord Atkin's view, Winterbottom stands only for the proposition that, as far as contracts are concerned, tort duties do not flow to those not party to the contract. It does not stand for the wider proposition that the duty flows only from contract, because the case was not pleaded in a way that raised that issue.

Lord Atkin's interpretations of the various cases carry serious implications for the interpretive exercise as a whole. Lord Atkin interprets Winterbottom strictly, but Le Lievre expansively. He focuses on Lord Esher's words in Heaven, but on the courts' actions in George, Hawkins, Elliott, Chapman, and Grote. Anyone searching for a method of interpretation in Lord Atkin's judgment will abandon the search in confusion. The easy, perhaps cynical, explanation for Lord Atkin's varied interpretive techniques is that he uses whatever technique serves his purpose. This utilitarian answer, however, reduces his judgment to manipulation, not conversation; it suggests insincerity on his part and asserts that his result depends on rhetoric alone, not on reason coupled with rhetoric. The respect he shows to his judicial predecessors, using their cases to establish his legal principle when he could simply overrule them or create his principle by judicial fiat, negates that explanation.

Lord Atkin's location of his source of authority in the general principle in society unifies his approach and helps explain his varying interpretive techniques. Each interpretation adjusts our understanding of the cases in a way that brings each case into line with the general principle. Heaven and Le Lievre express the general principle, but they had been narrowly interpreted. Lord Atkin opens them up. Winterbottom had been expansively

interpreted, contrary to the general principle. Lord Atkin restricts it. Throughout, anomalies to Winterbottom had appeared, from George to Grote. Lord Atkin realigns them with his location for authority.

But how does Lord Atkin legitimate this authority? His general principle and interpretation of the cases result from his idea that legal authority resides in a general moral sentiment. However, he offers no proof that the sentiment exists in the form he describes and gives no reason for it to prevail over law. James Boyd White's analysis again suggests an answer. Like Fish, White would agree that no higher authority legitimates Lord Atkin's location of legal authority (White 217). Lord Atkin's location of authority functions as a forceful interpretive act when it convinces us of its validity. However, where Fish would see Donoghue as the success of one interpretive community over its competitors, White would see Donoghue as a text through which Lord Atkin creates a new interpretive community consistent with Lord Atkin's own moral vision for his society. Lord Atkin's location of his legal authority simultaneously justifies and creates itself.

Conclusion

We originally asked how change occurs in the law. The formal model of law, that precedents from the past govern the decisions of the present, provides no assistance. Lord

Buckmaster's judgment demonstrates the failure of that model. Law must change with society. A refusal to admit the need for change would endanger the law's relevance to society. Further refusal to change would envelope the law in contradictions and inconsistencies which would further damage its authority. Law can never completely separate itself from the past. To maintain its legitimacy in a democratic society it must respect its own antiquity but retain its freedom to decide independently of the past. Law does that through an effort to continually improve on the past. Lord Atkin's judgment in Donoghue represents just such an effort. By adopting a respectful conversation with the past, Lord Atkin receives from the past what he needs to help him in resolving the problems of his day and adds to that discourse his own conversation with the future.

CHAPTER THREE

DECONSTRUCTING EQUALITY: BROWN v. BOARD OF EDUCATION and PLESSY v. FERGUSON[1]

Introduction

The cases we considered in the previous chapters, Murdoch and Donoghue, arose by accident: the Murdochs never intended their marriage to break down, and Donoghue never intended to poison herself. Brown v. Board of Education arose differently, as part of the NAACP's effort to eliminate segregation in the United States by legal means. Because Brown was framed with a political purpose, and because it pertains to one of America's most important values, equality, it invites inquiry into how judicial reasoning defines such values. Deconstruction gives us one way to make that inquiry.

Deconstruction frees literary critics from the constraints a text imposes on its own interpretation. Understanding a text involves understanding how texts privilege or suppress opposing ideas, as distinct from understanding the reasoned arguments a text otherwise makes. Deconstruction similarly permits legal critics to examine the foundations of a judicial decision's reasoning: it allows an analysis which goes beyond the validity of a judge's reasons to examine the ideas from which those reasons flow. In so doing, deconstruction forces legal

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[1] Brown is reproduced in Appendix III. Plessy is reproduced in Appendix IV.

critics to question the role of reason itself in judicial decision-making.

If we deconstruct Brown and the case it overturned, Plessy v. Ferguson, we see that although each case reaches results inconsistent with the other, their reasons support either case. Each judgment's preferred concepts, segregation in Plessy, and integration in Brown, exist within a binary hierarchy. They each try to subordinate the other, but also bear the trace of the other, and depend on the other for their meaning. As Bryce Tingle points out:

> Deconstruction's point is that regardless of the argument, these hierarchies will occur. If there is no hierarchy there is no argument. . . . An argument *must* start somewhere, and its starting place will [be a premise that will] exclude, devalue, or reduce, other competing starting points.[2]

Tingle goes on to say, "If deconstruction has been successful, the hierarchy of an argument will have been subverted and the speaker will be left with nowhere to ground her argument" (1329-1330). Because reason begins with premises on which we can never ground an argument, it can therefore never provide a sufficient justification for any decision we make or action we take.

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[2] Bryce C. Tingle, "Redeeming the Promise of Our Laws," Alberta L.R. 30 (1992): 1329.

The legal system uses reason to determine disputes, and relies on its use of reason to legitimize its decisions. Law need not fear deconstruction, however. Deconstruction only threatens reason's position within the legal system; it does not threaten the legal system itself. Deconstruction instead helps us explain how Plessy and Brown work. The reasons supporting each judgment construct the human subject in ways that support each decision. Mr. Justice Brown, in Plessy, constructs the human subject as race, while Chief Justice Warren, in Brown, makes the human subject more individual. Brown's construction allows him to avoid empathizing with those who will feel the consequences of his decision. Conversely, Warren's construction makes him feel more strongly the injustice Blacks would feel from segregation. As Brown's critics point out, however, by relying on social science data, Warren constructs a flawed vision of his subject. In this, Brown fails to tell the full story of racial inequality, and it fails to express "its central core of justice."[3]

Overview of Plessy v. Ferguson

In 1890 Louisiana passed a law requiring separate but equal accommodations for Blacks and Whites on trains. Railways had to provide separate cars for Blacks and Whites,

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[3] Richard Weisberg, Poethics and Other Strategies of Law and Literature (New York: Columbia UP, 1992) 9.

or install partitions to separate the races. If they refused, or if their conductors failed to segregate the races, both could face fines. Members of one race who insisted on sitting in a car assigned to members of the other race also faced fines and, additionally, imprisonment. The only exceptions were nurses of one race caring for children of the other, who could travel with their children in the car reserved for members of the child's race.

In June 1892 Homer A. Plessy took a seat in the Whites-only coach on the East Louisiana Railway. He was travelling from New Orleans to Covington.[4] Plessy was seven-eighths White, and his Black ancestry was not visible.[5] Still, the conductor required him to take a seat in the Blacks-only coach. Plessy refused, was arrested, imprisoned, and brought before Judge Ferguson to answer a charge of violating the act. Plessy brought proceedings to halt the prosecution, arguing that the Louisiana statute violated his Fourteenth Amendment right to equal protection of the laws.

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[4] Otto H. Olsen, ed., The Thin Disguise: Turning Point in Negro History: Plessy v. Ferguson: A Documentary Presentation (1864-1896) (New York: Humanities, 1967) 69. Olsen provides additional facts not found in the decision's reasons.

[5] Richard Kluger suggests that Plessy was collusively brought by railway companies who resented the extra expense to which the Louisiana statute put them. See Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (New York: Knopf, 1975) 73, cited in Herbert Hovenkamp, "Social Science and Segregation Before Brown," Duke L.J. (1985): 647 n139.

In 1896 the case reached the United States Supreme Court, which rejected Plessy's argument, Mr. Justice Harlan dissenting. The court ruled that separate but equal accommodations did not offend the Constitution.

Overview of Brown v. Board of Education

Plessy created the "separate but equal" doctrine in transportation, but it did not stop there. During the next fifty years the doctrine spread beyond transportation. By the early 1950's twenty-one states and the District of Columbia either permitted or required racially segregated schools, providing they were substantially equal.[6] Most jurisdictions stretched the meaning of "substantial" far beyond its breaking point; Black facilities, including schools, were often shockingly inadequate when measured against their White counterparts.[7]

In the mid-1930's, the NAACP began an assault on the institution of segregation, and on the decision which provided much of segregation's legal foundation, Plessy.[8] Through integration, the NAACP believed, Blacks could attain

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[6] Harold W. Horowitz and Kenneth L. Karst, eds., Law, Lawyers and Social Change: Cases and Materials on the Abolition of Slavery, Racial Segregation and Inequality of Educational Opportunity (Indianapolis, Kansas, New York: Bobbs-Merrill, 1969) 150.

[7] Charles L. Black, Jr., "The Lawfulness of The Segregation Decisions," Yale L.J. 69 (1960): 425-426.

[8] Jack Greenberg, Race Relations and American Law (New York: Columbia UP, 1959) 35, reproduced in Horowitz 177-181.

equality in American life. The NAACP's strategy was to submit to the court in-depth evidence about the effects of segregation, including the latest scientific findings, and then to contrast those effects with the purpose and meaning of the Civil Rights Amendments.[9] The NAACP hoped that the courts would see segregation for the national embarrassment it was and eliminate it.

The NAACP began its assault with lawsuits against professional and graduate schools (Greenberg 35-39). It reasoned that it could more easily prove inequality in higher education than in the public system. Not only were the facilities unequal, but many states, especially in the South, did not even have Black graduate and professional schools. Further, it would have been financially impossible for those states to provide separate, let alone equal, facilities (Greenberg 179). This approach would also have helped the NAACP refine its strategies and build a body of favourable precedent which it could use in the more difficult fight against public school segregation.

While the challenge to segregation in the graduate schools was pragmatic, the challenge in the public system was highly political. The cases heard under Brown

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[9] William Wayne Justice, "In Memoriam: Law Day Address at the University of Texas at Austin: The Enlightened Jurisprudence of Thurgood Marshall," Texas L.R. 7 (1993): 1101.

represented a diverse range of American geographical and political life:

> The Kansas case concerned grade school children in a northern state with a permissive segregation statute; the Virginia case involved Negro school students in a state having compulsory laws and located in the upper tier of southern states; South Carolina represented the Deep South, and Delaware the border states.[10]

Brown v. Board of Education was therefore a legal decision that arose from a profound desire for political change.

Deconstructing Plessy and Brown

Plessy and Brown each construct binary hierarchies: privileging, in Plessy's case, racial segregation over integration, and the reverse in Brown. Mr. Justice Brown, writing for the majority in Plessy, partly supports this privileging with his reasons, and we can infer other reasons from the attitudes of the time. Racial segregation, the argument goes, encourages less government interference in peoples' lives, urges a natural relationship between the races, reflects a proper exercise of legislative power (consonant with society's values and desires), and discriminates against neither race. Each of these reasons,

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[10] Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (New York: Pantheon, 1967) 344-346, reproduced in Horowitz 181-182.

however, also supports Warren's decision in Brown, justifying racial integration. Moreover, the reasons also support the critics of Brown, who argue for a return to separate education as best suited to the needs of minority children. The pliability of these reasons supports the deconstructive attack on reason as a basis for action, or for judicial decisions.

In order to see how these reasons act in this ambivalent and pliable way, and thereby to deconstruct them, we need first to review at some length the reasons themselves. We will examine these reasons consecutively as they apply to Plessy and Brown. When we consider the objective of a reduced role for the state in individual lives, we will see that segregation and integration both significantly interfere with individual freedom. When we consider the natural relationship between the races we will see that our ideas of "natural" are culturally determined and give us no assistance in defining a "natural" relationship. The same applies to arguments resting on a "proper" exercise of legislative power: our interpretations of "proper" ebb and flow between *laissez faire* and intervention. Finally, when we examine the arguments supporting both segregation and integration as race neutral policies, we will see that neither policies have race neutral effects. In the end we will see that these reasons can support or oppose either policy as easily as the other.

The first reason supporting Plessy stems from the nineteenth-century liberal goal of creating the greatest possible freedom for each individual consistent with every other individual's freedom. We can best achieve this goal by reducing government's role in people's lives to a minimum, leaving individuals free to pursue their own interests (usually economic). The combined efforts of thousands of individuals, free to do as they please, and all striving to increase their own wealth, creates more wealth for society than could any efforts of government.

Though this type of thinking mainly concerns society's economic life, it informs Brown's interpretation of the Fourteenth Amendment. Restraint guides his interpretation. The Fourteenth Amendment's "main purpose [is] to establish the citizenship of the negro" (Plessy 543). The amendment protects Black Americans' rights to vote, use the courts, own property, and so forth (Hovenkamp 650). It does not mean that Blacks are socially or racially equal, or that the courts or legislatures should try to make them so (Plessy 551-552). The Fourteenth Amendment responds only when provoked by state laws which threaten the fundamental rights it specifically protects. Otherwise, it allows individuals, either personally, or through their state and local governments, to conduct themselves as they please (Plessy 546-547).

One could also argue, however, that segregation restricts individual liberty by forcing people to duplicate public services and facilities. Even in the late nineteenth century, railways and city transit companies objected to the expense in providing extra cars to comply with the segregation laws. Railway companies also argued that such laws hindered their making interstate connections.[11] Separate educational facilities are no less wasteful, requiring extra schools, texts, teachers, equipment, and operating costs. In Brown, Warren does not use this argument against segregation, but he does note his country's "great expenditures for education" (Brown 493). If we encourage individual liberty to provide society with greater (economic) freedom, segregation diminishes that freedom. It keeps society from reaching its highest potential by forcing it to duplicate services and facilities for White and Black citizens.

Critics of Brown would note that integration, though it may restore individual freedom from laws that duplicate services and facilities, creates as much or more

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[11] Kluger 73, referred to in Hovenkamp 647 n139. Hovenkamp also notes that a Mississippi case dealing with legislation identical to Plessy's had come to the United States Supreme Court six years earlier when a railway company was indicted for failing to provide separate cars: Louisville, New Orleans &c. Railway v. Mississippi, 133 United States Supreme Court Reports 587 (1890). The railway's main concern was money; it attacked the legislation as an interference with interstate commerce, not as a denial of Fourteenth Amendment rights.

interference in individual lives as segregation. Speaking in 1962, Dr. Ewald Nyquist, then Deputy Commissioner of Education for the State of New York, spoke of "the massive official commitment on the part of the State [of New York] to recognize the problem [of racial imbalance in schools] and seek its solution."[12] New York also established offices, programs, and pilot projects to address subtle forms of discrimination, to alleviate the educational disadvantages of minority children, and to help faculties and staffs adjust to integrated schools (Conf. 67-69). This effort was in addition to bussing students into different school districts to achieve racial equality. Implementing Brown in good faith, therefore, arguably requires a greater interference in people's lives than segregation.

However, few would strongly object to such interference if it accomplished its goals. Dismantling decades of official discrimination was not an easy or inexpensive task. Does integration really work, then, by curing the harmful effects of segregation, or does it merely waste money and resources? As Hall and Henderson point out:

> [Most] of the deficiencies which Black children suffered did not derive from the nature and structure of the schools they attended, but from

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[12] Fourth Annual Education Conference on Problems of Segregation and Desegregation of Public Schools, Conference Before the United States Commission on Civil Rights, May 3-4, 1962 (Washington, D.C.: U.S. Government Printing Office, 1962): 67.

> the nature and structure of society. The social, economic and political deprivation of Black people in society curtailed the [educational] development of Black children.[13]

Hall and Henderson go on to recommend separate but truly equal education for Black students. Integration therefore becomes a superficial factor, or at least a less compelling factor, in explaining Black educational underachievement. Considering the effort expended to achieve integration, it represents as unnecessary an interference with individual liberty as segregation laws. It curtails citizens' freedom in educational choice without freeing them from racist economic deprivation.

The second reason supporting Plessy, that segregation encourages a natural relationship between the races, rests on the idea that Whites are racially superior to Blacks. This idea comes from nineteenth-century religious and scientific beliefs about the inferiority of the African race.[14] The religious view was that God had placed the different races in different parts of the world to keep them separate. The scientific view was that Blacks were

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[13] David Hall and George Henderson, "Thirty Years After Brown: Looking Ahead," Washburn L.J. 24 (1985): 234.

[14] Hovenkamp 634. For a contrary indication, see the editorial reactions to Plessy compiled in Olsen 123-130. Southern papers applauded the decision while northern papers condemned it. In fairness to Hovenkamp, his assertion concerns the views of the mass of Americans at the time, not editorial writers.

intellectually inferior to Whites, and that the offspring of interracial marriages were inferior even to Blacks. It would be only natural for Whites to separate themselves in order to avoid racial mixing, inferior offspring, and a weakened White race (Hovenkamp 629-630). Segregation therefore encourages a natural relationship between races, that being separateness.

Brown's agreement with this view shows clearly in his treatment of one of Plessy's arguments. Plessy argued that he was entitled to the reputation of membership in the White race (possibly because he could pass for a White, though the judgment does not mention this). That reputation, Plessy argued, was akin to property, which the Louisiana statute wrongly took from him. However, Brown ruled that only Whites placed in a Black car would suffer such an injury, not Blacks placed in a White car. In the former situation, a Black would have been given a reputation he did not deserve. Although he never says so explicitly, Brown clearly implies his agreement with the prevailing religious and scientific attitudes about the inferiority of Blacks.

The modern view, Brown's view, holds that integration, not segregation, reflects the natural relationship between races. Again, Warren makes no mention of this argument; but he bases his judgment on the argument's premise, that physical differences between the races make no difference in how the law must treat individual members of each race. His

reference to McLaurin v. Oklahoma State Regents[15] and his quotation from Brown at the Kansas trial level discuss individuals, not races. He refers to McLaurin's requirement that a Black admitted to a White graduate school be treated like all other students (Brown 493). The Kansas trial decision in Brown details the effects of segregation on individual children, not on a race. The natural relationship between the races, therefore, is no relationship at all: race simply ceases to be a factor in governing the manner in which people receive social services. Integration only reflects this way of thinking.

Critics of Brown argue that integration, while it strives for equality between the races, really creates homogeneity. When educated with White students, the minority Black students tend to be absorbed into the majority White culture. Absorption through a commitment to equality destroys Black culture even more effectively than suppression through a commitment to segregation. Oppressed cultures often gain strong cultural cohesion from oppression but lose their identities when the dominant culture accepts them. The proper relationship between the races, therefore, is tolerance and respect for each culture's individual differences. Separate schools for Black children, if equalized to White schools, provide the environment Blacks

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[15] 339 United States Supreme Court Reports 637 (1950), dealing with a black graduate student's application to the University of Oklahoma's doctoral program in education.

need to receive an equal education without sacrificing their cultural strengths (Hall and Henderson 234).

The third reason in support of Plessy, that segregation reflects a proper exercise of legislative power, grounds itself in democracy: people ultimately get the laws they want, no law can force people to mix against their will, and no law can make unequals equal. Brown's decision expresses all three thoughts. Society cannot accomplish racial integration with laws that conflict with the "'general sentiment of the community.'"[16] "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals" (Plessy 551). "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane" (Plessy 552). In this interpretation, segregation reflects the will of the majority, legislating realistically, accepting the limits of legislative power.

Yet integration also reflects a proper exercise of legislative power. Brown correctly says that laws can neither force people to respect each other nor make the races equal. Warren's predecessor on the Supreme Court, Chief Justice Vinson, refutes this argument by taking it to its next logical step. He points out in McLaurin that

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[16] Plessy 551, citing People v. Gallagher, 93 New York Reports 438 (1883) at 448.

removing segregation laws gives members of the minority race "the opportunity to secure acceptance by [their] fellow students on [their] own merits" (McLaurin 642). Under integration, lawmakers recognize the same proposition that segregationists maintain, that only individuals, not legislatures, can change attitudes. Through integration, legislatures give individuals the opportunity to do exactly that.

Brown's critics would still insist, however, that integration represents an improper exercise of legislative power. It encourages Black children to prove their worth in ways according to White values instead of encouraging both cultures to value each other for their unique merits. If they were given equal resources, Black schools could provide an education equal in quality to integrated or White schools and they could also provide that education in an environment that values Black cultural achievements (Hall and Henderson 234). Integration, as Brown's critics point out, promises the races an opportunity to prove their respective worth to each other, but, in a predominantly White environment, a Black person will feel some pressure to prove his or her worth in White terms, not Black. Separate education allows both cultures to flourish so that Blacks and Whites can prove their respective worth in their own ways.

Finally, Plessy favours segregation because it discriminates against neither race. The Louisiana statute

cited in Plessy speaks in race-neutral language, requiring that "'no person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, [*sic*] to them on account of the race they belong to'" (Plessy 540). The statute requires equal treatment for both races, providing "'equal but separate accommodations for the white, and colored races'" (Plessy 540). According to Brown, if Blacks see segregation as a mark of inferiority, that results only from their perception, not because the law makes them inferior (Plessy 551). Before Plessy, the Supreme Court had struck down legislation discriminating against Chinese people,[17] so it had some appreciation of the hardships that racist legislation, passed only to harass a minority group, could bring. The Louisiana statute, because it applies in a race-neutral way and guarantees equal accommodations for Blacks and Whites, does no injury to either.

Brown argues that segregation does harm members of the minority race. According to Warren, segregation deprives members of the minority race of equal educational opportunities (Brown 493-494). It does so through a cascade effect. Since Whites impose it on Blacks, segregation denotes Blacks' inferiority. This sense of inferiority affects Black children's motivation to learn and retards

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[17] Yick Wo v. Hopkins, 118 United States Supreme Court Reports 356 (1886), referred to in Plessy 550.

their educational and mental development.[18] Integration does not harm White children because they have suffered no racial discrimination in the first place. Integration, therefore, by removing the denotation of inferiority, corrects the harmful effects of a segregated education on Black children while leaving the White children unaffected.

Critics of Brown argue that integration discriminates against the Black children just as surely as segregation. It makes them feel inferior by suggesting that they can only improve themselves through exposure to White school children (Hall and Henderson 233 n26). It disrupts their social and emotional lives by removing them from their neighbourhoods and transporting them to far away schools. Separate but truly equal schools reinforce the strengths of Black schools: a sense of belonging, self-worth, spirit, and self-control (Hall and Henderson 234). Integrated schooling takes this away and harms Black children as severely as segregation.

After considering these arguments for and against, we see that each argument supports contradictory positions. An argument in favour of reducing the state's role in the lives of individual citizens both supports and opposes the separation and integration of the races. The same applies to arguments relying on some conception of the natural

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[18] Brown 494, referring to Brown at the Kansas trial level.

relationship between the races and the proper exercise of legislative power. We can even see the *effects* of integration in two distinct ways: as freeing Blacks from oppression or more effectively oppressing them than does segregation. No argument can therefore unambiguously support any position, because each argument can support both.

Furthermore, the terms *segregation* and *integration* contain traces of each other's meaning. *Segregation*, though it oppresses Blacks, helps preserve their culture. *Integration*, though it tries to free Blacks from oppression, helps destroy their culture. *Segregation* forces Blacks to have to respect their subservient place in White society, but not to have to prove their worth in White terms. *Integration* requires Blacks to prove their worth in White terms, but allows them to move up from a lower economic position. Therefore, each term, *segregation* and *integration*, simultaneously produces the other's liberating and restricting effects.

Each term also depends on the other for its own meaning. Without the fear of interracial mixing, no one could see any reason to separate the races. Without the perception of the harmful effects of segregation, no one would see a need for integration. Without a perception of Black culture suffocating under White culture, no one would see a need to educate Black children separately from White.

In other words, without the one, the other could not exist. Neither term exists as an independent ground for any action.

Deconstruction not unusually leaves us in a state approaching paralysis (Tingle 1338). We cannot choose between two opposing positions because each position resembles the other and sustains itself according to reasons which sustain the other. Each position depends on the other and tries to dominate and suppress the other. Deconstruction shows that reason cannot adequately justify any decision we make.

Beyond Deconstruction

How then do we evaluate conflicting judicial decisions? One way would be to reconsider the arguments we examined in favour of each position we deconstructed, examining not their logical consistency but their construction of the human subject. If we think of people as a collection of individuals, all similar to ourselves in every important respect, we have trouble denying them the same respect we would want to receive ourselves. If, on the other hand, we think of people as a mass, we lose the ability to empathize with them and find it easier to ignore their humanity. When we examine the arguments supporting segregation and integration in this way, we see that Plessy constructs the human subject as a mass, while Brown constructs it in

individual terms. We can then evaluate each decision based on its consideration for the people each case affected.

Plessy's arguments construct the human subject in broad, racial terms. The economic argument (people freed from government interference will produce great wealth) considers people as a mass, not individually. Each person acts selfishly, but their collective actions benefit society. The religious/scientific argument (some races are inferior) also considers people as a mass, reasoning from conclusions drawn about racial, not individual characteristics. The democratic argument (the will of the largest group prevails) and the race-neutral argument (ignore differences between races) treat races, not individuals, as equals. None of the arguments supporting Plessy constructs the human subject as an individual.

The arguments supporting Brown tend more towards an individual construction, though one not fully realized. Brown's first argument, that individual groups suffer economically from segregation, narrows the discussion from the mass to the group but stops short of considering segregation's effects on individuals. Brown's second argument, that individual, not racial characteristics must govern how we treat each other, comes much closer to considering people as individuals. The third argument, that legislation must give, not deny individuals the opportunity to demonstrate their merits, even more closely considers

peoples' individuality. However, the final argument, that segregation harms members of the minority race, retreats to a construction of people as a mass by relying on statistically derived social science studies. Brown therefore improves on Plessy's construction of the human subject but does not fully realize that subject's individuality.

Critics of Brown fasten on this construction of the individual. Though Brown vastly improves on Plessy, it still constructs the human subject in a flawed way. In particular, Hall and Henderson criticize the accuracy of the social science data that Warren used. They note that more recent studies show that "desegregation curtails the mental, emotional and spiritual development of Black children" (233 n26). If Warren had had access to more accurate studies, they suggest, he might have decided the case differently.

The solution does not lie in better social science studies: future studies will likely refute or modify those on which Hall and Henderson rely to criticize Brown just as their studies refute or modify Brown's. The solution lies, rather, in a more empathetic construction of the human subject. According to Weisberg, Brown's reliance on social science data keeps it from capturing "in its writing the essence of the human situation [it] so courageously attempted to alleviate" (9-10). Weisberg maintains that had Brown concentrated more on the historical and legal fates of

individual Black people, and less on social science data, it would have been a stronger opinion, better able to resist the erosion it now suffers (10).

Charles L. Black, Jr. makes a similar argument, though in defence of Brown. Responding to those who argued that Brown was wrongly decided in that it ignored neutral legal pirnciples, Black argues that it was correct in its affirmation of fundamental human dignity. Although he never uses Warren's arguments, he uses arguments with a human simplicity:

> When you are in Leeville and hear someone say "Leeville High," you know he has reference to the white high school; the Negro school will be called something else--Carver High, perhaps, or Lincoln High to our shame. That is what you would expect when one race forces a segregated position on another, and that is what you get. (425)

He dismisses the argument that "separate but equal" can ever be equal: Black facilities were always inferior to the White facilities, even if it was only in the little details (425-426). Segregation always reinforced the Black person's sense of inferiority. Black acknowledges the powerful legal arguments against him, but those arguments fade in their blindness to the human consequences of segregation. If these arguments justify segregation, with all its evils, he

says, they cannot be right, no matter how powerful their logic.

Conclusion

Deconstruction subverts the reasoning process by turning reason against itself. None of our ideas is ever foundational but always involves privileging one idea over another, a privileging we can never defend on logical grounds. Therefore, whenever judges use reason to justify a result, as the legal process demands they do, we can always deconstruct those reasons. To some, this means the death of law, in that judges decide cases on irrational or ideological grounds.[19] To others it expresses a simple truth about legal decisions, that judges reach whatever decisions they believe are right, then justify their decisions with logic.[20]

We can therefore understand judicial decisions if we understand the motivations supporting a decision, expressed through the reasons, but still distinct from the reasons. Brown constructs the human subject in terms that allow him to avoid empathy for Blacks; Warren constructs the human subject to create it. As Plessy, Brown, and the critics of

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[19] Tingle 1339. Tingle notes the arguments in favour of the death of law but does not endorse them.

[20] Jerome Frank, Law and the Modern World (New York: Anchor-Doubleday, 1963) 72, cited in Daniel G. Stroup, "Law and Language: Cardozo's Jurisprudence and Wittgenstein's Philosophy," Valparaiso U L.R. 18 (1984): 336 n15.

Brown suggest, the nearer we approach empathy for other people, the better our treatment of others will be.

CONCLUSION

In this thesis we examined three judicial decisions, each from a different literary perspective. We examined Martland's and Laskin's judgments in Murdoch as exercises in institutional discursive power. Both judges obscure their exercise of power with rhetorics of neutrality and impartiality. In Donoghue we used a model of democratic conversation to see how judges both maintain respect for precedent and maintain the law's relevance to society. Lord Atkin accomplishes these seemingly irreconcilable objectives by translating decisions from the past into precedents useful for the present. In Brown and Plessy we used deconstruction to show that reason provided an insufficient justification for either decision. Deconstruction forced us to look beyond reason to explain why we preferred or disliked each decision. Each decision's construction of the human subject, Plessy's as race, Brown's as individual, helped explain each decision's success or failure. In our consideration of each decision, we found a common theme: respect, or a lack of it, for the individual human subject of each judicial decision.

Martland's and Laskin's judgments in Murdoch show how judges obscure the exercise of institutional power behind a rhetoric of neutrality and impersonality. Their judicial function enhances this impression by restricting them to a decision-making role. They develop this impression

themselves in several distinct ways: they structure their decisions to give them a sense of scientific objectivity; they use passive constructions to suppress the human actor, assert rhetorical control over events, and obscure their own interpretive powers; and they each use nominalizations to enhance or diminish the litigants and trial judge, according to each judge's rhetorical purposes. Using this neutral and impartial rhetoric, Martland and Laskin exercise great institutional power. They rename the litigants and the trial judge to emphasize the power of decision they hold over them. They exclude discourses the law does not recognize and suppresses, and control those discourses the law does admit. Judges exercise great power, but they do so invisibly behind rhetorics of neutrality and impartiality.

Donoghue moves us from a question of power to one of interpretation. Lord Buckmaster interprets the decisions of the past as rules that he must obey. His approach robs him of any influence he could have over the development of the law, requiring instead that he freeze law in the past. Lord Atkin on the other hand engages in a democratic conversation with the past, wherein he respects the decisions from the past but uses them in ways that allow him to create an interpretation of the law different from that which existed before. Unlike Lord Buckmaster, Lord Atkin recognizes a middle ground between the demands of the past for his obedience, and the demands of the present for his

innovation. His judgment sa[illegible]nds without offence to either.

Our treatment of Plessy [illegible]s deconstruction to explore the reasons judo[illegible]deciding cases in particular ways. Deconstru[illegible]ysis shows us that whatever reasons support seg[illegible] in Plessy also support integration in Brown, and vice versa. Furthermore, the terms segregation and integration each bears the trace of the other and depends on the other for its meaning. Ultimately we find that we can justify neither term as a reason for deciding a case in any particular way. We can still use deconstruction, however, to explore why we find Brown more compelling than Plessy, and why we can still find fault with Brown. Brown constructs the human subject as individual to direct our concern to the problems of segregation, while Plessy constructs the human subject as race to allow it to ignore those problems. Brown nevertheless fails to construct the human subject as a fully realized individual and so fails to express fully the injustice it attempts to correct.

The common theme in our treatment of each decision has been our emphasis on each decision's humanity. In Murdoch, Mrs. Murdoch's claim threatens to expose the law's differential treatment of women: at the time law did not recognize married women's claims to their husbands' property on marriage breakdown unless those claims could be

translated into a legal remedy more suited to business applications than matrimonial. Instead of trying to modify the law so that it can better accommodate Mrs. Murdoch's claim, as Laskin tries to do, Martland restricts her voice in his judgment to eliminate her threat to the appearance of a neutral, impartial judiciary.

Lord Buckmaster in Donoghue acts in a similar fashion. He seems more concerned with maintaining legal doctrinal purity than with finding solutions to the problems of injured people. Lord Atkin recognizes the need for an imaginative solution, to overcome the difficulties stemming from legal rules created before the rise of a mass consumer society. Although Lord Atkin maintains a distance between himself and the plaintiff, discussing the facts very little, his concern for the plaintiff's case underscores his efforts to find a way to interpret the law in a way that will provide her, and others like her with a remedy within a coherent, fair set of rules.

Chief Justice Warren's decision in Brown emphasizes the human concern in law better than any of the cases we have considered. After deconstructing Brown and Plessy we see that their construction of the human subject is the only substantive difference between them, differences based on reason having collapsed under the deconstructive analysis. Warren's discussion of segregation within the context of the harm it does to children condemns the reasoning in Plessy

more effectively than any legal analysis. Brown's vision still remains inadequately realized, however. Warren's failure to fully describe the injustice of segregation in human terms both explains the difficulties Brown now faces, as American law moves away from the principles Brown established, and encourages us to improve on Warren's efforts.

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APPENDIX I

Irene Florence Murdoch *(Plaintiff) Appellant*;
and
James Alexander Murdoch *(Defendant) Respondent.*

1973: March 22, 23; 1973: October 2.

Present: Martland, Judson, Ritchie, Spence and Laskin, JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION

Husband and wife--Work done by wife in connection with husband's ranching activities--Wife's claim to interest in land and other assets owned by husband--Whether a resulting or a constructive trust.

The appellant wife and respondent husband were married in 1943. They worked, as a couple, on several ranches, until 1947, when the respondent and his father-in-law purchased a guest ranch for $6,000. The respondent paid his portion from his own assets. This property was sold in 1951 and the respondent received $3,500.

In 1952 the appellant's father died, leaving the proceeds of some life insurance policies to his wife, N. She testified that she gave part of these moneys to the appellant, who deposited them in a bank account in her own name. The respondent's evidence was that the moneys remained, throughout, the property of N.

In that year the respondent had an opportunity to acquire some grazing rights on the lands of S in return for a loan of $4,000 by the respondent to S. The funds for the loan came out of the appellant's bank account, and she testified that they represented a contribution by her to the venture. According to the respondent, the funds were borrowed by him from N.

S repaid his loan and the respondent purchased land referred to as the Ward property. The price was $4,500 of which $2,000 was paid out of the appellant's bank account. The remainder was paid by the respondent out of his receipts from the sale of the guest ranch.

In 1958 the respondent purchased three quarter-sections of land, known as the Brockway property.[424] The purchase price was $25,000. He also purchased from Brockway some farm machinery for $3,800. That amount plus the down payment on the land of $6,200 were paid out of the proceeds of the sale of the Ward property and from repayment of the S loan. Under the agreement, the respondent was obligated to pay instalments, the first for $2,000 and the remainder at $1,000 per year, and these payments were made by the respondent.

In 1964 the appellant filed a caveat against one of the quarter-sections, claiming an interest under *The Dower Act*, R.S.A. 1955, c. 90. In 1968 the respondent asked the appellant to have this caveat released in order to facilitate a sale of the Brockway property. The appellant refused.

The parties later separated and subsequently the appellant brought two actions against the respondent; *i.e.*, a claim for judicial separation whereby she was awarded $200 per month which was made to her and which judgment was not contested on appeal, and a claim alleging partnership for an undivided one-half interest in three quarter-sections of land and in all other assets of the husband. The second action was dismissed at trial and the appellant's appeal was dismissed by the Appellate Division of the Supreme Court of Alberta. On appeal to this Court, the appellant asserted an equitable claim, by way of a resulting or a constructive trust, to a one-half interest in the three quarter-sections of land and in the other assets owned by the respondent, by reason of her contribution over many years to the acquisition of those assets.

Held (Laskin J. dissenting): The appeal should be dismissed.

Per Martland, Judson, Ritchie and Spence JJ.: The finding of the trial judge rebutted the appellant's contention that the respondent accepted contributions from her toward the purchase price of the property and there was ample evidence on which that finding could properly be made. If a financial contribution was necessary in order to found the appellant's claim, it had not been established on the facts of this case.

The contention that, in the light of *Trueman v. Trueman*, [1971] 2 W.W.R. 688, a claim could be founded, apart from financial contribution, on the work performed by the appellant in connection with[425] her husband's ranching activities was not accepted. The claim in the *Trueman* case related only to an interest in the family homestead, whereas in the present case the claim was for a half interest in the husband's whole ranching business. In *Trueman*, the trial judge found a substantial contribution by the wife toward the acquisition of the farm home. In the present case, the trial judge made no such finding, but was of the view that what the appellant had done, while living with the respondent, was the work done by any ranch wife.

In the light of the evidence, and the findings of the trial judge thereon, it could not be said that there was any common intention that the beneficial interest in the property in issue was not to belong solely to the respondent, in whom the legal estate was vested. The evidence did not support the existence of a resulting trust.

Per Laskin J., *dissenting*: In making a substantial contribution of physical labour, as well as a financial contribution, to the acquisition of the successive properties culminating in the acquisition of the Brockway land, the wife had established a right to an interest which it would be inequitable to deny and which, if denied, would result in the unjust enrichment of her husband. Denial would equate her strenuous labours with mere housekeeping chores which, as has been held (see *Kowalczuk v. Kowalczuk*, [1973] 2 All E.R. 1042), will not per se support a constructive trust. Moreover, the evidence in the present case was consistent with a pooling of effort by the spouses to establish themselves in a ranch operation.

Having regard to what each put into the various ventures in labour and money, beginning with their hiring out as a couple working for wages, a declaration should be made that the wife is beneficially entitled to an interest in the Brockway property and that the husband is under an obligation as a constructive trustee to convey that interest to her. Rather than fix the size of her interest arbitrarily, the case should be referred back for inquiry and report for that purpose.[426]

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, dismissing an appeal from a judgment of MacDonald J. Appeal dismissed, Laskin J. dissenting.

Ernest R. Shymka, for the plaintiff, appellant.

Leslie R. Duncan and *James W. Rose*, for the defendant, respondent.

The judgment of Martland, Judson, Ritchie and Spence JJ. was delivered by

MARTLAND J.--The appellant is the wife of the respondent and was the plaintiff in two actions against him, which were consolidated for trial. The parties were married in 1943. The appellant left the respondent in 1968. The first of the two actions was commenced on December 4, 1968. The appellant claimed for judicial separation, custody of the infant son, alimony, maintenance for the child and an order giving to her the sole possession of a quarter-section of land referred to as the family home.

The second action was commenced on August 25, 1969, and claimed an undivided one-half interest in the North-East Quarter of Section 14, Township 19, Range 3, West of the 5th Meridian, less mines and minerals, and in the South Half of Section 23, Township 19, Range 3, West of the 5th Meridian, less mines and minerals, and in the cattle brand, cattle and other assets owned by the respondent, on the ground that she and the respondent were equal partners and that the

respondent was a trustee for her of such undivided one-half interest.

The respondent did not contest at trial the claim for judicial separation.

The judgment at trial, in the consolidated proceedings, granted a decree of judicial separation and maintenance in the amount of $200 per month. It gave custody of the infant son to the respondent. The second action was dismissed.[427]

The appellant's appeal to the Appellate Division was dismissed for the following reasons:

> It was admitted by counsel that the appellant has been accepting payments of alimony as directed in the Judgment.
>
> In our view the Judgment cannot be divided as the adjudication in respect of alimony was inextricably related to and dependent upon the fact that there was to be no division of the property.
>
> The defendant having taken advantage of the Judgment cannot therefore appeal the same. This principle was clearly enunciated by the Ontario Court of Appeal in *Pigott v. Pigott*, [1969] 2 O.R. 427.

The present appeal is from this judgment.

We are concerned in the present appeal only with the issues raised in the second of the appellant's two claims. These were fully argued before this Court on the merits, and I have reached a conclusion with respect thereto which makes it unnecessary to consider the ground relied upon by the Appellate Division for dismissing the appeal to that Court.

The facts which have to be considered are these: At the time of their marriage, in 1943, the appellant owned a couple of horses. The respondent owned some 25 to 30 horses and some eight cows. They worked, as a couple, on several ranches, until 1947, when the respondent and his father-in-law purchased a guest ranch for $6,000. The respondent paid his portion from his own assets. This property was sold in 1951 and the respondent received $3,500.

In 1952 the appellant's father died, leaving the proceeds of some life insurance policies to his wife, Mrs. Nash. She testified that she gave part of these moneys to the appellant, who deposited them in a bank account in her own name. The respondent's evidence was that the moneys remained, throughout, the property of Mrs. Nash.[428]

In that year the respondent had an opportunity to acquire some grazing rights on the lands of one Sturrock in return for a loan of $4,000 by the respondent to Sturrock. The funds for the loan came out of the appellant's bank account, and she testified that they represented a contribution by her to the venture. According to the respondent, the funds were borrowed by him from Mrs. Nash.

The appellant and the respondent, together, kept an expense book in which entries were made by both parties. In the page for the year 1955 appears an entry of a payment of

$2,000 to Mrs. Nash "borrowed for land deal". In the page for the year 1956 there is an entry "Payment F. Nash $1,000.00". In the page for the year 1957 there is an entry "Borrowed from Mrs. Nash for rent on Sturrock place $750.00".

Sturrock repaid his loan and the respondent purchased land referred to in evidence as the "Ward property". The price was $4,500, of which $2,000 was paid out of the appellant's bank account. The remainder was paid by the respondent out of his receipts from the sale of the guest ranch.

In 1958 the respondent purchased three quarter-sections of land, known as the Brockway property. It is these lands which are the subject of the appellant's claims. The purchase price was $25,000. He also purchased from Brockway some farm machinery for $3,800. That amount plus the down payment on the land of $6,200 were paid out of the proceeds of the sale of the Ward property and from repayment of the Sturrock loan. Under the agreement, the respondent was obligated to pay instalments, the first for $2,000 and the remainder at $1,000 per year, and these payments were made by the respondent. He also borrowed $12,240 from a bank to finance the purchase of livestock.[429]

In 1964 the appellant filed a caveat against one of the quarter-sections, the North-East Quarter of Section 14, Township 19, Range 3, West of the 5th Meridian, claiming an interest under *The Dower Act*, R.S.A. 1955, c. 90.

In 1968 the respondent asked the appellant to have this caveat released in order to facilitate a sale of the Brockway property. The appellant refused. Marital difficulties developed in that year, culminating in the two actions brought by the appellant against the respondent.

The appellant's claim, in the second action, was that a partnership existed between herself and the respondent and that, as such, the respondent held the lands and other assets as trustee for the parties equally. Her claim, in this regard, was based mainly on the payments which were made from her bank account, which, she alleged, were contributions to the partnership enterprise. The respondent's position was that there had never been any discussion of partnership until 1968, when separation was contemplated. He said he did not receive money from his wife, by way of contribution, but that he borrowed the funds from Mrs. Nash.

On this issue, the learned trial judge, having heard the conflicting evidence, made the following important findings of fact:

I accept the defendant's evidence that, in so far as he was concerned, the moneys that he received from time to time to assist in purchasing land or paying rent or purchasing cattle or use for other farm or ranch expenses,

he understood to belong to Mrs. Nash, and he understood and treated that money at all times as a loan made to him.

I find no evidence in the holding of any of the properties, nor in the way that cattle were sold or purchased, that would indicate that the parties intended to operate as a partnership, or that anything else by agreement was intended other than what, in fact, did take place. The land was held in the name of Mr.[430] Murdoch at all times. The cattle and the equipment were also held in his name; income tax returns were filed in his name; no declaration of partnership was ever filed under *The Partnership Act*, that I know of; and I, therefore, do not form the conclusion that the plaintiff and the defendant were partners, or that a relationship existed that would give the plaintiff the right to claim as a joint owner in equity in any of the farm assets.

Before this Court the appellant's submission was made, not on the basis of a partnership, but on the existence of a resulting trust, and reliance was placed upon the judgment of the Alberta Appellate Division in *Trueman v. Trueman*[1]. Counsel for the respondent contended that, in the light of the judgment of this Court in *Thompson v. Thompson*[2], the *Trueman* case was wrongly decided, and, in any event, that it was distinguishable.

In the *Thompson* case, which was from Ontario, the husband bought land and took title in his own name. With the assistance of a loan under the *Veterans' Land Act*, he had a house built on a lot within the parcel. Later he sold all the land except the house and lot. The wife sought a declaration that she was the sole owner of the property and entitled to all the proceeds of the sale. This claim was dismissed by the trial judge on the ground that she had made no financial contribution toward its purchase.

The Court of Appeal made its own independent finding of fact that some contribution had been made by the wife to the matrimonial home, and, on that basis, held that she was entitled to a one-half interest. Laidlaw J.A., delivering the majority reasons, stated that the rights of the parties rested in equity. He cited s. 12(1) of *The*[431] *Married Women's Property Act*, R.S.O. 1950, c. 223, which provided that in any question between husband and wife as to title to or possession of property, either party might apply in a summary way to a judge of the Supreme Court or a judge of a county or district court "and the judge may make such order with respect to the property in dispute . . . as he thinks fit". He then cited *Rimmer v. Rimmer*[3]; *Cobb v. Cobb*[4], and

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[1] [1971] 2 W.W.R. 688, 18 D.L.R. (3d) 109.

[2] [1961] S.C.R. 3.

[3] [1952] 2 All E.R. 863.

[4] [1955] 2 All E.R. 696.

Fribance v. Fribance[5]. He cited the view expressed by Sir Raymond Evershed M.R. in the *Rimmer* case at p. 866:

> On all the facts, what is the fair and just answer to be given to the question posed, having regard not merely to what occurred at the time when the property was originally purchased, but also to the light which the whole conduct of the parties throws on their relationship together as contributors to the property which was their joint matrimonial home?

The husband's appeal to this Court was allowed. Judson J., who delivered the majority reasons, mentioned the above cases, as well as others, and said, at pp. 13 and 14:

> But no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation and the fact the property in question is the matrimonial home. Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application and the exercise of the same discretion when there is no financial contribution when the other attributes of the matrimonial partnership are present. However, if one accepts the finding of the learned trial judge, the basis for the application of the rule at its present stage of development in England is to be found in the present case.
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> The judicial use of the discretionary power under s. 12 of *The Married Women's Property Act*, R.S.O. [432] 1950, c. 223, in property disputes between husband and wife has not developed in the same way in the common law provinces of Canada as it has in England. There is no hint of it in this Court in *Minaker v. Minaker*, [1949] S.C.R. 397, and there is an implicit rejection of the existence of any such power in *Carnochan v. Carnochan*, [1955] S.C.R. 669, where Cartwright J. stated that the problem was not one of the exercise of a discretionary power but one of application of the law to ascertained facts. Further, in *Jackman v. Jackman*, [1959] S.C.R. 702, where the Alberta Court of Appeal, in reversing the judgment at trial, had applied the line of decisions above referred to, this Court declined to support the exercise of the discretionary power in the rebuttal of the presumption of advancement in circumstances where the husband's contribution was very large and where it should not have been difficult to draw an inference of a joint interest in the matrimonial home.
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> If a presumption of joint assets is to be built up in these matrimonial cases, it seems to me that the better course would be to attain this object by legislation rather than by the exercise of an immeasurable judicial discretion under s. 12 of *The Married Women's Property Act*.

The proposition that s. 17 of the English *Married Women's Property Act, 1882*, which is similar to the Ontario provision above mentioned, gave to a Court a discretionary jurisdiction to disregard property rights and to pass proprietary interests from one spouse to another was rejected by the House of Lords in *Pettitt v. Pettitt*[6].

In Alberta, as Johnson J.A. points out in the *Trueman* case, s. 17 of the English Act never became a part of the

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[5] [1957] 1 All E.R. 357.

[6] [1969] 2 All E.R. 385, [1970] A.C. 777.

provincial law. In that province, for a great many years, the position of a wife in relation to the matrimonial home has been protected by *The Dower Act*, R.S.A. 1970, c. 114. This Act prohibits a disposition of the homestead by a married person without the written consent of the spouse, or a judge's order dispensing with such consent, and also makes[433] any testamentary disposition of the homestead, or its devolution on intestacy, subject to a life estate in the surviving spouse. Prior to 1948, the benefits of the Act applied only in favour of the wife. A homestead comprises the parcel of land on which the owner's residence is situated. The parcel, in respect of a ranch, as in this case, does not exceed a quarter-section. The appellant in this case enjoys the protection of this Act, and, as previously noted, filed a caveat in respect of that interest.

Reverting to the *Thompson* case, it was decided that, on the finding of the trial judge that it was the husband who had provided the purchase money, and who took title in his own name, there was no basis for the imposition of a trust. The finding of the trial judge in the present case rebuts the appellant's contention that the respondent accepted contributions from her toward the purchase price of the property. The finding is that the funds received from her bank account were regarded by the respondent as loans from Mrs. Nash, which he recognizes as payable, and there is ample evidence on which that finding could properly be made. If a financial contribution is necessary in order to found the appellant's claim, it has not been established on the facts of this case.

The appellant contends, however, that, in the light of the *Trueman* decision, a claim can be founded, apart from financial contribution, on the work performed by the appellant in connection with her husband's ranching activities. The circumstances of the *Trueman* case were these: The husband purchased a quartersection of land for $1,760. The down payment of $435 was financed by a bank loan to the husband. A house was built and moved on to the land. The land was farmed for nine years. The stock and machinery were then sold and the farm rented, the husband receiving the rent.[434]

The evidence showed that, in addition to doing the usual work of a farm wife, the wife worked in the fields, operated farm machinery, and contributed to the fund realized from the sale of grain and livestock, which was used to pay for the property. She helped to build the house. Because of her work on the farm, no hired man was employed. The husband was frequently ill, and she performed the extra duties required.

The trial judge had found that there was no doubt as to the wife's substantial contribution toward the acquisition of the property. The husband, on his examination-in-chief,

had been asked: "When you went to purchase this property what was your intention with respect to ownership?" The answer was: "Well I thought we was going to go along as a team."

The trial judge felt obliged to dismiss the wife's claim for a declaration that she had an interest in the family home, in view of the *Thompson* case. The Appellate Division allowed her appeal, relying upon two judgments of the House of Lords, subsequent to the *Thompson* case, in *Pettitt v. Pettitt, supra*, and *Gissing v. Gissing*[7]. The following passages from Lord Reid's judgment in the latter case, at p. 782, were quoted:

> I take a common case where husband and wife agreed when acquiring the family home that the wife should make a financial contribution and the title to the house was taken in the husband's name. That contribution could take one or other of two forms: the wife might pay part of the deposit and instalments or she might relieve the husband of some of his obligations, eg by paying household bills, so as to enable him to pay for the house. The latter is often the more convenient way. [435]
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> . . .
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> If there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him?

The Court was of the opinion that these propositions were consistent with the views expressed by Judson J. in the first paragraph of the portion of his reasons previously quoted. The Court's conclusion was as follows:

> In most of the English cases, the contribution is made by cash contributed by the spouse. It is evident from the passage from the judgment of Judson J. in the *Thompson* case which I have quoted that this principle should logically extend beyond financial contributions. Surely if services which the appellant rendered relieved the respondent from employing extra help to do the work which the appellant did, the value of such work should be counted as a contribution both to the purchase price of the farm and to the improvement created by the building of the house.
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> Leaving aside consideration of her work as a farm wife and mother, the share of the work usually done by the husband and his hired hands that was assumed and done by the appellant, has, I think, earned her an equal share in the ownership of the property and there will be a declaration accordingly. [436]

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[7] [1970] 2 All E.R. 780.

Assuming that the conclusion reached in the *Trueman* case was, on its facts, correct, it does not follow that the appellant should succeed in the present appeal. The English decisions in *Pettitt and Gissing*, as well as those to which reference was made in the *Thompson* case, were all concerned with the determination of interests in what has been called the matrimonial home. The *Trueman* case dealt with a claim for an interest in the family "homestead". The present case involves a claim to an interest in three quarter-sections of land and in all the other assets of the respondent. It is, in substance, a claim to a one-half interest in the respondent's ranching business and it is probably for that reason that the action, as formulated, sought a declaration of a partnership interest.

In both *Pettitt* and *Gissing*, the claims for an interest, in the one case by the husband, and in the other by the wife, were rejected. In *Pettitt*, the husband had done interior decorating in the house and had laid a lawn, constructed an ornamental well and had built a side wall. In *Gissing*, the wife had provided furniture and equipment for the house and had paid for improving the lawn.

In *Trueman*, the trial judge found a substantial contribution by the wife toward the acquisition of the farm home. In the present case, the trial judge has made no such finding, but was of the view that what the appellant had done, while living with the respondent, was the work done by any ranch wife.

It has already been noted that the *Pettitt* decision disposed of the idea that s. 17 of the *Married Women's Property Act, 1882* gave a discretionary jurisdiction to pass proprietary interests from one spouse to the other. It has also[437] been noted that in both *Pettitt* and *Gissing* the claims were refused. The effect of the reasons in these decisions is that, apart from an application under s. 17, it may be possible, on the evidence, to establish the existence of a resulting trust in favour of one spouse as against the other, who has the legal title to the matrimonial home. However, in each of these cases, all five of the members of the Court who sat wrote separate reasons, which were, in light of the judgment rendered, *obiter dicta*. It is difficult to state the ultimate result of the reasons rendered. I will, however, accept the headnote in the *Gissing* case, in the All England Reports, as correctly summarizing the view of the Court:

> (i) Where (a) both spouses contributed towards the purchase of the matrimonial home which was conveyed into the name of one spouse only, (b) there was no discussion, agreement or understanding between the spouses as to sharing the beneficial interest in the matrimonial home, and (c) the spouse in whose name the matrimonial home was purchased evinced no intention that the contributing spouse should have a beneficial interest therein, the question whether the contributing spouse is entitled to a

beneficial interest in the matrimonial home is a matter dependent on the law of trust.

If this be accepted as an accurate summary of the decision, I would point out that there is no evidence, on the findings of fact made by the trial judge in this case, that the appellant did contribute toward the purchase of the property in issue, and, further, that the property in which she claims an interest is not restricted to the matrimonial home.

I am in agreement with the view expressed by Lord Diplock, at pp. 789 and 793, as to what is necessary to be established in order to prove the existence of a resulting trust:

> Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the[438] beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of "resulting, implied or constructive trusts". Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by s 53(1) of the Law of Property Act 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application.
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> A resulting, implied or constructive trust--and it is unnecessary for present purposes to distinguish between these three classes of trust--is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.
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> . . .
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> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.[439]

In my opinion, in the light of the evidence in this case, and the findings of the trial judge thereon, it cannot be said that there was any common intention that the beneficial interest in the property in issue was not to belong solely to the respondent, in whom the legal estate was vested.

I would dismiss this appeal with costs.

LASKIN J. (*dissenting*)--The substantive issue in this appeal is whether the appellant wife is entitled to an interest in certain assets, including land, standing in the name of her husband from whom she is separated. She asserts an equitable claim, by way of a resulting or a constructive trust, to a one-half interest, by reason of her contribution of money and labour over many years to the acquisition of those assets.

In her pleadings, by an amendment allowed at trial, the appellant also alleged a partnership, and the reasons of the trial judge dismissing her claim focus mainly on that allegation. The only sentence in his brief reasons that could conceivably relate to the issue as argued in this Court was one coupling his rejection of the allegation of partnership with a refusal to find that (in his words) "a relationship existed which would give the plaintiff the right to claim as a joint owner in equity in any of the farm assets". Although I do not regard this as meeting the case advanced on behalf of the appellant, it appears to be founded on the trial judge's view that there was "a normal husband and wife relationship until the parties separated". On the evidence, to which I will refer, I cannot share the trial judge's appreciation of normalcy. The wife's contribution, in physical labour at least, to the assets amassed in the name of the husband can only be characterized as extraordinary. In so far as the trial judge's holding against the appellant rests on his view that she discharged a role that was not beyond what is normally expected of a wife, I disagree with it and approach her claim on a different footing. [440]

I am the less reluctant to do so because the Alberta Appellate Division did not deal with the merits and hence this Court is, in fact, the first appellate Court in respect to them. The Alberta Appellate Division held that the wife was precluded from pursuing her appeal on her claim for a division of property because she had accepted payments of alimony under a judgment of the trial judge in a separate action for judicial separation and alimony which was consolidated for trial with the claim now in appeal. It relied upon *Pigott v. Pigott*[*], which, in my view, is inapplicable. In the *Pigott* case, [441] interim alimony was fixed by taking into account what the husband had been directed to pay under a previous partition order. The husband did not appeal the interim alimony order but sought to appeal the partition order which he had invoked in having the amount of interim alimony reduced. The Ontario Court of Appeal quashed the appeal because he had acted upon the partition order to his advantage. No such situation is present here. There has been no appeal by the husband from

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[*] [1969] 2 O.R. 427.

the order for alimony, and the wife was certainly entitled to take the fruits of the judgment as it stood and to ask for more. She was not in the position of approbating and reprobating at the same time, as was the husband in the *Pigott* case.

I have had the advantage in preparing these reasons of reading those written by my brother Martland. Since the conclusions which I draw from the facts lead me to a different result in law from that which he has reached, it is best that I make my own summary to indicate how and why my view differs from his.

Central to my assessment is the uncontradicted evidence of the physical labour which the wife contributed to the spouses' well-being and evidence of what she otherwise put into the matrimonial stock. First, as to the physical labour. For some four years after the marriage in November 1943, the spouses worked on various ranches, hiring themselves out as a couple. The husband broke horses and looked after cattle and the wife did the cooking for the work crews and assisted her husband in some of his work. They were paid $100 per month, which was received by the husband, and got their board and lodging. In 1947, the husband and the wife's father bought a piece of ranch property jointly, each putting up $3,000. Some of this--the parties do not agree in their evidence as to how much--came from their earnings as a hired couple. This property, the Bragg Creek property, was operated as a dude ranch until it was sold in 1951 and the husband realized $3,500 as his share of the proceeds.

During most of the period of ownership of the Bragg Creek property the husband was an employee of a stock association, working for it during the day away from home for some five months of the year. He remained so employed up to the time the spouses separated in October 1968 and was still so employed at the time of the trial. In the result, it was the wife who, during her husband's absence for the five months of the year, performed the work which was involved in operating the dude ranch as a[442] joint venture with the wife's father. Thus, she accompanied guests on pack trips, on fishing and hunting hikes and did other necessary chores around the ranch. Her contribution of physical labour beyond ordinary housekeeping duties continued during the some four years that the spouses rented a property known as the Sturrock farm in which they had grazing rights and the right to mow and dispose of the hay on the property. One of the factual issues in this case concerned the source of the money, about $5,000 used to prepay the rent on the Sturrock farm, and I will return to this later in these reasons.

In 1956, the spouses bought the 160-acre Ward property, on which they had been living as tenants, for $4,500, making a down payment of $3,000. Again, there was a difference of

view by the parties as to the source of this money. Undeniably, however, the wife again did a husband's work, during his periods of absence, in operating this ranch property. The Ward property was sold in late 1958 for $8,000 and the Brockway property consisting of 480 acres, three quarter-sections, was bought for $25,000. A down payment was made of $10,000 but of this sum $3,800 represented the purchase price of farm machinery which was part of the deal. The balance of the purchase price was payable in annual instalments of $2,000 for the first year and $1,000 per year thereafter. Again, the wife did her husband's work on this property during the periods he was away on his stock association work.

The wife filed a caveat in 1964 against one of the Brockway quarter-sections as an assertion of an interest under *The Dower Act*, R.S.A. 1955, c. 90. Relations between the spouses had[443] deteriorated by that time, and they were severed completely in 1968 after the wife refused her husband's request to release the caveat to enable him to sell the Brockway property. Subsequently there was a physical clash which resulted in the hospitalization of the wife. The parties separated, with the husband remaining in possession of the Brockway property and everything in and on it. The wife was left with nothing, and her two actions followed.

The wife's contribution of physical labour to the various ranching operations on the properties successively occupied by the spouses is detailed in her evidence in chief as follows:

> Q. Now, you said earlier that you did certain kinds of work on ranches. We haven't dealt with the Ward property, the Sturrock property and the Brockway property. Did you do any work on those properties?
>
> A. Yes, I worked on all of them.
>
> Q. Could you tell the court, as briefly as you can, the nature of the work you did?
>
> A. Haying, raking, swathing, mowing, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done. I worked outside with him, just as a man would, anything that was to be done.
>
> Q. Was your husband away from these properties?
>
> A. Yes, for five months every year.

Q. Five months of every year?

A. Yes. He worked for the Stock Association in the Forestry Service.

Q. So that you would do the chores and other work around the farm?

A. I did until our son was old enough, then he helped, but until we had him I did it on my own, except for the few, you know, two or three weeks in the summer time when we would hire extra help then for stacking, but I was always[444] still out there helping to rake and take lunches and gas out into the field.

The respondent husband admitted on discovery that his wife did the necessary chores while he was away on his other work, and his evidence in chief on this matter was as follows:

Q. Over the years what were your wife's activities around the ranch?

A. Oh, just about what the ordinary rancher's wife does. Most of them can do most anything.

This answer appears to be the basis of the trial judge's conclusion that the wife made only a normal contribution as wife to the matrimonial regime, a conclusion carrying the legal signification that it gave her no foundation, upon the breakdown of the marriage, to claim an outright interest in the assets, standing in her husband's name, which were accumulated during the cohabitation of the spouses.

The evidence as to the wife's financial contribution falls into several categories. It is clear that the remuneration paid to the husband for the period that the spouses were engaged as a couple was in part earnings of the wife, and the husband used some of the money in making the down payment on the Bragg Creek property. The proceeds of the sale of that property were in part at least used for the purchase of the Ward property, and the proceeds of the sale of that property were used in part for the down payment on the Brockway property. It is undeniable, therefore, that the appellant wife made a financial contribution, that was more than nominal, to the various purchases of property taken in the husband's name. The trial judge, unfortunately, failed to deal with this although it was plain enough on the record.

A second type of financial contribution made by the wife was in the purchase of all household[445] furniture and

appliances, save a stove which the husband bought. The wife was not allowed to take any of those articles with her when she and her husband separated. There is no contradiction of her evidence that it was her money that purchased the household effects. The trial judge made no reference to this matter in his reasons but it is a factor in the case which operates in the wife's favour.

A third situation involving an alleged financial contribution by the wife relates to the prepayment of rent on the Sturrock farm and to the down payment on the Ward property. The mother of the appellant wife had come into some insurance money on the death of her husband and she gave the money to her daughter who banked it in her name. The daughter drew on this account to provide $4,000 for the rent on the Sturrock farm and $2,000 as a down payment on the Ward property. The husband's position was that these outlays were by way of a loan to him from his mother-in-law and that, as indicated by his records, he so treated them and had made repayments accordingly. The trial judge dealt with the conflicting evidence on this matter as follows:

> The money that Mrs. Nash received by way of insurance policies on her husband's life I find was turned over by her to the plaintiff and was banked by the plaintiff in her name. I find no quarrel with the suggestion of Mrs. Nash that this money was considered to be her daughter's money to use as her daughter saw fit. However, this relationship between the mother and daughter was a relationship between them, and was not a relationship which involved the defendant. I accept the defendant's evidence that, in so far as he was concerned, the moneys that he received from time to time to assist in purchasing land or paying rent or purchasing cattle or use for other farm or ranch expenses, he understood to belong to Mrs. Nash, and he understood and treated that money at all times as a loan made to him. [446]

Although clarity could have been better served if this is intended as a finding that the money was a loan from the wife's mother, I need not quarrel with it in the view that I take of this case.

The position as between the parties at the time of their separation was, therefore, that the wife had contributed considerable physical labour to the building up of the assets claimed by the husband as his own and had also made a modest financial contribution to their acquisition. The legal question is whether she can now claim a one-half or any interest in them when the husband has legal title and possession, denies any arrangement for the sharing of the assets and the wife is unable to produce any effective writing to support a division in her favour.

The legal proposition upon which the respondent husband rests is that his wife's work earned her nothing in a share of the assets in his name when it had not been recognised by him in a way that would demand an apportionment, that is by proof of an agreement or at least of a common intention that

she should share in the acquisitions. In my view, this is to state too narrowly the law that should apply to the present case.

The case is one where the spouses over a period of some fifteen years improved their lot in life through progressively larger acquisitions of ranch property to which the wife contributed necessary labour in seeing that the ranches were productive. There is no reason to treat this contribution as any less significant than a direct financial contribution, which to a much lesser degree she also made. The relations of husband and wife in such circumstances should not be allowed to rest on the mere obligation of support and shelter which arises from the fact of marriage, where the husband is able so to pro[447]-vide for an impecunious wife, nor on her statutory dower rights under the law of Alberta. They represent a minimum, and reflect the law's protection for a dependent wife. I do not regard them as exhausting a wife's claim upon her husband where she has, as here, been anything but dependent.

The most relevant decision in this country to date on the point in issue here has been the judgment of the Alberta Appellate Division in *Trueman v. Trueman*[9]. Counsel for the respondent husband invited this Court to say that the case was wrongly decided or, if not, that it was distinguishable on its facts so as to exclude in the present case the application of the legal principles upon which it proceeded. The findings of fact in the *Trueman* case were that the husband had provided the down payment for the purchase of the farm on which the spouses built the matrimonial home but that the wife assisted materially in the building of the house, and worked in the field operating the farm machinery thus helping in the realization of the revenue which was used to pay the purchase price of the farm. No hired man was employed and in working as she did (her husband was frequently ill and unable to work) she assumed duties beyond what a farm wife was expected to do. I point to this view of the Alberta Appellate Division in contrast to the assessment of the wife's work in the present case by the trial judge, an assessment which, I have already indicated, is unacceptable.

In holding that the wife (who sued for a declaration after dissolution of her marriage) was entitled to a one-half interest in the farm[448] property, Johnson J.A. speaking for the Court founded himself on principles stated by Lord Reid in *Pettitt v. Pettitt*[10], as expanded in *Gissing v. Gissing*[11], at p. 896. He also concluded that a declar

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[9] [1971] 2 W.W.R. 688, 18 D.L.R. (3d) 109.

[10] [1970] A.C. 777.

ation in favour of the appellant wife on the facts in the case was quite consistent with what was said by Judson J. for the majority of this Court in *Thompson v. Thompson*[12]. I wish to examine the foregoing three cases and other authorities, including recent English cases on the subject under review.

I begin with *Thompson v. Thompson* where there was a division of opinion in the provincial Court of Appeal and in this Court on whether on the evidence the wife had made a financial contribution to the purchase of the property on which the matrimonial home was built. The trial judge had found that the husband had purchased the land with his own money, and this view was sustained by a majority of this Court speaking through Judson J. The majority reasons did not advert to a point taken by Kerwin C.J.C. in dissent that the spouses had each expended physical labour in building the house and in working the land in conjunction with others. Three points emerge from the reasons of Judson J. First, he rejects the view that any financial contribution by the wife entitles her to a one-half interest. I agree that there can be no such arbitrary division, and recent English cases indicate that the extent of a wife's interest must depend on the extent of her contribution: see, for example, *Gissing v. Gissing*, at p. 897; *Falconer v. Falconer*[13], at p. 452 where Lord Denning, after adverting to *Gissing v. Gissing*, said: "It is not in every case that the parties hold in equal shares. Regard must be had to their respective contributions. This confirms the practice of this Court. In quite a few cases we have not given half-and-half but something[449] different."

I agree as well with the second point that emerges from the reasons of Judson J. in the *Thompson* case, and that is that a joint assets doctrine cannot be founded on the discretionary power given by s. 12 of the *Ontario Married Women's Property Act*, now R.S.O. 1970, c. 262, for the adjudication on summary application of disputes between husband and wife as to title to or possession of property. This same view was taken some years later by the House of Lords in *Pettitt v. Pettitt*[14], in respect of the prototype provision in the similarly named English Act. We are not concerned with such a provision here not only because it is not invoked in this case but because no such provision exists in any relevant Alberta legislation.

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[11] [1971] A.C. 886.

[12] [1961] S.C.R. 3.

[13] [1970] 3 All E.R. 449.

[14] [1970] A.C. 777.

The third point in the *Thompson* case is that to which Johnson J.A. in the Alberta Appellate Division referred and which, he found, did not inhibit his freedom to make an order in favour of the wife on a trust basis. After dealing with and rejecting the proposition that any contribution, however modest, entitled the wife to a one-half interest Judson J. went on as follows (at p. 13 of [1961] S.C.R.):

> But no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation and the fact the property in question is the matrimonial home. Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application and the exercise of the same discretion[450] when there is no financial contribution when the other attributes of the matrimonial partnership are present. However, if one accepts the finding of the learned trial judge, the basis for the application of the rule at its present stage of development in England is not to be found in the present case.

I read this passage as emphasizing the illogic of an arbitrary half-interest division in favour of a wife who has made little or no financial contribution. It does not relate to the equity considerations that may warrant a Court in declaring some entitlement in a wife who has contributed substantially in money or in labour to the acquisition of property taken in the husband's name.

Certainly, to say that a wife has no invariable right to a half-interest by reason of a financial contribution however modest is not to say that she must be denied any interest, where her contribution in money or in money's worth has been substantial, merely because legal title is in the husband. We are nearing a century (and it is more than that as to some States of the United States: see Schouler, *Marriage, Divorce, Separation and Domestic Relations*, vol. 1, 6th ed., 1921, at pp. 311 ff.) since married women's property legislation was enacted in England and in Canada. It offered merely mute testimony to the independent legal personality and capacity of the wife. As was said in a recent piece of periodical literature on the subject (see Foster and Freed, *Marital Property Reform: Partnership of Co Equals?*, in (1973) 169 New York L. J. for March 5, 23 and April 27) "it is relatively meaningless for a wife to acquire legal capacity to own property if she does not have any, or to become entitled to keep her own wages if she is forced to stay at home and raise children, or employment opportunities are limited. . . ."

No doubt, legislative action may be the better way to lay down policies and prescribe condi[451]-tions under which and the extent to which spouses should share in property acquired by either or both during marriage. But the better way is not the only way; and if the exercise of a traditional jurisdiction by the Courts can conduce to

equitable sharing, it should not be withheld merely because difficulties in particular uses and the making of distinctions may result in a slower and perhaps more painful evolution of principle.

A Court with equitable jurisdiction is on solid ground in translating into money's worth a contribution of labour by one spouse to the acquisition of property taken in the name of the other, especially when such labour is not simply housekeeping, which might be said to be merely a reflection of the marriage bond. It is unnecessary in such a situation to invoke present-day thinking as to the co-equality of the spouses to support an apportionment in favour of the wife. It can be grounded on known principles whose adaptability has, in other situations, been certified by this Court: *cf. Deglman v. Guaranty Trust Co. of Canada and Constantineau*[15]. The Court is not being asked in this case to declare an interest in the appellant merely because she is a wife and mother; nor is there here an implicit plea for a community property regime to be introduced by judicial fiat. Common law jurisdictions in the United States, which also has community property States, have recognized that it is within a court's equity powers to adjudicate property rights between husband and wife: see Clark, *Law of Domestic Relations in the United States*, 1968, at pp. 449 ff. In *Garver v. Garver*[16], the Supreme Court of Kansas in drawing a distinction between alimony (as based on the husband's common law obligation to support his wife) and division of property said (at p. 410), "division of property . . . has for its basis the wife's right to a just and equitable share of that property which has been[452] accumulated by the parties as a result of their joint efforts during the years of the marriage to serve their mutual needs"; and see also *Engebretsen v. Engebretsen*,[17] which is factually similar to the present case. Since, in my view, the wife has clearly established here a factual basis for a share in the Brockway property, the only remaining question is whether there are any obstacles in legal principle against a declaration in her favour.

The House of Lords canvassed this and other matters in the *Pettitt* and *Gissing* cases. As Lord Reid pointed out in the latter case, much wider questions were raised in the two cases than were necessary for the decisions in them, but this was because of the unsatisfactory state of the law as it had been developing in the English courts. The *Pettitt* case, on its facts, involved a claim by a husband to a

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[15] [1954] S.C.R. 725.

[16] (1959), 334 P.2d 408.

[17] (1942), 11 So.2d 322 (Fla).

beneficial interest in land purchased by his wife by reason of improvements made to a house thereon. His claim was disallowed, however, because there was no evidence of an agreement or of any common intention that the husband should have an interest by reason of the work he did on the house which the wife alone had purchased; such an agreement or common intention was held to be necessary where improvements, at least if not substantial, were concerned. Subsequent legislation, s. 37 of the *Matrimonial Proceedings and Property Act*, 1970 (U.K.), c. 45, has outflanked the *Pettitt* case by providing that subject to any agreement to the contrary a spouse who has contributed substantially in money or money's worth to the improvement of real or[453] personal property in which either or both has or have a beneficial interest is entitled to a share or enlarged share, as the case may be, in the beneficial interest. In the *Gissing* case, the House of Lords agreed with the finding of the trial judge that the claiming divorced wife had not made, either directly or indirectly, any substantial contribution to the purchase of the house standing in her former husband's name and hence it rejected her contention that she was entitled to a beneficial interest. The facts in the present case distinguish it markedly from the *Pettitt* and *Gissing* cases.

The wider questions raised in those cases included, first, the effect of s. 17 of the *Married Women's Property Act* (similar to s. 12 of the Ontario Act referred to in the *Thompson* case), a matter irrelevant to the present appeal, and, second, the circumstances under which trust doctrines could be invoked to support claims by one spouse or former spouse to an interest in property formally held as to legal title by the other. It is this second matter that controls the disposition of the present appeal.

On one point, a starting point, there can be no dispute. The fact that legal title is vested in a person does not necessarily exclude beneficial interests in others. Evidence of a common intention before or at the time of acquisition, qualifying the formal legal title, is generally admissible. A long-established presumption of a resulting trust operates in equity in favour of a purchaser who takes title in another's name, and this presumption, a rebuttable one, is equally[454] operable in favour of one who contributes some but not all of the purchase money. This is as true in the relations of husband and wife as it is in the relations of strangers. (For present purposes, it is unnecessary to consider the effect of the presumption of advancement on an alleged resulting trust in favour of a husband, it is the wife who is claiming here.)

What complicates the application of a presumption of a resulting trust, in its ordinary signification arising from a contribution of purchase money to the acquisition of property, is that in the case of husband and wife the

contribution may relate only to a deposit on property which has to be carried on mortgage or instalment payments for many years; that where the spouses have lived together for some years after the acquisition, without any thought having been given to formalizing a division of interests claimed upon the breakdown or dissolution of the marriage, the presumption (as a mere inference from the fact of payment of money) is considerably weakened if not entirely dissipated; and that there is no historical anchorage for it where the contribution of money is indirect or the contribution consists of phys[455]-ical labour. Attribution of a common intention to the spouses in such circumstances (where evidence of the existence of such an intention at the material time is lacking) and resort to the resulting trust to give it sanction seem to me to be quite artificial.

The appropriate mechanism to give relief to a wife who cannot prove a common intention or to a wife whose contribution to the acquisition of property is physical labour rather than purchase money is the constructive trust which does not depend on evidence of intention. Perhaps the resulting trust should be as readily available in the case of a contribution of physical labour as in the case of a financial contribution, but the historical roots of the inference that is raised in the latter case do not exist in the former. It is unnecessary to bend or adapt them to the desired end because the constructive trust more easily serves the purpose. As is pointed out by Scott, *Law of Trusts*, 3rd ed., 1967, vol. 5, at p. 3215, "a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be injustly enriched if be were permitted to retain it. . . . The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property"; and, again, at p. 3413, quoting Judge Cardozo "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."

Why the device of the constructive trust is more appropriate in a case like the present one is pointed up by what Lord Reid said in the Gissing case, at p. 896 of [1971] A.C., as follows:

> As I understand it, the competing view is that, when the wife makes direct contributions to the purchase by paying something either to the vendor or to the building society which is financing the purchase, she gets a beneficial interest in the house although nothing was ever said or agreed about this at the time: but that, when her contributions are only indirect

> by way of paying sums which the husband would otherwise have had to pay, she gets nothing unless at the time of the acquisition there was some agreement[456] that she should get a share. I can see no good reason for this distinction and I think that in many cases it would be unworkable.

It appears to me that Lord Diplock in the *Pettitt* case viewed the matter in the same way in speaking as he did (although this view did not attract majority support) at p. 823 of [1970] A.C.:

> Unless it is possible to infer from the conduct of the spouses at the time of their concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts upon the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses.

Although later English cases have continued to speak in terms of the resulting trust both where the financial contribution has been direct (see *Heseltine v. Heseltine*[18]), and where it has been indirect (see *Falconer v. Falconer*[19]), some of them are more easily explicable on the basis of a constructive trust: see *Hargrave v. Newton*[20]: *cf. Hussey v. Palmer*[21]. What has emerged in the recent cases as the law is that if contributions are established, they supply the basis for a beneficial interest without the necessity of proving in addition an agreement (see *Hazell v. Hazell*[22]), and that the contributions may be indirect or take the form of physical labour (see *In re Cummins*[23]).

It is the fact that the great majority of the decided cases concern the matrimonial home, but the applicable law is not limited to that kind of property: see *In re Cummins, supra*. In[457] making the substantial contribution of physical labour, as well as a financial contribution, to the acquisition of successive properties culminating in the acquisition of the Brockway land, the wife has, in my view, established a right to an interest which it would be inequitable to deny and which, if denied, would result in the unjust enrichment of her husband. Denial would equate her strenuous labours with mere housekeeping chores which,

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[18] [1971] 1 All E.R. 952.

[19] [1970] 3 All E.R. 449.

[20] [1971] 3 All E.R. 866.

[21] [1972] 3 All E.R. 744.

[22] [1972] 1 All E.R. 923.

[23] [1971] 3 All E.R. 782.

an English Court has held, will not per se support a constructive trust: see *Kowalczuk v. Kowalczuk*[24]. Moreover, the evidence in the present case is consistent with a pooling of effort by the spouses to establish themselves in a ranch operation.

Having regard to what each put into the various ventures in labour and money, beginning with their hiring out as a couple working for wages, I would declare that the wife is beneficially entitled to an interest in the Brockway property and that the husband is under an obligation as a constructive trustee to convey that interest to her. Rather than fix the size of her interest arbitrarily, I would refer the case back for inquiry and report for that purpose. I am not called upon in this appeal to determine the effect of this declaration upon the award of alimony in her favour or its relation to her statutory dower rights.

I would allow this appeal with costs to the wife throughout.

Appeal dismissed with costs, LASKIN J. *dissenting.*

Solicitors for the plaintiff, appellant: Shymka, Davis & Kay, Calgary.

Solicitors for the defendant, respondent: Fenerty, McGillivray, Robertson, Prowse, Brennan, Fraser, Bell & Hatch, Calgary.

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[24] [1973] 2 All E.R. 1042.

APPENDIX II

DONOGHUE (or McALISTER) *v.* STEVENSON

[HOUSE OF LORDS (Lord Buckmaster, Lord Atkin, Lord Tomlin, Lord Thankerton and Lord Macmillan), December 10, 11, 1931, May 26, 1932]

[Reported [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 48 T.L.R. 494; 76 Sol. Jo. 396; 37 Com. Cas. 350]

Negligence--Duty of manufacturer to consumer--No contractual relation--No possibility of examination of product before use--Knowledge that absence of reasonable care in preparation of product will result in injury to consumer--Bottle of ginger-beer purchased from retailer--Dead snail in bottle--Purchaser poisoned by drinking contents--Liability of manufacturer.

A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer, owes a duty to the consumer to take reasonable care, although the manufacturer does not know the product to be dangerous and no contractual relation exists between him and the consumer.

Per LORD ATKIN: The rule that you are to love your neighbour becomes in law: You must not injure your neighbour; and the lawyer's question: Who is my neighbour receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Per LORD MACMILLAN: A person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of those articles. That duty he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his[2] commodities, and that relationship, which he assumes and desires for his own ends, imposes on him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome

and innocent into an article which is dangerous to life and health.

The appellant and a friend visited a cafe where the friend ordered for her a bottle of ginger-beer. The proprietor of the cafe opened the ginger-beer bottle, which was of opaque glass so that it was impossible to see the contents, and poured some of the ginger-beer into a tumbler. The appellant drank some of the ginger-beer. Then her friend poured the remaining contents of the bottle into the tumbler and with it a decomposed snail came from the bottle. As a result of her having drunk part of the impure ginger-beer the appellant suffered from shock and gastric illness. In an action by her for negligence against the manufacturer of the ginger-beer,

Held by LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN (LORD BUCKMASTER and LORD TOMLIN dissenting), on proof of these facts the appellant would be entitled to recover.

Notes. Distinguished: *Parr v. Butters Bros. Co.*, p. 339, post. Considered: *Pattendon v. Beney* (1933), 50 T.L.R. 10. Applied: *Brown v. Cotterill* (1934), 51 T.L.R. 21; *Malfroot v. Noxal, Ltd.* (1935), 51 T.L.R. 551; *Grant v. Australian Knitting Mills, Ltd.*, [1935] All E.R.Rep. 209. Distinguished: *Evans v. Triplex Safety Glass Co.*, [1936] 1 All E.R. 283. Considered: *Otto v. Bolton and Norris*, [1936] 1 All E.R. 960; *Kubach v. Hollands*, [1937] 3 All E.R. 907; *Dransfield v. British Insulated Cables, Ltd.*, [1937] 4 All E.R. 382; *Barnes v. Irwell Valley Water Board*, [1938] 2 All E.R. 650; *Sharp v. Avery and Kerwood*, [1938] 4 All E.R. 85; *Square v. Model Farm Dairies (Bournemouth), Ltd.*, [1938] 2 All E.R. 740; *Daniels and Daniels v. Whites Sons, Ltd. and Tarbard*, [1938] 4 All E.R. 258. Distinguished: *Paine and Colne Valley Electricity Supply Co.*, [1938] 4 All E.R. 803. Explained and distinguished: *Old Gate Estates, Ltd. v. Toplis and Harding and Russell*, [1939] 3 All E.R. 209. Applied: *Slennett v. Hancock and Peters*, [1939] 2 All E.R. 578; *Barnes v. Irwell Valley Water Board*, [1939] 1 K.B. 21. Considered: *Burfitt v. A. & E. Kille*, [1939] 2 All E.R. 372; *Hanson v. Wearmouth Coal Co.*, [1939] 3 All E.R. 47. Distinguished: *Davis v. Foots*, [1939] 4 All E.R. 4. Applied: *Herschthal v. Stewart and Ardern, Ltd.*, [1939] 4 All E.R. 123; *Barnett v. Packer & Co.*, [1940] 3 All E.R. 575; *Watson v. Buckley Osborne, Garrett & Co. and Wyrovoys Products, Ltd.*, [1940] 1 All E.R. 174; *Buckner v. Ashby and Horner, Ltd.*, [1941] 1 K.B. 321. Distinguished: *Travers v. Gloucester Corpn.*, [1946] 2 All E.R. 506; *Jerred v. Roddam Dent & Son*, [1948] 2 All E.R. 104. Considered: *Candler v. Crane Christmas & Co.*, [1951] 1 All E.R. 426; *Merrington v. Ironbridge Metal Works, Ltd. and Others*, [1952] 2 All E.R. 1101. Applied: *White v. John Warwick & Co., Ltd.*, [1953] 2 All E.R. 1021; *Hartley v. Mayoh & Co. and another*, [1953] 2 All E.R. 525; *Davis v. St. Mary's Demolition, etc., Ltd.*,

[1954] 1 All E.R. 578. Not applied: *Sellars v. Best*, [1954] 2 All E.R. 389. Referred to: *Cunard v. Antifyre, Ltd.*, p. 558, post; *Bishop v. Consolidated London Properties, Ltd.*, [1933] All E.R.Rep. 963; *Brown v. Cotterill* (1934), 51 T.L.R. 21; *Haynes v. Harwood*, [1934] All E.R.Rep. 103; *Howard v. Furness Houlder Argentine Lines, Ltd. and Brown, Ltd.*, [1936] 2 All E.R. 781; *London, Midland and Scottish Rail. Co. v. Ribble Hat Works, Ltd.* (1936), 80 Sol. Jo. 1038; *Read v. Croydon Corpn.*, [1938] 4 All E.R. 631; *Kerry v. Keighley Electrical Engineering Co.*, [1940] 3 All E.R. 399; *East Suffolk Rivers Catchment Board v. Kent*, [1940] 4 All E.R. 527; *Thomas and Evans, Ltd. v. Mid-Rhondda Co-operative Society, Ltd.*, [1940] 4 All E.R. 357; *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; *Bourhill v. Young*, [1942] 2 All E.R. 396; *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; *Read v. J. Lyons & Co.*, [1944] 2 All E.R. 98; *Deyong v. Shenburn*, [1946] 1 All E.R. 226; *Woods v. Duncan, Duncan v. Hambrook, Duncan v. Cammell Laird & Co.*, [1946] A.C. 401; *Read v. J. Lyons & Co.*, [1946] 2 All E.R. 471; *Dodd and Dodd v. Wilson and McWilliam*, [1946] 2 All E.R. 691; *Anglo-Saxon Petroleum Co. v. Damant, Anglo-Saxon Petroleum Co. v. R.*, [1947] 2 All E.R. 465; *Marshall v. Cellactite and British Uralite, Ltd.* (1947), 63 T.L.R. 456; *Stansbie v. Troman*, [1948] 1 All E.R. 599; *Grant v. Sun Shipping Co.*, [1948] 2 All E.R. 238; *Buckland v. Guildford Gas, Light and Coke Co.*, [1948] 2 All E.R. 1086; *Davies v.*[3] *Swan Motor Co. (Swansea)*, [1949] 1 All E.R. 620; *Ball v. L.C.C.*, [1949] 2 K.B. 159; *Horton v. London Graving Lock Co.*, [1950] 1 All E.R. 180; *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033; *Denny v. Supplies and Transport Co. and Scruttons, Ltd.*, (1950) 66 (pt. 1) T.L.R. 1168; *Wright v. Callwood*, (1950) 66 (pt. 2) T.L.R. 72.

As to a manufacturer's duty to the consumer, see 23 HALSBURY'S LAWS (2nd Edn.) 632, 633, and for cases see 36 DIGEST (Repl.) 85 et seq.

Cases referred to:

(1) *Langridge v. Levy* (1837), 2 M. & W. 519; affirmed (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levi v. Langridge*, 1 Horn & H. 325; 7 L.J.Ex. 387, Ex.Ch.; 35 Digest 51, *464*.

(2) *Longmeid v. Holliday* (1851), 6 Exch. 761; 20 L.J.Ex. 430; 17 L.T.O.S. 243; 155 E.R. 753; 39 Digest 458, *854*.

(3) *Winterbottom v. Wright* (1842), 10 M. & W. 109; 11 L.J.Ex. 415; 152 E.R. 402; 36 Digest (Repl.) 107, *531*.

(4) *Blacker v. Lake and Elliot, Ltd.* (1912), 106 L.T. 533, D.C.; 36 Digest (Repl.) 80, *428*.

(5) *George v. Skivington* (1869), L.R. 5 Exch. 1; 39 L.J.Ex. 8; 21 L.T. 495; 18 W.R. 118; 39 Digest 441, *705*.

(6) *Dominion Natural Gas Co., Ltd. v. Collins and Perkins*, [1909] A.C. 640; 79 L.J.P.C. 13; 101 L. T. 359; 25 T.L.R. 831, P.C.; 36 Digest (Repl.) 36, *176*.

(7) *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 18 W.R. 1205, Ex.Ch.; 34 Digest 166, *1296*.

(8) *Heaven v. Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

(9) *Blakemore v. Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; 31 L.T.O.S. 12; 120 E.R. 385; sub nom. *Blackmore v. Bristol and Exeter Rail. Co.*, 27 L.J.Q.B. 167; 4 Jur.N.S. 657; 6 W.R. 336; 3 Digest 69, *107*.

(10) *Collis v. Selden* (1868), L.R. 3 C.P. 495; 37 L.J.C.P. 233; 16 W.R. 1170; 29 Digest 10, *125*.

(11) *Le Lievre and another v. Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Dennes v. Gould*, 9 T.L.R. 243, C.A.; 36 Digest (Repl.) 9, *27*.

(12) *Earl v. Lubbock*, [1905] 1 K.B. 253; 74 L.J.K.B. 121; 91 L.T. 830; 53 W.R. 145; 21 T.L.R. 71; 49 Sol. Jo. 83, C.A.; 36 Digest (Repl.) 107, *532*.

(13) *Bates and another v. Batey & Co., Ltd.*, [1913] 3 K.B. 351; 82 L.J.K.B. 963; 108 L.T. 1036; 29 T.L.R. 616; 36 Digest (Repl.) 85, *457*.

(14) *Thomas v. Winchester* (1852), 6 N.Y. 397.

(15) *McPherson v. Buick Motor Co.* (1916), 217 N.Y. 382.

(16) *Mullen v. Barr & Co.; McGowan v. Barr & Co.*, 1929 S.C. 461; 36 Digest (Repl.) 19, **69*.

(17) *Cunnington v. Great Northern Rail. Co.* (1883), 49 L.T. 392; 48 J.P. 134, C.A.; 36 Digest (Repl.) 5, *2*.

(18) *Hawkins v. Smith* (1896), 12 T.L.R. 532, D.C.; 36 Digest (Repl.) 63, *343*.

(19) *Elliott v. Hall* (1885), 15 Q.B.D. 315; 54 L.J.Q.B. 518; sub nom. *Elliott v. Nailstone Colliery Co.*, 34 W.R. 16; 1 T.L.R. 628, D.C.; 36 Digest (Repl.) 62, *337*.

(20) *Chapman (or Oliver) v. Saddler & Co.*, [1929] A.C. 584; 98 L.J.P.C. 87; 141 L.T. 305; 45 T.L.R. 456; 34 Com. Cas. 277, H.L.; 36 Digest (Repl.) 160, *846*.

(21) *Grote v. Chester and Holyhead Rail. Co.* (1848), 2 Exch. 251; 5 Ry. & Can. Cas. 649; 154 E.R. 485; 34 Digest 161, *1262*.

(22) *Dixon v. Bell*, (1816), 5 M. & S. 198; 1 Stark. 287; 105 E.R. 1023; 36 Digest (Repl.) 80, *431*.

(23) *Hope & Son v. Anglo-American Oil Co.* (1922), 12 Ll.L.Rep. 183.
(24) *Brass v. Maitland* (1856), 6 E. & B. 470; 26 L.J.Q.B. 49; 27 L.T.O.S. 249; 2 Jur.N.S. 710; 4 W.R. 647; 119 E.R. 940; 8 Digest (Repl.) 148, *938.*
(25) *Farrant v. Barnes* (1862), 11 C.B.N.S. 553; 31 L.J.C.P. 137; 8 Jur.N.S. 868; 142 E.R. 912; 8 Digest (Repl.) 148, *937.*[4]
(26) *Caledonian Rail. Co. v. Mulholland,* [1898] A.C. 216; 67 L.J.P.C. 1; 46 W.R. 236; 14 T.L.R. 41; sub nom. *Caledonian Rail. Co. v. Warwick,* 77 L.T. 570, H.L.; 36 Digest (Repl.) 14, *54.*
(27) *Cavalier v. Pope,* [1906] A.C. 428; 75 L.J.K.B. 609; 95 L.T. 65; 22 T.L.R. 648; 50 Sol. Jo. 575, E.L.; 12 Digest (Repl.) 52, *283.*
(28) *Bottomley and another v. Bannister and another,* [1932] 1 K.B. 458; 101 L.J.K.B. 46; 146 L.T. 68; 48 T.L.R. 39, C.A.; 36 Digest (Repl.) 80, *429.*
(29) *Kemp and Dougall v. Darngavil Coal Co.,* 1909 S.C. 1314.
(30) *Clelland v. Robb,* 1911 S.C. 253; 36 Digest (Repl.) 19, **67.*
(31) *Gordon v. M'Hardy* 1903, 6 F. (Ct. of Sess.) 210; 41 Sc.L.R. 129; 11 S.L.T. 490; 36 Digest (Repl.) 169, **1403.*
(32) *Emmens v. Pottle* (1885), 16 Q.B.D. 354; 55 L.J.Q.B. 51; 53 L.T. 808; 50 J.P. 228; 34 W.R. 116; 2 T.L.R. 115, C.A.; 32 Digest 81, *1120.*
(33) *Cameron and others v. Young,* [1908] A.C. 176; 77 L.J.P.C. 68; 98 L.T. 592, E.L.; 12 Digest (Repl.) 52, *285.*
(34) *White and wife v. Steadman,* [1913] 3 K.B. 340; 82 L.J.K.B. 846; 109 L.T. 249; 29 T.L.R. 563; 8 Digest (Repl.) 75, *497.*

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland. On Aug. 26, 1928, the appellant, a shop assistant, drank a bottle of ginger-beer manufactured by the respondent, which a friend had ordered on her behalf from a retailer in a shop at Paisley and given to her. She stated that the shopkeeper, who supplied the ginger-beer, opened the bottle, which she said was sealed with a metal cap and was made of dark opaque glass, and poured some of its contents into a tumbler which contained some ice cream, and that she drank some of the contents of the tumbler, that her friend then lifted the bottle and was pouring the remainder of the contents into the tumbler, when a snail which had been in the bottle floated out in a state of decomposition. As a result, the appellant alleged, she had contracted a serious illness, and she claimed from the respondents damages for negligence. She alleged that the respondent, as the manufacturer of an article intended for

consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the article, that he neglected such duty, and that he was, consequently, liable for any damage caused by such neglect. The case then came before the Lord Ordinary, who rejected the plea in law of the respondent and allowed the parties a proof of their averments, but on a reclaiming note the Second Division (the Lord Justice Clerk, LORD ORMIDALE and LORD ANDERSON; LORD HUNTER dissenting) recalled the interlocutor of the Lord Ordinary and dismissed the action. The plaintiff appealed.

George Morton, K.C., and *W. R. Milligan* (both of the Scottish Bar) for the appellant.

The Attorney-General for Scotland (Normand, K.C.), J. L. Clyde (of the Scottish Bar) and *T. Elder Jones* for the respondent.

The House took time for consideration.

May 26. LORD BUCKMASTER (read by LORD TOMLIN).--The facts of this case are simple. On Aug. 26, 1928, the appellant drank a bottle of ginger-beer, manufactured by the respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not and could not be detected until the greater part of the contents of the bottle had been consumed. As a result she alleged, and at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro-enteritis. She, accordingly, instituted the proceedings against the manufacturer which have given rise to this appeal. The foundation of her case is that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty, and that he is, consequently, liable for any damage caused by such neglect. After certain amendments which are now immaterial, the case came before the Lord Ordinary, who rejected the respondent's plea in law and allowed[5] a proof. His interlocutor was revoked by the Second Division of the Court of Session, from whose judgment this appeal has been brought.

Before examining the merits two comments are desirable: (i) that the appellant's case rests solely on the ground of a tort based, not on fraud, but on negligence; and (ii) that throughout the appeal the case has been argued on the basis, undisputed by the Second Division and never questioned by counsel for the appellant or by any of your Lordships, that the English law and the Scots law on the subject are identical. It is, therefore, upon the English law alone that I have considered the matter, and, in my opinion, it is

on the English law alone that in the circumstances we ought to proceed.

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, yet themselves they cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

The common law must be sought in law books by writers of authority and in the judgments of judges entrusted with its administration. The law books give no assistance because the works of living authors, however deservedly eminent, cannot be used as authorities, though the opinions they express may demand attention, and the ancient books do not assist. I turn, therefore, to the decided cases to see if they can be construed so as to support the appellant's case. One of the earliest is *Langridge v. Levy* (1). It is a case often quoted and variously explained. There a man sold a gun, which he knew was dangerous, for the use of the purchaser's son. The gun exploded in the son's hands and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Baron Parke, who, in delivering the judgment of the court, used these words:

> "We should pause before we make a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby";

and in *Longmeid v. Holliday* (2) the same eminent judge points out that the earlier case was based on a fraudulent mis-statement, and he expressly repudiates the view that it has any wider application. *Langridge v. Levy* (1), therefore, can be dismissed from consideration with the comment that it is rather surprising that it has so often been cited for a proposition which it cannot support.

Winterbottom v. Wright (3) is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the character of a coach to place it in a special category. It may be noted also that in this case ALDERSON, B., said:

> "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

Longmeid v. Holliday (2) was the case of a defective lamp sold to a man whose wife was injured by its explosion. The vendor of the lamp, against whom the action was brought, was not the manufacturer, so that the case is not parallel to the present, but the statement of PARKE, B., in his judgment covers the case of the manufacturer, for he said:

> "It would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that, if a machine not in its nature dangerous . . . but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."[6]

It is true that he uses the words "lent or given" and omits the word "sold," but, if the duty be entirely independent of contract and is a duty owed to a third person, it seems to me the same whether the article be originally given or sold. The fact in the present case that the ginger-beer originally left the premises of the manufacturer on a purchase, as was probably the case, cannot add to his duty, if such existed, to take care in its preparation. It has been suggested that the statement of PARKE, B., does not over the case of negligent construction. But the omission to exercise reasonable care in the discovery of the defect in the manufacture of an article where the duty of examination exists is just as negligent as the negligent construction itself.

The general principle of these cases is stated by LORD SUMNER (then HAMILTON, J.) in *Blacker v. Lake and Elliot, Ltd.* (4) (in these terms 106 L.T. at p. 536):

> "The breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B. when he is injured by reason of the article proving to be defective."

From this general rule there are two well-known exceptions:

(i) in the case of an article dangerous in itself, and (ii) where the article, not in itself dangerous, is in fact dangerous on account of some defect or for any other reason,

and this is known to the manufacturer. Until *George v. Skivington* (5) I know of no further modification of the general rule.

As to (i), in the case of things dangerous in themselves, there is, in the words of LORD DUNEDIN,

> "a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity":

Dominion Natural Gas Co., Ltd. v. Collins (6) ([1909] A.C. at p. 646). And as to (ii), this depends on the fact that the knowledge of the danger creates the obligation to warn, and its concealment is in the nature of fraud.

In the present case no one can suggest that the ginger-beer was an article dangerous in itself, and the words of LORD DUNEDIN show that the duty attaches only to such articles, for I read the words "a peculiar duty" as meaning a duty peculiar to the special class of subject mentioned.

Of the remaining cases *George v. Skivington* (5) is the one nearest to the present, and without that case and the statement of CLEASBY, B., in *Francis v. Cockrell* (7) (L.R. 5 Q.B. at p. 515), and the dicta of BRETT, M.R., in *Heaven v. Pender* (8) (11 Q.B.D. at p. 509 et seq.), the appellant would be destitute of authority. *George v. Skivington* (5) related to the sale of a noxious hairwash, and a claim made by a person who had suffered from its use, based on its having been negligently compounded, was allowed. It is remarkable that *Langridge v. Levy* (1) was used in support of the claim and influenced the judgment of all the parties to the decision. Both KELLY, C.B., and PIGOTT, B., stressed the fact that the article had been purchased to the knowledge of the defendant for the use of the plaintiff, as in *Langridge v. Levy* (1), and CLEASBY, B., who, realising that *Langridge v. Levy* (1) was decided on the ground of fraud, said:

> "Substitute the word 'negligence' for 'fraud,' and the analogy between *Langridge v. Levy* (1) and this case is complete."

It is unnecessary to point out too emphatically that such a substitution cannot possibly be made. No action based on fraud can be supported by mere proof of negligence. I do not propose to follow the fortunes of *George v. Skivington* (5); few cases can have lived so dangerously and lived so long. LORD SUMNER, in *Blacker v. Lake and Elliot, Ltd.* (4), closely examines its history, and I agree with his analysis. He said that he could not presume to say that it was wrong, but he declined to follow it on the ground, which is I think

firm, that it was in conflict with *Winterbottom v. Wright* (3).

In *Francis v. Cockrell* (7) the plaintiff had been injured by the fall of a racecourse stand, on a seat for which he had paid. The defendant was part proprietor of the stand and acted as receiver of the money. The stand had been negligently erected by a contractor, though the defendant was not aware of the defect. The plaintiff succeeded.[7] The case has no bearing upon the present, but in the course of his judgment CLEASBY, B., made the following observations (L.R. 5 Q.B. at p. 515):

> "The point that Mr. Matthews referred to last was raised in the case of *George v. Skivington* (5), where there was an injury to one person, the wife, and a contract of sale with another person, the husband. The wife was considered to have a good cause of action, and I would adopt the view which the Lord Chief Baron took in that case. He said there was a duty in the vendor to use ordinary care in compounding the article sold, and that this extended to the person for whose use he knew it was purchased, and, this duty having been violated, and he having failed to use reasonable care, was liable in an action at the suit of the third person."

It is difficult to appreciate what is the importance of the fact that the vendor knew who was the person for whom the article was purchased unless it be that the case was treated as one of fraud, and that without this element of knowledge it could not be brought within the principle of *Langridge v. Levy* (1). Indeed, this is the only view of the matter which adequately explains the references in the judgments in *George v. Skivington* (5) to *Langridge v. Levy* (1) and the observations of CLEASBY, B., upon *George v. Skivington* (5).

The dicta of BRETT, M.R., in *Heaven v. Pender* (8) are rightly relied on by the appellant. The material passage is as follows (11 Q.B.D. at p. 509):

> "The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. . . . Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the

purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods or machinery, or the like, for the purpose of their being used by another person under such circumstances that everyone of sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises, to be enforced by an action for negligence. This includes the case of goods, &c., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which, if there were no contract between the parties, the law would, according to the rule above stated, imply the duty."[8]

"The recognised cases" to which the Master of the Rolls refers are not definitely quoted, but they appear to refer to cases of collision and carriage, and the cases of visitation to premises on which there is some hidden danger, cases far removed from the doctrine he enunciates. None the less, this passage has been used as a tabula in naufragio

for many litigants, struggling in the seas of adverse authority. It cannot, however, be divorced from the fact that the case had nothing whatever to do with the question of manufacture and sale. An unsound staging had been erected on premises to which there had been an invitation to the plaintiffs to enter, and the case really depended on the duty of the owner of the premises to persons so invited. None the less, it is clear that BRETT, M.R., considered the cases of manufactured articles, for he examined *Langridge v. Levy* (1), and he says that it does not negative the proposition that the case might have been supported on the ground of negligence.

In the same case, however, COTTON, L.J., in whose judgment BOWEN, L.J., concurred, said that he was unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertained, inasmuch as there were many cases in which the principle was impliedly negatived. He then referred to *Langridge v. Levy* (I), and stated that it was based upon fraudulent misrepresentation and had been so treated by COLERIDGE, J., in *Blakemore v. Bristol and Exeter Rail. Co.* (9), and that in *Collis v. Selden* (10) WILLES, J., had said that the judgment in *Langridge v. Levy* (1) was based on the fraud of the defendant. The lord justice then proceeded as follows:

> "This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis v. Selden* (10) and in *Longmeid v. Holliday* (2) (in each of which the plaintiff failed) are in my opinion at variance with the principle contended for. The case of *George v. Skivington* (5), and especially what is said by CLEASBY, B., in giving judgment in that case, seems to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and that case was decided by CLEASBY, B., on the ground that the negligence of the defendant, which was his own personal negligence, was equivalent, for the purposes of that action, to fraud, on which (as he said) the decision in *Langridge v. Levy* (1) was based. In declining to concur in laying down the principle enunciated by the Master of the Rolls I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act."

With the views expressed by COTTON, L.J., I agree.

In *Le Lievre and another v. Gould* (11) the mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees and there was no contractual relationship between him and them. In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part. It was held that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates and they could not maintain an action against him by reason of his negligence. In this case LORD ESHER, M.R., seems to have qualified to some extent what he said in *Heaven v. Pender* (8) for he says this ([1893] 1 Q.B. at p. 497):

> "But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven v. Pender* (8) has no bearing upon the present question. That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract[9] between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

In the same case, at p. 504, A.L. SMITH, L.J., said:

> "The decision of *Heaven v. Pender* (8) was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. *Heaven v. Pender* (8) goes no further than this, though it is often cited to support all kinds of untenable propositions."

In *Earl v. Lubbock* (12) the plaintiff had been injured by a wheel coming off a van which he was driving for his employer and which it was the duty of the defendant under contract with such employer to keep in repair. The county court judge and the Divisional Court both held that even if negligence was proved the action would not lie. It was held

by the Court of Appeal that the defendant was under no duty to the plaintiff and that there was no cause of action. In his judgment COLLINS, M.R., said that the case was concluded by the authority of *Winterbottom v. Wright* (3), and he pointed out that the dictum of LORD ESHER, M.R., in *Heaven v. Pender* (8) was not a decision of the court and that it was subsequently qualified and explained by LORD ESHER himself in *Le Lievre and another v. Gould* (11). STIRLING, L.J., said that in order to succeed in the action the plaintiff must bring his case within the proposition enunciated by COTTON, L.J., and agreed to by BOWEN, L.J., in *Heaven v. Pender* (8), while MATHEW, L.J., made the following observation ([1905] 1 K.B. at p. 259):

> "The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that anyone in their employment, or, indeed, anyone else who sustained an injury traceable to that negligence, had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade."

In *Bates and another v. Batey & Co.* (13) the defendants, ginger-beer manufacturers, were held not liable to a consumer (who had purchased from a retailer one of their bottles) for injury occasioned by the bottle bursting as the result of a defect of which the defendants did not know, but which by the exercise of reasonable care they could have discovered. In reaching this conclusion HORRIDGE, J., stated that he thought the judgments of PARKE, B., in *Longmeid v. Holliday* (2), of COTTON and BOWEN, L.JJ., in *Heaven v. Pender* (8), of STIRLING, L.J., in *Earl v. Lubbock* (12), and of COTTON, J., in *Blacker v. Lake and Elliot* (4), made it clear that the plaintiff was not entitled to recover, and that he had not felt himself bound by *George v. Skivington* (5).

So far, therefore, as *George v. Skivington* (5) and the dicta in *Heaven v. Pender* (8) are concerned, it is, in my opinion, better that they should be buried so securely that their perturbed spirits shall no longer vex the law.

One further case mentioned in argument may be referred to, certainly not by way of authority, but to gain assistance by considering how similar cases are dealt with by eminent judges of the United States. That such cases can have no close application and no authority is clear, for, though the source of the law in the two countries may be the same, its current may well flow in different channels. The

case referred to is that of *Thomas v. Winchester* (14). There a chemist issued poison in answer to a request for a harmless drug, and he was held responsible to a third party injured by his neglect. It appears to me that the decision might well rest on the principle that he in fact sold a drug dangerous in itself none the less so because he was asked to sell something else, and on this view the case does not advance the matter.

In another case, *McPherson v. Buick Motor Co.* (15), where a manufacturer of a defective motor car was held liable for damages at the instance of a third party, the learned judge appears to base his judgment on the view that a motor car might reasonably be[10] regarded as a dangerous article. In my view, therefore, the authorities are against the appellant's contention, and apart from authority it is difficult to see how any common law proposition can be formulated to support her claim.

The principle contended for must be this--that the manufacturer, or, indeed, the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. All rights in contract must be excluded from consideration of this principle, for such rights undoubtedly exist in successive steps from the original manufacturer down to the ultimate purchaser, embraced in the general rule that an article is warranted as reasonably fit for the purpose for which it is sold. Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrines applicable to sale and purchase.

The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food, apart from those implied by contract or imposed by statute. If such a duty exists it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or anyone else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon. Were such a principle known and recognised, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that with the exception of *George v. Skivington* (5) no case directly involving the principle has ever succeeded in the courts, and were it well

known and accepted much of the discussion of the earlier cases would have been waste of time.

In *Mullen v. Barr & Co., McGowan v. Barr & Co.* (16), a case indistinguishable from the present, except upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, LORD ANDERSON says this (1929 S.C. at p. 479):

> "In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."

In agreeing, as I do, with the judgment of LORD ANDERSON, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this appeal should be dismissed, and I beg to move your Lordships accordingly.

LORD ATKIN.--The sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not re-state the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity, important both because of its bearing on public health and because of the practical test which it applies to the system of law under which it arises. The case has to be determined in accordance with Scots law, but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the law of Scotland and the law of England are the same. I[11] speak with little authority on this point, but my own research, such as it is, satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law, and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to

show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for the present purposes must be assumed. We are solely concerned with the question whether as a matter of law in the circumstances alleged the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To exist a complete logical definition of the general principle is probably to go beyond the action of the judge, for, the more general the definition, the more likely it is to omit essentials or introduce non-essentials. The attempt was made by LORD ESHER in *Heaven v. Pender* (8) in a definition to which I will later refer. As framed it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

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

receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender* (8) as laid down by LORD ESHER when it is limited by the notion of proximity introduced by LORD ESHER himself and A. L. SMITH, L.J., in *Le Lievre and another v. Gould* (11). LORD ESHER, M.R., says ([1893] 1 Q.B. at p. 497):

> "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

So A.L. SMITH, L.J., says ([1893] 1 Q.B. at p. 504):

> "The decision of *Heaven v. Pender* (8) was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity[12] to the person or property of another that, if due care was not taken damage might be done by the one to the other."

I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness or "proximity" was intended by LORD ESHER is obvious from his own illustration in *Heaven v. Pender* (8) (11 Q.B.D. at p. 510) of the application of his doctrine to the sale of goods.

> "This [i.e., the rule he has just formulated] includes the case of goods, &c., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would

> probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used, or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property."

I draw particular attention to the fact that LORD ESHER emphasises the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even by the person using, certainty by an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship, as explained in *Le Lievre and another v. Gould* (11), I think the judgment of LORD ESHER expresses the law of England. Without the qualification, I think that the majority of the court in *Heaven v. Pender* (8) was justified in thinking that the principle was expressed in too general terms. There will, no doubt, arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently in the course of preparation he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that in the assumed state of the authorities not only would the consumer have no remedy against the manufacturer, he would have none against anyone else, for in the circumstances alleged there would be no evidence of negligence against anyone other than the manufacturer, and except in the case of a consumer who was also a purchaser no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or

drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, when the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless[13] proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where everyone, including the manufacturer, knows that the articles will be used by persons other than the actual ultimate purchaser--namely, by members of his family and his servants, and, in some cases, his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims which it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

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

In my opinion, several decided cases support the view that in such a case as the present the manufacturer owes a duty to the consumer to be careful. A direct authority is *George v. Skivington* (5). That was a decision on a demurrer to a declaration which averred that the defendant professed to sell a hairwash made by himself and that the plaintiff, Joseph George, bought a bottle to be used by his wife, the plaintiff Emma George, as the defendant then knew, and that the defendant had so negligently conducted himself in preparing and selling the hairwash that it was unfit for use, whereby the female plaintiff was injured. KELLY, C.B., said that there was no question of warranty, but whether the

chemist was liable in an action on the case for unskilfulness and negligence in the manufacture of it:

> "Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased."

PIGOTT and CLEASBY, BB., put their judgments on the same ground.

I venture to think that COTTON, L.J., in *Heaven v. Pender* (8) (11 Q.B.D. at p. 517), misinterprets CLEASBY, B.'s judgment in the reference to *Langridge v. Levy* (1). CLEASBY, B., appears to me to make it plain that, in his opinion, the duty to take reasonable care can be substituted for the duty which existed in *Langridge v. Levy* (1) not to defraud. It is worth noticing that *George v. Skivington* (5) was referred to by CLEASBY, B., himself sitting as a member of the Court of Exchequer Chamber in *Francis v. Cockrell* (7) (L.R. 5 Q.B. at p. 515) and was recognised by him as based on an ordinary duty to take care. It was also affirmed by BRETT, M.R., in *Cunnington v. Great North Rail. Co.* (17), decided on July 2, 1883, at a date between the argument and the judgment in *Heaven v. Pender* (8), though as in that case the court negatived any breach of duty the expression of opinion is not authoritative.

The existence of the duty contended for is also supported by *Hawkins v. Smith* (18), where a dock labourer in the employ of the dock company was injured by a defective sack which had been hired by the consignees from the defendant, who knew the use to which it was to be put, and which had been provided by the consignees for the use of the dock company which had been employed by them to unload the ship on the dock company's premises. The Divisional Court (DAY, J., and LAWRENCE, J.) held the defendant liable for negligence. Similarly, in *Elliott v. Hall or Nailstone Colliery Co.* (19) the defendants, colliery owners, consigned coal to the plaintiff's employers, coal merchants, in a truck hired by the defendants from a wagon company. The plaintiff was injured in the course of unloading the coal by reason of the defective condition of the[14] truck, and was held by a Divisional Court (GROVE, J., and A.L. SMITH, J.) entitled to recover on the ground of the defendants' breach of duty to see that the truck was not in a dangerous condition. It is to be noticed that in neither case was the defective chattel in the defendants' occupation, possession or control, or on their premises, while in the latter case it was not even their property. It is sometimes said that the liability in these cases depends upon an invitation by the defendant to the plaintiff to use his chattel. I do not find the decisions expressed to be based upon this ground, but rather upon the knowledge that the plaintiff, in the

course of the contemplated use of the chattel, would use it, and the supposed invitation appears to me to be in many cases a fiction and merely a form of expressing the direct relation between supplier and user which gives rise to the duty to take care.

A very recent case, which has the authority of this House, is *Chapman (or Oliver) v. Saddler & Co.* (20). In that case a firm of stevedores employed to unload a cargo of maize in bags provided the rope slings by which the cargo was raised to the ship's deck by their own men using the ship's tackle and was then transported to the dock side by the shore porters, of whom the plaintiff was one. The porters relied on examination by the stevedores and had themselves no opportunity of examination. In these circumstances this House, reversing the decision of the First Division, held that there was a duty owed by the stevedore company to the porters to see that the slings were fit for use, and restored the judgment of the Lord Ordinary, LORD MORISON, in favour of the pursuer. I find no trace of the doctrine of invitation in the opinions expressed in this house, of which mine was one: the decision was based upon the fact that the direct relations established, especially the circumstance that the injured porter had no opportunity of independent examination, gave rise to a duty to be careful.

I should not omit in this review of cases the decision in *Grote v. Chester and Holyhead Rail. Co.* (21). That was an action on the case in which it was alleged that the defendants had constructed a bridge over the Dee on their railway and had licensed the use of the bridge to the Shrewsbury and Chester Rail. Co. to carry passengers over it, and had so negligently constructed the bridge that the plaintiff, a passenger on the last-named railway, had been injured by the falling of the bridge. At the trial before VAUGHAN WILLIAMS, J., the judge had directed the jury that the plaintiff was entitled to recover if the bridge was not constructed with reasonable care and skill. On a motion for a new trial the Attorney-General, Sir John Jervis, contended that there was misdirection, for the defendants were liable only for negligence, and the jury might have understood that there was an absolute liability. The Court of Exchequer, after consulting the trial judge as to his direction, refused the rule. This case is said by KELLY, C.B., in *Francis v. Cockrell* (7), in the Exchequer Chamber (L.R. 5 Q.B. at p. 505), to have been decided upon an implied contract with every person lawfully using the bridge that it was reasonably fit for the purpose. I can find no trace of such a ground in the pleadings or in the argument or judgment. It is true that the defendants were the owners and occupiers of the bridge. The law as to the liability to invitees and licensees had not then been developed. The case is interesting because it is a simple action on the

case for negligence, and the court upheld the duty to persons using the bridge to take reasonable care that the bridge was safe.

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

In *Dixon v. Bell* (22) the defendant had left a loaded gun at his lodgings and sent his servant, a mulatto girl aged about ten or fourteen, for the gun, asking the landlord to remove the priming and give it her. The landlord did remove the priming and gave the gun to the girl, who later levelled it at the plaintiff's small son, drew the trigger, and injured the boy. The action was in case for negligently entrusting the young servant with the gun. The jury at the trial before LORD ELLENBOROUGH had returned a verdict for the plaintiff. A motion by the Attorney-General, Sir William Garrow, for a new trial was dismissed by the court, LORD ELLENBOROUGH and BAYLEY, J., the former remarking that it was incumbent on the defendant, who by charging the gun had made it capable of doing mischief, to render it safe and innoxious.[15]

In *Langridge v. Levy* (1) the action was in case and the declaration alleged that the defendant, by falsely and fraudulently warranting a gun to have been made by Nock and to be a good, safe, and secure gun, sold the gun to the plaintiff's father for the use of himself and his son, and that one of his sons, confiding in the warranty, used the gun, which burst and injured him. Plea: Not Guilty and no warranty as alleged. The report is not very satisfactory. No evidence is reported of any warranty or statement except that the gun was an elegant twist gun by Nock. The judge left to the jury whether the defendant had warranted the gun to be by Nock and to be safe, whether it was in fact unsafe, and whether the defendant warranted it to be safe knowing that it was not so. The jury returned a general verdict for the plaintiff. It appears to have been argued that the plaintiff could recover wherever there is a breach of duty imposed on the defendant by contract or otherwise and the plaintiff is injured by reason of its breach; by this is meant, apparently, that the duty need not be owed to the plaintiff, but that he can take advantage of the breach of a duty owed to a third party. This contention was negatived by the court, who held, however, that the plaintiff could recover if a representation known to be false was made to a third person with the intention that a chattel should be used by the plaintiff, even though it does not appear that the defendant intended the false representation to be communicated to him: see per PARKE, B. (2 M. & W. at p. 531). The same view was adopted by the Exchequer Chamber, the user by the plaintiff being treated by the court as one of the acts contemplated by the fraudulent defendant. It is

unnecessary to consider whether the proposition can be supported in its widest form. It is sufficient to say that the case was based, as I think, in the pleading, and certainly in the judgment, on the ground of fraud, and it appears to add nothing of value positively or negatively to the present discussion.

Winterbottom v. Wright (3) was a case decided on a demurrer. The plaintiff had demurred to two of the pleas as to which there was no decision by the court, but on the hearing of the plaintiff's demurrer the court, in accordance with the practice of the day, were entitled to consider the whole record, including the declaration, and, owing to the conclusion that this declaration disclosed no cause of action, gave judgment for the defendant: see SUTTON'S PERSONAL ACTIONS AT COMMON LAW, p. 113. The advantage of the procedure is that we are in a position to know the precise issue at law which arose for determination. The declaration was in case and alleged that the defendant had contracted with the Postmaster-General to convey the road mail coach from Hartford to Holyhead, and that the plaintiff, relying on the said first contract, hired himself to Atkinson to drive the mail coach, but that the defendant so negligently conducted himself and so utterly disregarded his aforesaid contract that, the defendant having the means of knowing and well knowing all the aforesaid premises, the mail coach, being in a dangerous condition owing to certain latent defects and to no other cause, gave way, whereby the plaintiff was thrown from his seat and injured. It is to be observed that no negligence apart from breach of contract was alleged--in other words, no duty was alleged other than the duty arising out of the contract. It is not stated that the defendant knew or ought to have known of the latent defect. The argument of the defendant was that on the fact of the declaration the wrong arose merely out of the breach of a contract, and that only a party to the contract could sue. The Court of Exchequer adopted that view, as clearly appears from the judgments of ALDERSON and ROLFE, BB. There are dicta by LORD ABINGER which are too wide as to an action of negligence being confined to cases of breach of a public duty. The actual decision appears to have been manifestly right, no duty to the plaintiff arose out of the contract, and the duty of the defendant under the contract with the Postmaster-General to put the coach in good repair would not have involved such direct relations with the servant of the person whom the Postmaster-General employed to drive the coach as would give rise to a duty of care owed to such servant.

We now come to *Longmeid v. Holliday* (2), the dicta in which have had considerable effect in subsequent decisions. In that case the declaration in case alleged that the[16] plaintiff, Frederick Longmeid, had bought from the defendant, the maker and seller of "the Holliday lamp," a

lamp to be used by himself and his wife Eliza in the plaintiffs' shop; that the defendant induced the sale by the false and fraudulent warranty that the lamp was reasonably fit for the purpose; and that the plaintiff Eliza, confiding in the said warranty, lighted the lamp, which exploded, whereby she was injured. It is, perhaps, not an extravagant guess to suppose that the plaintiffs' pleader had read *Langridge v. Levy* (1). The jury found all the facts for the plaintiffs except the allegation of fraud; they were not satisfied that the defendant knew of the defects. The plaintiff Frederick had already recovered damages on the contract of sale for breach of the implied warranty of fitness. The declaration made no averment of negligence. Verdict was entered at the trial by MARTIN, B., for the plaintiff, but with liberty to the defendant to move to enter the verdict for him. A rule having been obtained, plaintiff's counsel sought to support the verdict on the ground that this was an action, not for a breach of duty arising solely from contract, but for an injury resulting from conduct amounting to fraud.

PARKE, B., who delivered the judgment of the court, held that, fraud having been negatived, the action could not be maintained on that ground. He then went on to discuss cases in which a third person not a party to a contract may sue for damages sustained if it is broken. After dealing with the negligence of a surgeon or of a carrier, or of a firm in breach of contract committing a nuisance on a highway, he deals with the case where anyone delivers to another without notice an instrument in its nature dangerous or under particular circumstances, as a loaded gun, and refers to *Dixon v. Bell* (22), though what this case has to do with contract it is difficult to see. He then goes on:

> "But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that, if a machine not in its nature dangerous--a carriage, for instance--but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

It is worth noticing how guarded this dictum is. The case put is a machine, such as a carriage, not in its nature dangerous, which might become dangerous by a latent defect entirely unknown. Then there is the saving "although discoverable by the exercise of ordinary care," discoverable by whom it is not said; it may include the person to whom the innocent machine is "lent or given." Then the dictum is confined to machines "lent or given" (a later sentence makes

it clear that a distinction is intended between these words and "delivered to the purchaser under the contract of sale"), and the manufacturer is introduced for the first time--"even by the person who manufactured it." I do not for a moment believe that PARKE, B., had in his mind such a case as a loaf negligently mixed by the baker with poison which poisoned a purchaser's family. He is, in my opinion, confining his remarks primarily to cases where a person is seeking to rely upon a duty of care which arises out of a contract with a third party, and has never even discussed the case of a manufacturer negligently causing an article to be dangerous and selling it in that condition whether with immediate or mediate effect upon the consumer. It is noteworthy that he refers only to "letting or giving" chattels, operations known to the law, where the special relations thereby created have a particular bearing on the existence or non-existence of a duty to take care.

Next in his chain of authority come *George v. Skivington* (5) and *Heaven v. Pender* (8), which I have already discussed. The next case is *Earl v. Lubbock* (12). The plaintiff sued in the county court for personal injuries due to the negligence of the defendant. The plaintiff was a driver in the employ of a firm who owned vans. The defendant, a master wheelwright, had contracted with the firm to keep their vans in good and substantial repair. The allegation of negligence was that the defendant's servant had negligently failed to inspect and repair a defective wheel, and had negligently repaired the wheel. The learned county court judge had held that the defendant owed no duty to the plaintiff, and the Divisional Court (LORD ALVERSTONE, C.J., WILLS and[17] KENNEDY, JJ.) and the Court of Appeal agreed with him. COLLINS, M.R., said that the case was concluded by *Winterbottom v. Wright* (3). In other words, he must have treated the duty as alleged to arise only from a breach of contract, for, as has been pointed out, that was the only allegation in *Winterbottom v. Wright* (3), negligence, apart from contract, being neither averred nor proved. It is true that he cites with approval the dicta of LORD ABINGER in the case, but obviously I think his approval must be limited to those dicta so far as they related to the particular facts before the Court of Appeal, and to cases where, as LORD ABINGER says, the law permits a contract to be turned into a tort. STERLING, L.J., it is true, said that to succeed the plaintiff must bring his case within the proposition of the majority in *Heaven v. Pender* (8), that any one who, without due warning, supplies to others for use an instrument which to his knowledge is in such a condition as to cause danger is liable for injury. I venture to think that the lord justice was mistakenly treating a proposition which applies one test of a duty as though it afforded the only criterion. MATHEW, L.J., appears to me to put the case on its proper footing when he says:

> "The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that anyone in their employment . . . had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on."

I entirely agree. I have no doubt that in that case the plaintiff failed to show that the repairer owed any duty to him. The question of law in that case seems very different from that raised in the present case. *Blacker v. Lake and Elliot, Ltd.* (4) approaches more nearly the facts of this case. I have read and reread it, having unfeigned respect for the authority of the two learned judges, HAMILTON and LUSH, JJ., who decided it, and I am bound to say I have found difficulty in formulating the precise grounds upon which the judgment was given. The plaintiff had been injured by the bursting of a brazing lamp which he had bought from a shopkeeper, who had bought it from the manufacturer, the defendant. The plaintiff had used the lamp for twelve months before the accident. The case was tried in the county court before that excellent lawyer, the late JUDGE SIR HOWLAND ROBERTS. That learned judge had directed the jury that the plaintiff could succeed if the defendants had put upon the market a lamp not fit for use in the sense that a person working it with reasonable care would incur a risk which a properly constructed lamp would not impose upon him. The jury found that the lamp was defective by reason of an improper system of making an essential joint between the container and the vaporiser; that the defendants did not know that it was dangerous, but ought, as reasonable men, to have known it. HAMILTON, J., seems to have thought that there was no evidence of negligence in this respect. LUSH, J., expressly says so, and implies by the words "I also think" that HAMILTON, J.,so thought. If so, the case resolves itself into a series of important dicta. HAMILTON, J., says (106 L.T. at p. 536) that it has been decided in authorities from *Winterbottom v. Wright* (3) to *Earl v. Lubbock* (12) that the breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not itself give any cause of action to B. when injured by the article proving to be defective in breach of that contract. He then goes on to say: How is the case of the plaintiff any better when there is no contract proved of which there could be breach? I think, with respect, that this saying does not give sufficient weight to the actual issues raised by the pleadings, on which alone the older cases are an authority. If the issue raised was an alleged duty created by contract, it would have been irrelevant to consider

duties created without reference to contract, and contract cases cease to be authorities for duties alleged to exist beyond or without contract. Moreover, it is a mistake to describe the authorities as dealing with the breach of care or skill in the manufacture of goods, as contrasted with repair.

The only manufacturing case was *Longmeid v. Holliday* (2), where negligence was not alleged. HAMILTON, J., recognises that *George v. Skivington* (5) was a decision which, if it remained an authority, bound him. Be says that, without presuming to say it[18] was wrong, he cannot follow it because it is in conflict with *Winterbottom v. Wright* (3). I find this very difficult to understand, for *George v. Skivington* (5) was based upon a duty in the manufacturer to take care independently of contract, while *Winterbottom v. Wright* (3) was decided on a demurrer in a case where the alleged duty was based solely on breach of a contractual duty to keep in repair and no negligence was alleged. LUSH, J., says in terms that there are only three classes of cases in which a stranger to a contract can sue for injury by a defective chattel: one is fraud, the second is the case of articles dangerous or noxious in themselves where the duty is only to warn, the third is public nuisance. He does not bring the cases represented by *Elliott v. Hall* (19) (the defective coal wagon) within his classes at all. He says (106 L.T. at p. 541) that they belong to a totally different class

> "where the control of premises or the management of a dangerous thing upon premises creates a duty."

I have already pointed out that this distinction is unfounded in fact, for in *Elliott v. Hall* (19), as in *Hawkins v. Smith* (18) (the defective sack), the defendant exercised no control over the article and the accident did not occur on his premises. With all respect I think that the judgments in the case err by seeking to confine the law to rigid and exclusive categories, and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed to those who will be immediately injured by lack of care.

The last case I need refer to is *Bates and another v. Batey & Co.* (13), where manufacturers of ginger-beer were sued by a plaintiff who had been injured by the bursting of a bottle of ginger-beer bought from a shopkeeper who had obtained it from the manufacturers. The manufacturers had bought the actual bottle from its maker, but were found by the jury to have been negligent in not taking proper means to discover whether the bottle was defective or not. HORRIDGE, J., found that a bottle of ginger-beer was not dangerous in itself, but that this defective bottle was in fact dangerous, but, as the defendants did not know it was

dangerous, they were not liable, though by the exercise of reasonable care they could have discovered the defect. This case differs from the present only by reason of the fact that it was not the manufacturers of the ginger-beer who caused the defect in the bottle, but, on the assumption that the jury were right in finding a lack of reasonable care in not examining the bottle, I should have come to the conclusion that, as the manufacturers must have contemplated the bottle being handled immediately by the consumer, they owed a duty to him to take care that he should not be injured externally by explosion, just as I think they owed a duty to him to take care that he should not be injured internally by poison or other noxious thing.

I do not find it necessary to discuss at length the cases dealing with duties where a thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or nonexistence of a legal right. In this respect I agree with what was said by SCRUTTON, L.J., in *Hope & Son v. Anglo-American Oil Co.* (23) (12 Ll.L.R. at p. 187), a case which was ultimately decided on a question of fact:

> "Personally, I do not understand the difference between a thing dangerous in itself as poison and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf."

The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods, so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. In *Dominion Natural Gas Co., Ltd. v. Collins* (6) the appellants had installed a gas apparatus and were supplying natural gas on the premises of a railway company. They had installed a regulator to control the pressure and their men negligently made an escape valve discharge into the building instead of into the open air. The railway workmen--the plaintiffs--were injured by an[19] explosion in the premises. The defendants were held liable. LORD DUNEDIN, in giving the judgment of the Judicial Committee, consisting of himself, LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON, after stating that there was no relation of contract between the plaintiffs and the defendants, proceeded ([1909] A.C. at p. 646):

> "There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity."

This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved, but clearly in the class of things enumerated there is a special duty to take precautions. This is the very opposite of creating a special category in which alone the duty exists. I may add, though it obviously would make no difference in the creation of a duty, that the installation of an apparatus to be used for gas perhaps more closely resembles the manufacture of a gun than a dealing with a loaded gun. In both cases the actual work is innocuous; it is only when the gun is loaded or the apparatus charged with gas that the danger arises. I do not think it necessary to consider the obligation of a person who entrusts to a carrier goods which are dangerous or which he ought to know are dangerous. As far as the direct obligation of the consignor to the carrier is concerned, it has been put upon an implied warranty, *Brass v. Maitland* (24), but it is also a duty owed independently of contract--e.g., to the carrier's servant, *Farrant v. Barnes* (25).

So far as the cases afford an analogy they seem to support the proposition now asserted. I need only mention, to distinguish them, two cases in this House which are referred to in some of the cases which I have reviewed. The first is *Caledonian Rail. Co. v. Warwick* (26), in which the appellant company were held not liable for injuries caused by a defective brake on a coal wagon conveyed by the railway company to a point in the transit where their contract ended and where the wagons were taken over for haulage for the last part of the journey by a second railway company, on which part the accident happened. It was held that the first railway company were under no duty to the injured workman to examine the wagon for defects at the end of their contractual haulage. There was ample opportunity for inspection by the second railway company. The relations were not proximate. In the second, *Cavalier v. Pope* (27), the wife of the tenant of a house let unfurnished sought to recover from the landlord damages for personal injuries arising from the nonrepair of the house, on the ground that the landlord had contracted with her husband to repair the

house. It was held that the wife was not a party to the contract, and that the well-known absence of any duty in respect of the letting an unfurnished house prevented her from relying on any cause of action for negligence.

In the most recent case, *Bottomley and another v. Bannister and another* (28), an action under Lord Campbell's Act, the deceased man, the father of the plaintiff, had taken an unfurnished house from the defendants, who had installed a gas boiler with a special gas burner which, if properly regulated, required no flue. The father and his wife were killed by fumes from the apparatus. The case was determined on the ground that the apparatus was part of the realty and that the landlord did not know of the danger, but there is a discussion of the case on the supposition that it was a chattel. GREER, L.J., states with truth that it is not easy to reconcile all the authorities, and that there is no authority binding on the Court of Appeal that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract, by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. When the danger is in fact occasioned by his own lack of care then in cases of proximate relationship, this case will, I trust, supply the deficiency.[20]

It is always satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the courts of the United States. In that country I find that the law appears to be well established in the sense which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of CARDOZO, J., in *McPherson v.Buick Motor Co.* (15), in the New York Court of Appeals, in which he states the principles of the law as I should desire to state them and reviews the authorities in States other than his own. Whether the principle which he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise, prevented the relation between manufacturer and the user of the car from being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.

If your Lordships accept the view that the appellant's pleading discloses a relevant cause of action, you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a

form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

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

LORD TOMLIN.--I have had an opportunity of considering the opinion prepared by my noble and learned friend LORD BUCKMASTER, which I have already read. As the reasoning of that opinion and the conclusions reached therein accord in every respect with my own views, I propose to say only a few words.

First, I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to everyone who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. Moreover, the fact that an article of food is sent out in a sealed container can have no relevancy on the question of duty. It is only a factor which may render it easier to bring negligence home to the manufacturer.

Secondly, I desire to say that, in my opinion, the decision in *Winterbottom v. Wright* (3) is directly in point against the appellant. The examination of the report makes it, I think, plain (i) that negligence was alleged and was the basis of the claim, and (ii) that the wide proposition which I have indicated was that for which the plaintiff was contending. The declaration averred (inter alia) that the defendant "so improperly and negligently conducted himself" that the accident complained of happened. The plaintiff's counsel said: "Here the declaration alleges the accident to have happened through the defendant's negligence and want of care." The alarming consequences of accepting the validity of this proposition were pointed out by the defendant's counsel, who said: "For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle."

That the action, which was in case, embraced a cause of action in tort is I think implicit in its form and appears from the concluding sentence of LORD ABINGER's judgment, which was in these terms:

> "By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of[21] their contract, we should subject them to be ripped open by this action of tort being brought against him."

I will only add to what has been already said by my noble and learned LORD BUCKMASTER with regard to the decisions and dicta relied upon by the appellant, and the other relevant reported cases, that I am unable to explain how the cases of dangerous articles can have been treated as "exceptions" if the appellant's contention is well founded. Upon the view which I take of the matter the reported cases, some directly, others impliedly, negative the existence as part of the common law of England of any principle affording support to the appellant's claim, and therefore there is, in my opinion, no material from which it is legitimate for your Lordships' House to deduce such a principle.

LORD THANKERTON.--In this action the appellant claims reparation from the respondent in respect of illness and other injurious effects resulting from the presence of a decomposed snail in a bottle of ginger-beer, which is alleged to have been manufactured by the respondent, and which was partially consumed by her, it having been ordered by a friend on her behalf in a café in Paisley.

The action is based on negligence, and the only question in this appeal is whether, the appellant's averments pro veritate, they disclose a case relevant in law, so as to entitle her to have them remitted for proof. The Lord Ordinary allowed a proof, but, on a reclaiming note for the respondent, the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor and dismissed the action, following their decision in the recent cases of *Mullen v. Barr & Co. and McGowan v. Barr & Co.* (16).

The appellant's case is that the bottle was sealed with a metal cap, and was made of dark opaque glass, which not only excluded access to the contents before consumption if the contents were to retain their aerated condition, but also excluded the possibility of visual examination of the contents from outside; and that on the side of the bottle there was pasted a label containing the name and address of the respondent, who was the manufacturer. She states that the shopkeeper who supplied the ginger-beer opened it and poured some of its contents into a tumbler, which contained some ice cream, and that she drank some of the contents of the tumbler; that her friend then lifted the bottle and was pouring the remainder of the contents into the tumbler when a snail, which had been, unknown to her, her friend, or the

shopkeeper, in the bottle, and was in a state of decomposition, floated out of the bottle.

The duties which the appellant accuses the respondent of having neglected may be summarized as follows: (a) that the ginger-beer was manufactured by the respondent or his servants to be sold as an article of drink to members of the public (including the appellant), and that, accordingly, it was his duty to exercise the greatest care in order that snails should not get into the bottles, render the ginger-beer dangerous and harmful, and be sold with the ginger-beer; (b) a duty to provide a system of working his business which would not allow snails to get into the sealed bottles, and, in particular, would not allow the bottles when washed to stand in places to which snails had access; (c) a duty to provide an efficient system of inspection, which would prevent snails from getting into the sealed bottles; and (d) a duty to provide clear bottles, so as to facilitate the said system of inspection.

There can be no doubt, in my opinion, that equally in the law of Scotland and of England it lies upon the party claiming redress in such a case to show that there was some relation of duty between her and the defender which required the defender to exercise due and reasonable care for her safety. It is not at all necessary that there should be any direct contract between them, because the action is not based upon contract but upon negligence; but it is necessary for the pursuer in such an action to show there was a duty owed to her by the defender, because a man cannot be charged with negligence if he has no obligation to exercise diligence: *Kemp and Dougall v. Darngavil Coal Co.* (29), per LORD KINNEAR (1909 S.C. at p. 1319); see also *Clelland v. Robb* (30), per LORD PRESIDENT DUNEDIN and LORD KINNEAR (1911 S.C. at p. 256). The question in each case is whether the pursuer has established, or, in the stage of the[22] present appeal, has relevantly averred, such facts as involve the existence of such a relation of duty.

We are not dealing here with a case of what is called an article per se dangerous or one which was known by the defender to be dangerous, in which cases a special duty of protection or adequate warning is placed upon the person who uses or distributes it. The present case is that of a manufacturer and a consumer, with whom he has no contractual relation, of an article which the manufacturer did not know to be dangerous, and, unless the consumer can establish a special relationship with the manufacturer, it is clear, in my opinion, that neither the law of Scotland nor the law of England will hold that the manufacturer has any duty towards the consumer to exercise diligence. In such a case the remedy of the consumer, if any, will lie against the intervening party from whom he has procured the article. I am aware that the American courts, in the decisions referred

to by my noble and learned friend LORD MACMILLAN, have taken a view more favourable to the consumer.

The special circumstances, from which the appellant claims that such a relationship of duty should be inferred, may, I think, be stated thus, namely, that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. If that contention be sound, the consumer, on her showing that the article has reached her intact, and that she has been injured by the harmful nature of the article owing to the failure of the manufacturer to take reasonable care in its preparation before its enclosure in the sealed vessel, will be entitled to reparation from the manufacturer.

In my opinion, the existence of a legal duty in such circumstances is in conformity with the principles of both the law of Scotland and the law of England. The English cases demonstrate how impossible it is finally to catalogue, amid the ever-varying types of human relationships, those relationships in which a duty to exercise care arises apart from contract, and each of these cases relates to its own set of circumstances, out of which it was claimed that the duty had arisen. In none of these cases were the circumstances identical with the present case as regards that which I regard as the essential element in this case, namely, the manufacturer's own action in bringing himself into direct relationship with the party injured. I have had the privilege of considering the discussion of these authorities by my noble and learned friend LORD ATKIN in the judgment which he has just delivered, and I so entirely agree with it that I cannot usefully add anything to it.

An interesting illustration of similar circumstances is to be found in *Gordon v. M'Hardy* (31), in which the pursuer sought to recover damages from a retail grocer on account of the death of his son by ptomaine poisoning, caused by eating tinned salmon purchased from the defender. The pursuer averred that the tin, when sold, was dented, but he did not suggest that the grocer had cut through the metal and allowed air to get in, or had otherwise caused injury to the contents. The action was held irrelevant, the LORD JUSTICE CLERK remarking,

> "I do not see how the defender could have examined the tin of salmon which he is alleged to have sold without destroying the very condition which the manufacturer had established in order to preserve the contents, the

tin not being intended to be opened until immediately before use."

Apparently in that case the manufacturers' label was off the tin when sold, and they had not been identified. I should be sorry to think that the meticulous care of the manufacturer to exclude interference or inspection by the grocer in that case should relieve the grocer of any responsibility to the consumer without any corresponding assumption of duty by the manufacturer.

I am of opinion that the contention of the appellant is sound and that she has[23] relevantly averred a relationship of duty as between the respondent and herself, as also that her averments of the respondent's neglect of that duty are relevant.

The cases of *Mullen* and *McGowan* (16), which the learned judges of the Second Division followed in the present case, related to facts similar in every respect except that the foreign matter was a decomposed mouse. In these cases the same court--LORD HUNTER dissenting--held that the manufacturer owed no duty to the consumer. The view of the majority was that the English authorities excluded the existence of such a duty, but LORD ORMIDALE (1929 S.C. at p. 471) would otherwise have been prepared to come to a contrary conclusion. LORD HUNTER's opinion seems to be in conformity with the view which I have expressed above. My conclusion rests upon the facts averred in this case, and would apparently also have applied in the cases of *Mullen* and *McGowan* (16), in which, however, there had been a proof before answer, and there was also a question as to whether the pursuers had proved their averments. I am, therefore, of opinion that the appeal should be allowed and the case should be remitted for proof, as the pursuer did not ask for an issue.

LORD MACMILLAN.--The incident which in its legal bearings your Lordships are called upon to consider in this appeal was in itself of a trivial character, though the consequences to the appellant, as she describes them, were serious enough. It appears from the appellant's allegation that on an evening in August, 1928 she and a friend visited a café in Paisley, where her friend ordered for her some ice cream and a bottle of gingerbeer. These were supplied by the shopkeeper, who opened the ginger-beer bottle and poured some of the contents over the ice cream which was contained in a tumbler. The appellant drank part of the mixture and her friend then proceeded to pour the remaining contents of the bottle into the tumbler. As she was doing so a decomposed snail floated out with the ginger-beer. In consequence of her having drunk part of the contaminated contents of the bottle the appellant alleges that she contracted a serious illness. The bottle is stated to have

been of dark opaque glass, so that the condition of the contents could not be ascertained by inspection, and to have been closed with a metal cap, while on the side was a label bearing the name of the respondent, who was the manufacturer of the ginger-beer, of which the shopkeeper was merely the retailer.

The allegations of negligence on which the appellant founds her action against the respondent may be shortly summarised. She says that the ginger-beer was manufactured by the respondent for sale as an article of drink to members of the public including herself: that the presence of a decomposing snail in ginger-beer renders the ginger-beer harmful and dangerous to those consuming it; and that it was the duty of the respondent to exercise his process of manufacture with sufficient care to prevent snails from getting into or remaining in the bottles which he filled with ginger-beer. The appellant attacks the respondent's system of conducting his business, alleging that he kept his bottles in premises to which snails had access, and that he failed to have his bottles properly inspected for the presence of foreign matter before he filled them. The respondent challenged the relevancy of the appellant's averments and, taking them pro veritate, as for this purpose he was bound to do, pleaded that they disclosed no ground of legal liability on his part to the appellant. The Lord Ordinary repelled the respondent's plea to the relevancy and allowed the parties a proof of their averments, but on a reclaiming note their Lordships of the Second Division (LORD HUNTER dissenting, or, perhaps more accurately, protesting) dismissed the action, and in doing so followed their decision in the previous cases of *Mullen v. Barr & Co.* and *McGowan v. Barr & Co.* (16). The only difference in fact between those cases and the present case is that it was a mouse and not a snail which was found in the ginger-beer. The present appeal is, consequently, in effect against the decision in these previous cases, which I now proceed to examine.

The two cases, being to all intents and purposes identical, were heard and decided together. In *Mullen v. Barr & Co.* (16) the sheriff-substitute allowed a proof, but the sheriff on appeal dismissed the action as irrelevant. In *McGowan v. Barr & Co.* (16) the sheriff-substitute allowed a proof and the sheriff altered his interlocutor by allowing[24] a proof before answer-that is to say, a proof under reservation of all objections to the relevancy of the action. On the cases coming before the Second Division on the appeals of the pursuer and the defenders respectively their Lordships ordered a proof before answer in each case and the evidence was taken before LORD HUNTER. It will be sufficient to refer to *Mullen's Case* (16), in which their Lordships gave their reasons for assoilzieing the defenders in both cases. The LORD JUSTICE CLERK held that negligence

had not been proved, and, therefore, he did not pronounce upon the question of relevancy. LORD ORMIDALE held that there was no relevant case against the defenders, but would have been prepared if necessary to hold that in any case negligence had not been established by the evidence. LORD HUNTER held that the case was relevant and that negligence had been proved. LORD ANDERSON held that the pursuer had no case in law against the defenders, but that, if this view was erroneous, negligence had not been proved.

I desire to draw special attention to certain passages in the opinions of their Lordships. At 1929 S.C., p. 470, the learned LORD JUSTICE CLERK states that he prefers

> "to base my judgment on the proposition that the pursuer has failed to prove fault on the part of the defenders" [and feels] "absolved from expressing a concluded opinion on the thorny and difficult question of law whether, assuming fault to be proved on the part of the defenders, the pursuer has in law a right to sue them."

In the present case his Lordship, after pointing out that he had formally reserved his opinion on the point in *Mullen v. Barr & Co.* (16), proceeds:

> "I think I indicated not obscurely the view which I entertained on a perusal of the English cases,"

and to that view, in deference to the English cases which his Lordship has re-considered, he has given effect adversely to the present appellant. That the opinions of the majority of the judges of the Second Division in *Mullen's Case* (16) on the question of relevancy are founded entirely on their reading of the series of English cases cited to them is made clear by LORD ORMIDALE. After stating the questions in the case, the first being

> "whether in the absence of any contractual relation between the pursuers and the defenders, the latter owed a duty to the pursuers, as the consumers of the beer, of taking precautions to see that nothing of a poisonous or deleterious nature was allowed to enter and remain in the bottles,"

his Lordship proceeds:

> "I recognise the difficulty of determining the first of these questions with either confidence or satisfaction; and were it not for the unbroken and consistent current of decisions beginning with *Winterbottom v. Wright* (3) to which we were referred I should have been disposed to answer it in the affirmative. The evidence shows

> that the greatest care is taken by the manufacturers to ensure by tab and label that the ginger-beer should pass, as it were, from the hand of the maker to the hand of the ultimate user uninterfered with by the retail dealer--who has little interest in, and no opportunity of, examining the contents of the containers. Accordingly, it would appear to be reasonable and equitable to hold that, in the circumstances and apart altogether from contract, there exists a relationship of duty as between the maker and the consumer of the beer. Such considerations, however, as I read the authorities, have been held to be irrelevant in analogous circumstances."

LORD ORMIDALE thus finds himself constrained to reach a conclusion which appears to him to be contrary to reason and equity by his reading of what he describes as an "unbroken and consistent current of decisions beginning with *Winterbottom v. Wright* (3)." In view of the defence thus paid to English precedents, it is a singular fact that the case of *Winterbottom v. Wright* (3) is one in which no negligence in the sense of breach of a duty owed by the defendant to the plaintiff was alleged on the part of the plaintiff. The truth, as I hope to show, is that there is in the English reports no such "unbroken and consistent current of decisions" as would justify the aspersion that the law of England has committed itself irrevocably to what is neither reasonable nor equitable,[25] or require a Scottish judge in following them to do violence to his conscience. "In my opinion, said LORD ESHER in *Emmens v. Pottle* (32) (16 Q.B.D. at pp. 357-358),

> "any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust cannot be part of the common law of England."

At your Lordships' Bar counsel for both parties to the present appeal, accepting, as I do also, the view that there is no distinction between the law of Scotland and the law of England in the legal principles applicable to the case, confined their arguments to the English authorities. The appellant endeavoured to establish that according to the law of England the pleadings disclose a good cause of action; the respondent endeavoured to show that on the English decisions the appellant had stated no admissible case. I propose, therefore, to address myself at once to an examination of the relevant English precedents.

I observe in the first place that there is no decision of this House upon the point at issue, for I agree with LORD HUNTER that such cases as *Cavalier v. Pope* (27) and *Cameron and others v. Young* (33) which decided that

> "a stranger to a lease cannot found upon a landlord's failure to fulfil obligations undertaken by him under contract with his lessee,"

are in a different chapter of the law. Nor can it by any means be said that the cases present "an unbroken and consistent current" of authority, for some flow one way and some the other.

It humbly appears to me that the diversity of view which is exhibited in such cases as *George v. Skivington* (5) on the one hand, and *Blacker v. Lake and Elliot* (4) on the other hand--to take two extreme instances--is explained by the fact that in the discussion of the topic which now engages your Lordships' attention two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well-established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well-established doctrine that negligence, apart from contract, gives a right of action to the party injured by that negligence--and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties independently of the contract though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a rignt of action in contract and another person a right of action in tort. I may be permitted to adopt as my own the language of a very distinguished English writer on this subject.

> "It appears, [says SIR FREDERICK POLLOCK (LAW OF TORTS (13th Edn.) 570)] that there has been (though, perhaps, there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect. The authorities formerly relied on for this proposition really proved something different and much more rational, namely, that if A. breaks his contract with B. (which may happen without any personal default in A. or A.'s servants), that is not of itself sufficient to make A. liable to C., a stranger to the contract, for consequential damage. This, and only this, is the substance of the perfectly correct decisions of the Court of Exchequer in *Winterbottom v. Wright* (3) and *Longmeid v. Holliday* (2). In each case

> the defendant delivered, under a contract of sale or hiring, a chattel which was in fact unsafe to use, but in the one case it was not alleged, in the other was alleged but not proved, to have been so to his knowledge. In each case a stranger to the contract, using the chattel--a coach in the one case, a lamp in the other--in the ordinary way, came to harm through its dangerous condition, and was held not to have any cause of action against the[26] purveyor. Not in contract, for there was no contract between these parties; not in tort, for no bad faith or negligence on the defendant's part was proved."

Where, as in cases like the present, so much depends upon the avenue of approach to the question it is very easy to take the wrong turning. If you begin with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the manufacturer and so disentitled to sue upon it. There is no contractual relation between the manufacturer and the consumer, and thus the plaintiff if he is to succeed is driven to try to bring himself within one or other of the exceptional cases where the strictness of the rule that none but a party to a contract can found on a breach of that contract has been mitigated in the public interest, as it has been in the case of a person who issues a chattel which is inherently dangerous or which he knows to be in a dangerous condition. If, on the other hand, you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer and whether he owed a duty to be careful in a question with the party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to the incidental contract of sale becomes irrelevant and his title to sue the manufacturer is unaffected by that circumstance. The appellant in the present instance asks that her case be approached as a case of delict, not as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been held to be entitled to complain of some defect in the subject-matter of the contract which has caused him harm. The exceptional case of things dangerous in themselves or known to be in a dangerous condition has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of

negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

With these preliminary observations I turn to the series of English cases which is said to compose the consistent body of authority on which we are asked to non-suit the appellant. It will be found that in most of them the facts were very different from the facts of the present case and did not give rise to the special relationship and consequent duty which, in my opinion, is the deciding factor here. *Dixon v. Bell* (22) is the starting point. There a maidservant was sent to fetch a gun from a neighbour's house; on the way back she pointed it at a child and the gun went off and injured the child. The owner of the gun was held liable for the injury to the child on the ground that he should have seen that the charge was drawn before he entrusted the gun to the maidservant.

> "It was incumbent on him who, by charging the gun, had made it capable of doing mischief to render it safe and innoxious."

This case, in my opinion, merely illustrates the high degree of care, amounting in effect to insurance against risk, which the law exacts from those who take the responsibility of giving out such dangerous things as loaded firearms. The decision, if it has any relevance, is favourable to the appellant, who submits that human drink, rendered poisonous by careless preparation, may be as dangerous to life as any loaded firearm.

Langridge v. Levy (1) is another case of a gun, this time of defective make and known to the vendor to be defective. The purchaser's son was held entitled to sue for damages in consequence of injuries sustained by him through the defective condition of the gun causing it to explode. The ground of the decision seems to have been that there was a false representation by the vendor that the gun was safe, and the representation appears to have been held to extend to the purchaser's son. The case is treated by commentators as turning on its special circumstances and as not deciding any principle of general application. As for *Winterbottom v. Wright* (3) and *Longmeid v. Holliday* (2) neither of these cases is really in point for the reason indicated in the passage from SIR FREDERICK POLLOCK's treatise which I have quoted above.[27]

Then comes *George v. Skivington* (5), which is entirely in favour of the appellant's contention. There was a sale in that case by a chemist of some hairwash to a purchaser for the use of his wife, who suffered injury from using it by reason of its having been negligently compounded. As KELLY, C.B., points out, the action was not founded on any warranty implied in the contract of sale between the vendor and the purchaser, and the plaintiff, the purchaser's wife,

was not seeking to sue on the contract, to which she was not a party. The question, as the Chief Baron stated it, was

> "whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it whereby the person who used it was injured."

And this question the court unanimously answered in the affirmative. I may mention in passing that LORD ATKINSON in this House, speaking of that case and *Langridge v. Levy* (1), observed in *Cavalier v. Pope* (27) ([1906] A.C. at p. 433) that

> "in both these latter cases the defendant represented that the article sold was fit and proper for the purposes for which it was contemplated that it should be used, and the party injured was ignorant of its unfitness for these purposes."

It is true that *George v. Skivington* (5) has been the subject of some criticism and was said by HAMILTON, J., as he then was, in *Blacker v. Lake and Elliot, Ltd.* (4), to have been in later cases as nearly disaffirmed as is possible without being expressly overruled. I am not sure that it has been so severely handled as that. At any rate, I do not think that it deserved to be, and, certainly, so far as I am aware, it has never been, disapproved in this House.

Heaven v. Pender (8) has probably been more quoted and discussed in this branch of the law than any other authority, because of the dicta of BRETT, M.R., as he then was, on the general principles regulating liability to third parties. In his opinion,

> "it may safely be affirmed to be a true proposition [that] wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

The passage specially applicable to the present case is as follows:

> "Whenever one person supplies goods . . . for the purpose of their being used by another person under

> such circumstances that everyone of ordinary sense would, if he thought, recognise at once that, unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises, to be enforced by an action for negligence."

COTTON, L.J., with whom BOWEN, L.J., agreed, expressed himself as

> "unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived,"

but the decision of the Court of Appeal was unanimously in the plaintiff's favour. The passages I have quoted, like all attempts to formulate principles of law compendiously and exhaustively, may be open to some criticism, and their universality may require some qualification, but as enunciations of general legal doctrine, I am prepared, like LORD HUNTER, to accept them as sound guides.

I now pass to the three modern cases of *Earl v. Lubbock* (12), *Blacker v. Lake and Elliot, Ltd.* (4), and *Bates and another v. Batey & Co., Ltd.* (13). The first of these cases related to a van which had recently been repaired by the defendant under contract[28] with the owner of the van. A driver in the employment of the owner was injured in consequence of a defect in the van which was said to be due to the careless manner in which the repairer had done his work. It was held that the driver had no right of action against the repairer. The case turns upon the rule that a stranger to a contract cannot found an action of tort on a breach of that contract. It was pointed out that there was no evidence that the plaintiff had been invited by the defendant to use the van and the van owner was not complaining of the way in which the van had been repaired. The negligence, if negligence there was, was too remote, and the practical consequences of affirming liability in such a case were considered to be such as would render it difficult to carry on a trade at all.

> "No prudent man [says MATHEW, L.J.] would contract to make or repair what the employer intended to permit others to use in the way of his trade."

The special facts in that case seem to me to differ widely from the circumstances of the present case, where the manufacturer has specifically in view the use and consumption of his products by the consumer and where the retailer is merely the vehicle of transmission of the products to the consumer and by the nature of the products is precluded from inspecting or interfering with them in any way.

Blacker v. Lake and Elliot (4) is of importance because of the survey of previous decisions which it contains. It related to a brazing lamp which, by exploding owing to a latent defect, injured a person other than the purchaser of it, and the vendor was held not liable to the party injured. There appears to have been some difference of opinion between HAMILTON, J., and LUSH, J., who heard the case in the Divisional Court, whether the lamp was an inherently dangerous thing. The case seems to have turned largely on the question whether, there being a contract for sale of the lamp between the vendor and the purchaser, the article was of such a dangerous character as to impose upon the vendor in a question with a third party any responsibility for its condition. This question was answered in the negative. So far as negligence was concerned, it may well have been regarded as too remote, for I find that HAMILTON, J., used these words (106 L.T. at p. 537):

> "In the present case all that can be said is that the defendants did not know that their lamp was not perfectly safe and had no reason to believe that it was not so in the sense that no one had drawn their attention to the fact, but that had they been wiser men or more experienced engineers they would then have known what the plaintiff's experts say that they ought to have known."

I should doubt indeed if that is really a finding of negligence at all. The case on its facts is very far from the present one, and if any principle of general application can be derived from it adverse to the appellant's contention I should not be disposed to approve of such principle. I may add that in *White and wife v. Steadman* (34) ([1913] 3 K.B. at p. 348) I find that LUSH, J., who was a party to the decision in *Blacker v. Lake and Elliot, Ltd.* (4), expressed the view that

> "a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous because he does not take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows."

As for *Bates v. Batey & Co., Ltd.* (13). where a ginger-beer bottle burst owing to a defect in it which, though unknown to the manufacturer of the ginger-beer, could have been discovered by him by the exercise of reasonable care, HORRIDGE, J., there held that the plaintiff who bought the bottle of ginger-beer from a retailer to whom the manufacturer had sold it and who was injured by its explosion had no right to action against the manufacturer. The case does not advance matters, for it really turns upon the fact that the manufacturer did not know that the bottle was defective, and this, in the view of HORRIDGE, J., as he read the authorities, was enough to absolve the manufacturer. I would observe that in a true case of negligence knowledge of the existence of the defect causing damage is not an essential element at all.[29]

This summary survey is sufficient to show what more detailed study confirms, that the current of authority has by no means always set in the same direction. In addition to *George v. Skivington* (5) there is the American case of *Thomas v. Winchester* (14), which has met with considerable acceptance in this country and which is distinctly on the side of the appellant. There a chemist carelessly issued, in response to an order for extract of dandelion, a bottle containing belladonna which he labelled "extract of dandelion," with the consequence that a third party who took a dose from the bottle suffered severely. The chemist was held responsible. This case is quoted by LORD DUNEDIN in giving the judgment of the Privy Council in *Dominion Natural Gas Co. v. Collins* (6) as an instance of liability to third parties, and I think it was a sound decision.

In the American courts the law has advanced considerably in the development of the principle exemplified in *Thomas v. Winchester* (14). In one of the latest cases in the United States, *McPherson v. Buick Motor Co.* (15), the plaintiff, who had purchased from a retailer a motor car, manufactured by the defendant company, was injured in consequence of a defect in the construction of the car and was held entitled to recover damages from the manufacturer. CARDOZO, J., the very eminent Chief Judge of the New York Court of Appeals, and now an associate justice of the United States Supreme Court, thus stated the law:

> "There is no claim that the defendant knew of the defect and wilfully concealed it. . . . The charge is one not of fraud but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser. . . . The principle of *Thomas v. Winchester* (14) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and

> limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. . . . There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. . . . The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it [the defendant company] was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion."

The prolonged discussion of English and American cases into which I have been led might well dispose your Lordships to think that I have forgotten that the present is a Scottish appeal, which must be decided according to Scots law. But this discussion has been rendered inevitable by the course of the argument at your Lordships' Bar, which, as I have said, proceeded on the footing that the law applicable to the case was the same in England and Scotland. Having regard to the inconclusive state of the authorities in the courts below, and to the fact that the important question involved is now before your Lordships for the first time, I think it desirable to consider the matter from the point of view of the principles applicable to this branch of law which are admittedly common to both English and Scottish jurisprudence.

The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What then are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows, and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a[30] duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human errancy, and the conception of legal responsibility may develop in adaptation to altering

social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view is in determining what circumstances will establish such a relationship between the parties as to give rise on the one side to a duty to take care and on the other side to a right to have care taken.

To descend from these generalities to the circumstances of the present case I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that if the appellant establishes her allegations the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter may reasonably be characterised as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom does he owe that duty? I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship, which he assumes and desires for his own ends, imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health.

It is sometimes said that liability can arise only where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his

ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said "through carelessness" and thus excluded the case of a pure accident such as may happen where every care is taken. I cannot believe, and I do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequences of such carelessness can scarcely be less wide than its criminal consequences. Yet the principle of the decision appealed from is that the manufacturer of food products intended by him for human consumption does not owe to the consumers whom he has in view any duty of care, not even the duty to take care that he does not poison them.

The recognition by counsel that the law of Scotland applicable to the case was the same as the law of England implied that there was no special doctrine of Scots law which either the appellant or the respondent could invoke to support her or his case, and[31] your Lordships have thus been relieved of the necessity of a separate consideration of the law of Scotland. For myself I am satisfied that there is no speciality of Scots law involved, and that the case may safely be decided on principles common to both systems. I am happy to think that in their relation to the practical problem of everyday life which this appeal presents the legal systems of the two countries are in no way at variance and that the principles of both alike are sufficiently consonant with justice and common sense to admit of the claim which appellant seeks to establish.

I am anxious to emphasise that the principle of judgment which commends itself to me does not give rise to the sort of objection stated by PARKE, B., in *Longmeid v. Holliday* (2), where he said (6 Exch. at p. 768):

> "But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another, that if a machine not in its nature dangerous--a carriage for instance--but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the

> former should be answerable to the latter for a subsequent damage accruing by the use of it."

I read this passage rather as a note of warning that the standard of care exacted in the dealings of human beings with one another must not be pitched too high than as giving any countenance to the view that negligence may be exhibited with impunity. It must always be a question of circumstances whether the carelessness amounts to negligence and whether the injury is not too remote from the carelessness. I can readily conceive that where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious and for which the manufacturer could not in any view be held to be to blame. It may be a good general rule to regard responsibility as ceasing when control ceases. So also where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he reissues it to the actual user. But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer and the manufacturer takes steps to ensure this by sealing or closing the container, so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded. It is doubtful whether in such there is any redress against the retailer: *Gordon v. M'Hardy* (31).

The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, that the circumstances are such as to cast upon the defender a duty to take care not injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim res ipsa loquitur. Negligence must be both averred and proved. The appellant accepts this burden of proof and, in my opinion, she is entitled to have an opportunity of discharging it if she can. I am, accordingly, of opinion that this appeal should be allowed, the judgment of the Second Division of the Court of Session reversed, and the judgment of the Lord Ordinary restored.

Appeal allowed.

Solicitors: ***Horner & Horner, for W. G. Leechman & Co., Glasgow and Edinburgh; Lawrence Jones & Co., for Niven,***

Macniven & Co., Glasgow, and *Macpherson & Mackay, W.S.*, Edinburgh.

[*Reported* by E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

APPENDIX III

BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL.

NO. 1. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.*

Argued December 9, 1952.--Reargued December 8, 1953.--Decided May 17, 1954.

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment--even though the physical facilities and other "tangible" factors of white and Negro schools may be equal. Pp. 486-96.

(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education. Pp. 489-90.

(b) The question presented in these cases must be determined, not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation. Pp. 492-93.

(c) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms. P. 493.

(d) Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other "tangible" factors may be equal. Pp. 493-94.[484]

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* Together with No. 2, *Briggs et al. v. Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9-10, 1952, reargued December 7-8, 1953; No. 4, *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7-8, 1953; and No. 10, *Gebhart et al. v. Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

(e) The "separate but equal" doctrine adopted in *Plessy v. Ferguson*, 163 U.S. 537, has no place in the field of public education. P. 495.

(f) The cases are restored to the docket for further argument on specified questions relating to the forms of the decrees. Pp. 495-96.

Robert L. Carter argued the cause for appellants in No. 1 on the original argument and on the reargument. *Thurgood Marshall* argued the cause for appellants in No. 2 on the original argument and *Spottswood W. Robinson, III*, for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. *Louis L. Redding* and *Jack Greenberg* argued the cause for respondents in No. 10 on the original argument and *Jack Greenberg* and *Thurgood Marshall* on the reargument.

On the briefs were *Robert L. Carter, Thurgood Marshall, Spottswood W. Robinson, III, Louis L. Redding, Jack Greenberg, George E. C. Hayes, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Charles S. Scott, Frank D. Reeves, Harold R. Boulware* and *Oliver W. Hill* for appellants in Nos. 1,2 and 4 and respondents in No. 10; *George M. Johnson* for appellants in Nos. 1, 2 and 4; and *Loren Miller* for appellants in Nos. 2 and 4. *Arthur D. Shores* and *A. T. Walden* were on the Statement as to Jurisdiction and a brief opposing a Motion to Dismiss or Affirm in No. 2.

Paul E. Wilson, Assistant Attorney General of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was *Harold R. Fatzer*, Attorney General.

John W. Davis argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were *T. C. Callison*, Attorney General of South Carolina, *Robert McC. Figg, Jr., S. E. Rogers, William R. Meagher* and *Taggart Whipple*. [485]

J. Lindsay Almond, Jr., Attorney General of Virginia, and *T. Justin Moore* argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were *J. Lindsay Almond, Jr.*, Attorney General, and *Henry T. Wickham*, Special Assistant Attorney General, for the State of Virginia, and *T. Justin Moore, Archibald G. Robertson, John W. Riely* and *T. Justin Moore, Jr.* for the Prince Edward County School Authorities, appellees.

H. Albert Young, Attorney General of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was *Louis J. Finger*, Special Deputy Attorney General.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1,2 and 4 and affirmance in No. 10. With him on the brief were *Attorney General Brownell, Philip Elman, Leon Ulman, William J. Lamont* and *M. Magdelena Schoch*. *James P. McGranery*, then Attorney General, and *Philip Elman* filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by *Shad Polier, Will Maslow* and *Joseph B. Robison* for the American Jewish Congress; by *Edwin J. Lukas, Arnold Forster, Arthur Garfield Hays, Frank E. Karelsen, Leonard Haas, Saburo Kido* and *Theodore Leskes* for the American Civil Liberties Union et al.; and by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by *Arthur J. Goldberg* and *Thomas E. Harris*[486] for the Congress of Industrial Organizations and by *Phineas Indritz* for the American Veterans Committee, Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1][487]

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[1] In the Kansas case, *Brown v. Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 7-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, found that

segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U.S.C. § 1253.

In the South Carolina case, *Briggs v. Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C. Const., Art. XI, § 7; S.C. Code § 5377 (1942). The three judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F.Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F.Supp. 920. The case is again here on direct appeal under 28 U.S.C. § 1253.

In the Virginia case, *Davis v. County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22-221 (1950). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance,[488] they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the

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F.Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253.

In the Delaware case, *Gebhart v. Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A.2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A.2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.[3] [489]

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools is the status of public education at that time.[4] In the South,

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[2] 344 U.S. 1, 141, 891.

[3] 345 U.S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269-275; Cubberley, *supra*, at 288-339, 408-431; Knight, Public Education in the South (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e.g.*, the rural character of the South and the different regional attitudes toward state

the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

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In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state imposed discriminations against the Negro race. The doctrine

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assistance) are well explained in Cubberley, *supra*, at 408-423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. *Id.*, at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563-565.

[5] *Slaughter-House Cases*, 16 Wall. 36, 67-72 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880): "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of

of [491] "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, *supra*, involving not education but transportation.[7] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming v. County Board of Education*, 175 U.S. 528, and *Gong Lum v. Rice*, 275 U.S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school [492] level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337; *Sipuel v. Oklahoma*, 332 U.S. 631; *Sweatt v. Painter*, 339 U.S. 629; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637. In none of these cases was it

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the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,--the right to exemption from unfriendly legislation against them distinctively as colored,--exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."
See also *Virginia v. Rives*, 100 U.S. 313, 318 (1880); *Ex parte Virginia*, 100 U.S. 339, 344-345 (1880).

[7] The doctrine apparently originated in *Roberts v. City of Boston*, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[8] See also *Berea College v. Kentucky*, 211 U.S. 45 (1908).

[9] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout [493] the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

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[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F.Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F.Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F.Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A.2d 137, 149.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter, supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents, supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "...his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."**[494]** Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply

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[10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A.2d 862, 865.

supported by modern authority. Any lang[195] stated in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.[12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.[13] The Attorney General[496] of the United States is

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[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

[12] See *Bolling v. Sharpe, post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity

again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

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powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

APPENDIX IV

PLESSY v. FERGUSON.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 210. Argued April 13, 1896. Decided May 18, 1896.

The statute of Louisiana, acts of 1890, No. 111, requiring railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, on account [538] of the race they belong to; and requiring the officers of the passenger trains to assign each passenger to the coach or compartment assigned for the race to which he or she belongs; and imposing fines or imprisonment upon passengers insisting on going into a coach or compartment other than the one set aside for the race to which he or she belongs; and conferring upon officers of the trains power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal, are not in conflict with the provisions either of the Thirteenth Amendment or of the Fourteenth Amendment to the Constitution of the United States.

THIS was a petition for writs of prohibition and certiorari, originally filed in the Supreme Court of the State by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal District Court for the parish of Orleans, and setting forth in substance the following facts:

That petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws; that on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same State, and thereupon entered a passenger train, and took possession of

a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of [539] New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State, approved July 10, 1890, in such case made and provided.

That petitioner was subsequently brought before the recorder of the city for preliminary examination and committed for trial to the criminal District Court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the Constitution of the United States; that petitioner interposed a plea to such information, based upon the unconstitutionality of the act of the General Assembly, to which the district attorney, on behalf of the State, filed a demurrer; that, upon issue being joined upon such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal District Court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue and be made perpetual, and a further order that the record of the proceedings had in the criminal cause be certified and transmitted to the Supreme Court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race,

the said Plessy declined and refused, either by pleading or otherwise, to ad[540]-mit that he was in any sense or in any proportion a colored man. The case coming on for a hearing before the Supreme Court, that court was of opinion that the law under which the prosecution was had was constitutional, and denied the relief prayed for by the petitioner. *Ex parte Plessy*, 45 La. Ann. 80. Whereupon petitioner prayed for a writ of error from this court which was allowed by the Chief Justice of the Supreme Court of Louisiana.

Mr A.W. Tourgee and *Mr. S.F. Phillips* for plaintiff in error. *Mr. F.D. McKenney* was on *Mr. Phillips's* brief.

Mr. James C. Walker filed a brief for plaintiff in error.

Mr. Alexander Porter Morse for defendant in error. *Mr. M.J. Cunningham*, Attorney General of the State of Louisiana, and *Mr. Lional Adams* were on his brief.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to."

By the second section it was enacted "that the officers of such passenger trains shall have power and are hereby required[541] to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any

passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State." The third section provides penalties for the refusal or neglect of the officers, directors, conductors and employees of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea, was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate[542] said coach and take a seat in another assigned to persons of the colored race, and having refused to comply with such demand he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act. The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude--a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughter-house cases*, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was

intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.

So, too, in the *Civil Rights cases*, 109 U.S. 3, 24, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but[543] only as involving an ordinary civil injury, properly cognizable by the laws of the State; and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races--a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughter-house cases*, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship

of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.[544]

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston*, 5 Cush. 198; in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff," (Mr. Charles Sumner,) "is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the establish[545]-ment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of

Columbia, Rev. Stat. D.C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts. *State v. McCann*, 21 Ohio St. 198; *Lehew v. Brummell*, 15 S.W. Rep. 765; *Ward v. Flood*, 48 California, 36; *Bertonneau v. School Directors*, 3 Woods, 177; *People v. Gallagher*, 93 N.Y. 438; *Cory v. Carter*, 48 Indiana, 327; *Dawson v. Lee*, 83 Kentucky, 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. *State v. Gibson*, 36 Indiana, 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus in *Strauder v. West Virginia*, 100 U.S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. *Virginia v. Rives*, 100 U.S. 313; *Neal v. Delaware*, 103 U.S. 370; *Bush v. Kentucky*, 107 U.S. 110; *Gibson v. Mississippi*, 162 U.S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of[546] color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Company v. Brown*, 17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the States to give to all persons travelling within that State, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be so far as it applied to interstate commerce, unconstitutional and void. *Hall v. De Cuir*, 95 U.S. 485. The court in this

case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the States.

In the *Civil Rights* case, 109 U.S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the Fourteenth Amendment was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court Mr. Justice Bradley observed that the Fourteenth Amendment "does not invest Congress with power to legislate upon subjects that are within the[547] domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point, is the case of the *Louisville, New Orleans &c. Railway v. Mississippi*, 133 U.S. 587, therein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations. The case was presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the

constitutionality of the law. In that case, the Supreme Court of Mississippi, 66 Mississippi, 662, had held that the statute applied solely to commerce within the State, and, that being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court, p. 591, "respecting commerce wholly within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution. . . . No question arises under this section, as to the power of the State to separate in different compartments interstate pas[548]-sengers, or affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races; that affecting only commerce within the State is no invasion of the power given to Congress by the commerce clause."

A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana in the case of the *State ex rel. Abbott v. Hicks, Judge, et al.*, 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers travelling exclusively within the borders of the State. The case was decided largely upon the authority of *Railway Co. v. State*, 66 Mississippi, 662, and affirmed by this court in 133 U.S. 587. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the State of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *West Chester &c. Railroad v. Miles*, 55 Penn. St. 209; *Day v. Owen*, 5 Michigan, 520; *Chicago &c. Railway v. Williams*, 55 Illinois, 185; *Chesapeake &c. Railroad v. Wells*, 85 Tennessee, 613; *Memphis &c. Railroad v. Benson*, 85 Tennessee, 627; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis &c. Railroad*, 23 Fed. Rep. 318; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *People v. King*, 18 N.E. Rep. 245; *Houck v. South Pac. Railway*, 38 Fed. Rep. 226; *Heard v. Georgia Railroad Co.*, 3 Int. Com. Com'n, 111; *S.C.*, 1 Ibid. 428.

While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act, that denies to the passenger compensa[549]-tion in damages for a

refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the State's attorney, that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side[550] of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo v. Hopkins*, 118 U.S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the Constitution of the United States, if it

conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Company v. Husen*, 95 U.S, 465; *Louisville & Nashville Railroad v. Kentucky*, 161 U.S. 677, and cases cited on p. 700; *Daggett v. Hudson*, 43 Ohio St. 548; *Capen v. Foster*, 12 Pick. 485; *State ex rel. Wood v. Baker*, 48 Wisconsin, 71; *Monroe v. Collins*, 17 Ohio St. 665; *Hulseman v. Rems*, 41 Penn. St. 396; *Orman v. Riley*, 15 California, 48.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances[551] is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of

social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N.Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly[552] or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, (*State v. Chavers*, 5 Jones, [N.C.] 1, p. 11); others that it depends upon the preponderance of blood, (*Gray v. State*, 4 Ohio, 354; *Monroe v. Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three fourths. (*People v. Dean*, 14 Michigan, 406; *Jones v. Commonwealth*, 80 Virginia, 538.) But these are questions to be determined under the laws of each State and are not properly put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is, therefore,

Affirmed.

MR. JUSTICE HARLAN dissenting.

By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person, to occupy a seat in a coach assigned to colored

persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race,[553] he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employés (*sic*) of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race" are excepted from the operation of the statute. No exception is made of colored attendants travelling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while travelling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act, "white and colored races," necessarily include all citizens of the United States of both races residing in that State. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 382, said that a common carrier was in the exercise "of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." Mr. Justice Strong, delivering the judgment of[554] this court in *Olcott v. The Supervisors*, 16 Wall. 678, 694, said: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the

purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use?" So, in *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676: "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the State." So, in *Inhabitants of Worcester v. Western Railroad Corporation*, 4 Met. 564: "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement." It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public."

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the[555] race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through[556] many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race--the right to exemption from unfriendly legislation against them distinctively as colored--exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race and however well qualified in other respects to discharge the duties of jurymen, was repugnant to the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U.S. 303, 306, 307; *Virginia v. Rives*; 100 U.S. 313; *Ex parte Virginia*, 100 U.S. 339; *Neal v. Delaware*, 103 U.S. 370, 386; *Bush v. Kentucky*, 107 U.S. 110, 116. At the present term, referring to the previous adjudications, this court declared that "underlying all of those decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are

concerned, discrimination by the General Government or the States against any citizen because of his race. All citizens are equal before the law." *Gibson v. Mississippi*, 162 U.S. 565.

The decisions referred to show the scope of the recent amendments of the Constitution. They also show that it is not within the power of a State to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of Louisiana does[557] not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Com. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road[558] or street? Why may it not require sheriffs to assign whites to one side of a courtroom and blacks to the other? And why

may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." Stat. & Const. Constr. 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes, liberally, in order to carry out the legisla[559]-tive will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it

will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant[560] race and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government choose to grant them." 19 How. 393, 404. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race--a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of State enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both

require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the[561] war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when travelling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to

separate coaches for his race, if his rights under the law were recognized. But he objects, and ought never to cease objecting to the proposition, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.[562]

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

The result of the whole matter is, that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a State cannot, consistently with the Constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a State may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition," when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperilled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a moveable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the "partition" used in the court room happens to be stationary, provision could be made for screens with openings through[563] which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States

of a particular race, would be held to be consistent with the Constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them are wholly inapplicable, because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community called the[564] People of the United States, for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

MR. JUSTICE BREWER did not hear the argument or participate in the decision of this case.