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THE WAY OF AN ICONOCLAST*

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When I went recently to Glasgow to receive an honorary degree, the promoter, Professor Walker, made an oblique reference to the title which I have given to this address. He referred to me before a distinguished assembly as a "self-confessed iconoclast". I admit the soft impeachment—provided always that you accept the definition of an iconoclast which is given in the *Shorter Oxford English Dictionary*—and surely you will accept it here in Oxford. An iconoclast, says the *Dictionary*, is "one who assails cherished beliefs or venerated institutions on the ground that they are erroneous or pernicious". Note that the iconoclast only *assails* cherished beliefs—he does not *change* them. He assails them on the ground that they are erroneous—leaving it to his hearers to decide whether they are in fact erroneous or not. And you, my friends here—the public teachers of law—are the people whom I would wish to convince. For you are not concerned, as practitioners are, only with the law as it is. You are concerned also with the law as it ought to be. If you find it is erroneous, will you not point out the errors to your pupils? Will you not, by your published works, draw it to the attention of those in authority in the State? so that they can correct it. It is, I suggest, your duty so to do. And in so doing you will acquire for yourselves an influence comparable to that of the jurisconsults of ancient Rome. These were, as Maine says, the instrumentality by which the Roman Law was developed, "the sources of its characteristic excellence, its early wealth in principles".

Let me therefore this morning take some of the *eidola*—the cherished beliefs—of the older text-books and see how they have been broken down even in our own day. And let me start with Sir William Anson's book on contract. It was the first book I studied on the law. That was in 1921. In it he laid down the principle that "consideration is necessary to the validity of every promise not under seal." I accepted it without question—as did everyone else at Oxford

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at the time. Side by side with that statement let me place an extract from *Smith's Leading Cases*. It was the first book my master told me to consult when I went into chambers as a pupil. That was in 1922. In it it was said that, in order to give rise to an estoppel, "there must be a misrepresentation of existing facts, and not of a mere intention". I accepted that principle too without question, as did everyone else. After all, the House of Lords had decided it, and that was the end of the matter. Those two principles, taken together, meant that a statement of intention must either be binding as a contract or it is not binding at all. No promise was binding—in attack or defence—unless there was consideration to support it. Such was the law accepted by the profession in the 1920s.

It was not long before I discovered that those principles could be used—or rather misused—to produce the most unjust results. It occurred in a simple case which my master had when I was still a pupil. A man had agreed to make goods valued at some £80 for a customer and deliver them in six weeks. He got delayed and before the six weeks were up, he asked by word of mouth for an extension of two weeks. The customer orally agreed to this extension. He said it would be all right. He would accept the goods if they were delivered in that time. The seller accordingly made the goods within the extended time and tendered them to the customer, but the customer then refused to accept them. Could the seller recover damages? I thought that he ought in justice to get damages: but my master said that in law he could not get any damages. There was no consideration for the agreement to extend the time and in any case it was not in writing so as to satisfy section 4 of the Sale of Goods Act. No estoppel could avail, because there was no representation as to existing fact; and in any case estoppel did not give rise to a cause of action. My master told me to look into the authorities. I did so. And I had to admit that my master was right—on the authorities as they then stood—but in the course of my reading I found a reference which interested me. It was tucked away in a long judgment of McCardie, J. So you see his long judgments have their uses. He referred to the "broad rule of justice stated by Lord Cairns, L.C. in *Hughes* v. *Metropolitan Rly.*"[1] I followed this up. I found that Bowen, L.J. had applied it and indeed extended it, in *Birmingham Land Co.* v. *L.N.W. Rly.*[2] Those two cases were not referred to in the text-books. They were lost in obscurity. But they were worth remembering. For they showed a man would not be allowed to insist on his strict legal rights when it would be inequitable to allow him to do so: and that it would certainly be inequitable for him to do so when he by his conduct had led the other to alter his position.

We had another case in chambers later which brought home the same lesson to me. A company had agreed to pay one of its directors a remuneration of £500 a year and then fell on difficult times. His remuneration had already become due for the current year, but, in order to help the company, the director agreed to forego it. Afterwards disputes arose on other matters and he sought to get the remuneration, despite his agreement to forego it. Could the company resist the claim? What was the consideration for his promise to forego it? I could see none. And where was the estoppel? There was no representation of fact at all. I felt there would be great difficulty in resisting the claim when to my surprise and delight, one of my colleagues in chambers—now Mr. Roy Wilson, Q.C.—produced a case in which a very similar point had been decided.

[1] (1877) 2 App. Cas. 439.
[2] (1888) 40 Ch. D. 268.

It had been overlooked by the authorised Law Reports. It was only reported in the All England Reports. It was the case of *Re Wm. Porter*.[3] Simonds, J. had there rejected a director's claim to remuneration in similar circumstances. Simonds, J. had invoked a broad rule of justice very similar to that stated by Lord Cairns in *Hughes's Case*: but he derived it from something said by Lord Campbell in the House of Lords in a Scottish appeal *Cairncross* v. *Lorimer*.[4] Lord Campbell had said that the doctrine applied "in the laws of all civilised nations". This case too had been lost in obscurity. But it was worth remembering.

As it happened, I had only been a judge of the King's Bench Division for nine months, when a case came before me which raised very similar points. It was *Central London Properties* v. *High Trees House*.[5] A landlord company, which owned a block of flats, let them on a ground lease at a rent of £2,500 a year. Early in the war, owing to the evacuation from London, many of the flats were unlet: and the landlords in order to help the tenants, agreed to reduce the rent by one-half to £1,250 a year. There was no consideration for the reduction but both parties acted on it. The reduced rent was paid and accepted. At the end of the war when people returned to London, the flats were fully let: and the landlords sought to recover the full rents from that time onwards. The case might have been disposed of by saying that the reduction was not binding on the landlord because there was no consideration for it: or alternatively by saying that the agreement to reduce the rent (whether it was binding or not) only applied so long as the flats were unlet, and not when they were fully let. But I rather rashly perhaps—it is the way of an iconoclast, I suppose—went beyond what was necessary for the decision. I called to mind the cases of which I have told you and I expressed the opinion that, even during the time when the flats were unlet, the reduction was binding, though there was no consideration for it.

In short I applied the broad rule of justice which did not allow the landlord to go back on his word, seeing that the tenant had acted on it. But when the flats became fully let, the reduction did not apply and the whole rent was payable.

Now I have since followed, of course, all the discussion which has taken place about the *High Trees Case*. The one thing that cannot be controverted is that it has rescued from oblivion the principle of equity—the broad rule of justice—stated by Lord Cairns in *Hughes* v. *Metropolitan Rly*. This principle has been reaffirmed by the House of Lords in *Tool Metal Co.* v. *Tungsten*[6] and Lord Tucker has said that it must now be regarded as of general application. No longer can it be said that a promise made without consideration is not binding. It often is. No longer can it be said that a statement of intention does not give rise to an estoppel. It often does. (See *City & Westminster Properties* v. *Mudd*.[7]) These false idols, which disfigured the temple of the law, have been broken down, not by the blows of an iconoclast, but by the broad rule of justice itself.

What is the effect of all this discussion on the doctrine of consideration itself? It has often been said that, in order that a contract should be enforceable by action, there must be consideration to support it. He would be a bolder iconoclast than I who would attack a doctrine so revered by generations of

[3] (1937) 2 All E.R. 361.
[4] (1860) 3 L.T. 130.
[5] (1947) K.B. 130.
[6] (1955) 1 W.L.R. 761.
[7] (1958) 3 W.L.R. 312.

lawyers. The principle of equity of which I have been speaking does not directly touch this doctrine. It does not deal with the formation of contracts, but only with their modification or discharge. But in case there should be some among you who would assail the doctrine of consideration as now established, I would present you with a weapon for your armoury.

The doctrine of consideration is often said to have been affirmed by the House of Lords in 1778 in the case of *Rann* v. *Hughes*[8] but, when that case is examined, it will be found that it can be supported on another ground altogether. Lord Mansfield, you will remember, did not agree with the rule that consideration was necessary. He held that, in commercial transactions, if a promise was made in writing and intended to be enforceable, it was binding even though there was no consideration for it. "I take it," he said, "that the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, there was no objection to the want of consideration." He so held in 1765 in a case where bankers agreed in writing to honour drafts which should be drawn upon them. They were held bound by their promise even though there was no consideration for it. All the Judges in the King's Bench agreed with Lord Mansfield on this point.[9] Many subsequent cases were decided on the same ground. But 13 years later a case was taken to the House of Lords which was supposed to raise the same point. John Hughes owed £938 to a creditor, but before paying it he died, leaving an estate of over £3,000. His widow Isabella Hughes took out letters of administration to his estate, and took possession of his assets. She promised to pay to the creditor the £938 which John Hughes owed: but she did not say that she would pay it personally out of her own money. Presumably she meant it to come out of the dead man's estate. She did not, however, keep the promise. The creditor then brought an action—not against her as administratrix—but against her personally. Lord Mansfield and the Court of King's Bench held that she was personally liable: but the Court of Exchequer Chamber and the House of Lords held that she was not.

There were three possible reasons for the decision. One was that it was never alleged or proved that she promised to pay *personally*. The next was that any such promise would have to be in writing to satisfy the Statute of Frauds and none such was alleged or proved. The third was that there was no consideration for any such promise. Which of these reasons was the ground of the decision? No one can say. All three points were argued. Some of the peers may have been influenced by one reason. Others by another. The Judges who advised the House thought that any such promise was unenforceable because there was no consideration for it.[10] But according to the Reporter—the only one who reported the case—the House held the promise to be unenforceable because it was not alleged or proved to be in writing.[11] In these circumstances it cannot properly be regarded as an authority of the House for either view. Most lawyers have for the last 180 years, however, proceeded on the assumption that the opinion of the Judges was accepted by the House. In so doing, may they not be wrong? May it not be that Lord Mansfield was right after all? Many great lawyers since his time have agreed with him that, in commercial matters at least, where a promise is intended to be binding and is put

[8] *Rann* v. *Hughes* (1778) 4 Brown's Parliamentary Cases 27.
[9] *Pillans* v. *Van Mierop* (1765) 3 Burrow 1663.
[10] See 7 Term Reports p. 350, note (a).
[11] See 4 Brown's Parl. Cases, headnote p. 27.

into writing with that object, it should be enforceable at law. Indeed in 1937 the Law Revision Committee so recommended.[12] And they did not confine it to commercial matters. Any promise in writing was to be enforceable, even though there was no consideration to support it. Who were these bold iconoclasts? Names you all know. They included Lord Wright, Lord Goddard, Lord Porter, Lord Asquith, Lord McNair, Professor Goodhart and Professor Gutteridge. Yet their unanimous recommendation has not been accepted—so far. It is often said that it takes 25 years for the recommendation of a committee to get on the statute book. It did in the case of the divorce laws. If this is right, the doctrine of consideration has only three more years to go. But I myself would not be prepared to see it go. I would be content with abolishing the rule that consideration must move from the promisee—for reasons which will now appear.

Let me now turn to another cherished belief which I take as stated by Sir William Anson: "A man cannot acquire rights under a contract to which he is not a party." Lord Haldane said indeed that it was a fundamental principle that only a person who is a party to a contract can sue on it. This principle was at one time so generally accepted that no one thought of questioning it. But the pressure of modern commercial practice has led to a move to change it. I came up against the difficulties whilst I was still a junior at the Bar. It was a case in which I was led by Mr. Pritt, Q.C., who had great experience in commercial matters. A man had agreed to sell goods to a Canadian firm on the terms that payment would be made by confirmed letter of credit to be issued by a London bank. The buyer made arrangements with the bank in consequence of which the bank notified the seller that they would honour all drafts accompanied by documents which complied with the terms of the credit. The seller duly presented the documents to the bank, but the bank refused to pay, saying that the shipping documents did not comply exactly with the terms of the credit. The seller brought an action against the bank for refusing to honour the letter of credit. We appeared for the seller. Mr. Pritt said to me: "Suppose the bank take the objection that the seller is a stranger to the contract? or suppose the bank say that there is no consideration moving from the seller: What is the answer?" I studied closely Professor Gutteridge's book on Commercial Credits. He had attempted an answer but it was more ingenious than sound. The truth is that, according to the law as I was taught it, there is no answer. The bank could, if it wished, in law have refused to pay even though shipping documents were in the most perfect order. As it happened my labour was wasted, because the bank never took the objection at the trial. No bank ever does. But perhaps the labour was not altogether wasted, for it convinced me that there is something wrong with this "taught" law if it produces a result which is completely contrary to commercial practice and commercial morality.

Another case which drove home the same lesson to me was a case in which I was engaged as King's Counsel. A company employed a good servant for many years but afterwards on his resignation agreed to pay him £5,000 compensation for loss of office. The sum was payable by instalments over six years. And if he died within the six years, the outstanding instalments were to be paid to his widow and daughter. He died within two years. What was the legal position of the widow and daughter. Had they any right to sue for the outstanding instalments? I read Professor Corbin's article in the *Law*

[12] Law Revision Committee (1937) 6th Interim Report, *Cmd.* 5449, pp. 14, 18, 31.

Quarterly Review. I looked into all the cases. The answer I felt compelled to give was that the widow and daughter had no right to sue at all. The company could repudiate the obligation with impunity: because they were strangers to the contract and no consideration had moved from them. As it happened the company did not repudiate the obligation. They paid up. (*Re Schebsman.*)[13] But it showed decisively to my mind that the law was out of step with commonsense.

As it happened I had only been a judge of the Court of Appeal for eight months when a case came before us which raised a very similar point. Some land in Lancashire had been subject to flooding by the River Douglas breaking its banks. The Board agreed with the landowners to make good the banks for the benefit of all concerned but they did the work so badly that it soon overflowed again. The land was let to a tenant farmer, and he was the one who suffered the damage, not the landowner. Could the tenant farmer sue for breach of the agreement? The judge at first instance held he could not do so because he was not a party to it. But the Court of Appeal reversed him. The other members of the Court put their decision on special law relating to land. That was all that was necessary for the decision. But I went further than was necessary—again it is the way of an iconoclast, I suppose—and considered all the law relating to contract for the benefit of third parties. In the result, rather rashly, I made a frontal attack on the supposed principle that no one could sue upon a contract to which he was not a party. I went back to the old authorities and expressed the opinion that, according to them, a third party could sue upon a contract, provided that it was made for his benefit and he had a sufficient interest to entitle him to enforce it. (*Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board.*)[14]

Now I have since followed, of course, all that has been said on the subject. I am afraid that it shows that, in law as in war, a frontal attack is not likely to succeed against a position that is strongly held. (Much better make an outflanking movement, as in the *High Trees Case.*) At any rate, there has been more than one judicial observation lately insisting on the rule that no one can enforce the provisions of contract to which he was not a party. (*Midland Silicone* v. *Scrutton*;[15] *Green* v. *Russell.*)[16] How, then, does this matter stand? The Law Revision Committee has recommended that where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name. But that recommendation has not been implemented by legislation. And there seems, in the present climate of opinion, no hope of the Judges taking this step on their own. Does this mean that our law is forever to be out of step with commercial practice and commercial morality? Are we forever to be behind Scotland? and, I may add, the United States of America? You, Mr. President, in your illuminating book on *Modern Equity*, have pointed out that "the fetters have been of the Courts' own forging, and though the key which would unlock them has been presented by jurists, the gift has been rejected." Is not this a matter which the Society of Public Teachers of Law can take up? They may succeed where others have failed. Could it not be done within the next three years?

Now let me turn to another cherished belief, which I may call the sanctity of printed conditions. When I was called to the Bar, it was generally accepted that if a man signed a form containing printed conditions, or even

[13] (1944) Ch. 83.
[14] (1949) 2 K.B. 500.
[15] (1959) 2 W.L.R. 761.
[16] (1959) 3 W.L.R. 17, 24.

incorporating them by reference, he was bound by them, no matter that he did not read the document or did not realise there were conditions on it, and no matter how unreasonable the conditions were. I became very familiar with all the cases on the subject because one of my first clients was a railway company and it remained one of my best clients throughout my time at the Bar. I got to know the "ticket" cases and the "signature" cases backwards. And I made good use—I might almost say bad use—of this knowledge in the case of *L'Estrange* v. *Graucob*,[17] which carried this old principle to its logical conclusion. The case was this: A company was engaging in selling automatic machines to small shopkeepers. They employed canvassers to go round the country seeking sales, payment to be by instalments. Once a shopkeeper was persuaded to buy one of these machines, the canvasser produced a "Sales Agreement" which included a large number of clauses in small print, one of which said that "any express or implied condition, statement or warranty, statutory or otherwise, is hereby excluded". A canvasser put this form before a woman who kept a little shop. She signed it without reading it, made the first payment and took delivery of the machine. There was something wrong with it. It never worked properly. They sent workmen to try to get it to work but they did not succeed. When they sued her for the remaining instalments, she said it did not work: but they relied on the conditions as excusing them from any responsibility for it. The County Court Judge did not allow the company to recover the instalments. I was instructed by the company in the appeal. I submitted that it was settled law that, once she signed the document, she was bound by the conditions, although she had never read them, and it mattered not that they were very unreasonable conditions. The Court upheld this argument. The Judges were Scrutton and Maugham, L.JJ. I remember well that they did not like the argument—they did their best to find a way round—but, finding none, decided in my favour. The Reporter did not like it either. He did his best to conceal the case from the public gaze. He did not put it at the time in the Law Reports. But the company took advantage of the decision in many subsequent cases. Indeed, they had the judgment of the Court privately printed so that it could be handed up to the County Court Judges who had to deal with similar cases. This forced the hand of the Law Reporters, who thereupon printed it in the Law Reports, where it is to be found in (1934) 2 K.B. 394. It became known as the "canvasser's charter".

That was not the only case which brought vividly to my mind the injustice of many of these printed conditions. They were nothing less than a legislative code imposed by the one party on the other—and sanctioned under the guise of freedom of contract. I knew, of course, all the cases. I had read and reread the famous opinion of Blackburn, J. in *Peek* v. *North Staffordshire Rly. Co.*[18] I discovered there that in former times there were instances where conditions were held to be invalid as being contrary to the fundamental obligations which a party had assumed. Thus a person who carried on a public employment could not by any special agreement exempt himself from all responsibility. It was contrary to the salutary policy of the common law for him to do so. I began to wonder whether in the new situations now arising the common law was as powerless as had been supposed. As it happened, within two months after I went to the Court of Appeal, the question arose in connection with rules laid down by the various associations which control the workaday lives of their

[17] (1934) 2 K.B. 394.
[18] (1863) 10 H.L.C. 473, 493-94.

members—which operate a closed shop. A man, if he wishes to engage in that trade, has to be a member. He has to sign a form agreeing to abide by the rules. The rules are said to be a contract, but is he then to be bound by these rules, no matter how unreasonable they are? Suppose the rules say that the executive committee can expel a man at will, is such a rule binding? so that he can be deprived of his livelihood without a hearing? I found that, in this class of case at least, there is some ground for saying that the common law will write into the contract the fundamental obligation that the principles of natural justice must be observed. If and in so far as the rules seek to give the society power to ignore those principles, the rules are invalid. No one can stipulate for a power to condemn a man unheard (*Russell* v. *Duke of Norfolk*;[19] *Lee* v. *Showmen's Guild*).[20]

Since that time I have come to see that there are parallels in other types of case. I have in mind, for instance, the cases where a carrier deviates from the contract voyage or a warehouseman puts the goods in a warehouse different from that contracted for. I have also in mind all the cases—and there have been many lately—where a party does something in plain disregard of one of the fundamental obligations of the contract and then seeks to rely on the printed conditions to excuse himself. In such cases the Courts will not allow the person in breach to avail himself of the conditions. The Courts will either reject the printed conditions as inconsistent with the fundamental obligation or will say that the party cannot rely on it seeing that he was guilty of a fundamental breach. (*Glynn* v. *Margetson*;[21] *Sze Hai Tong Bank* v. *Rambler Cycle Co. Ltd.*)[22] Do we not see here a new principle emerging which says that the fundamental obligations of a contract take precedence over printed rules and conditions? No one should be allowed, by means of printed conditions, to derogate from the fundamental obligations which he has assumed. I would not seek here to formulate this new principle but I hope that you, the Public Teachers of Law, will lead the way. You will then be acting in the way of an iconoclast. You will outflank principles that have become out of date by raising up new principles to counteract them.

Now let me turn from the Law of Contracts to the Law of Torts. When I was called to the Bar, it was believed by everyone that hospital authorities were not liable for the negligence of their professional staff in the course of their professional duties. This was based on a *dictum* of Kennedy, L.J. in *Hillyer's Case*.[23] It was brought sharply to my notice in my very first case in the High Court. It was a poor person's case for which, of course, I got no fee at all. A lady had gone to a dental hospital to have a tooth out. Whilst she was under the anaesthetic, the tooth broke and a piece went down her throat. She was told nothing about it. The operator who extracted it hoped that it would disappear through the stomach. But in fact it went down her wind-pipe and into her lung. She developed a cough, and not knowing the cause, it was not properly treated and she died. If she had only been told of the piece of tooth, it could have been taken out of her lung and she might have lived. According to the law as we believed it to be, her representatives could not sue the hospital. So we had to find out the name of the dentist who operated on her. How could we do this? If the hospital had refused to give us his name, I know of no way in which we could have compelled them to do it. As it happened, the hospital did,

[19] (1949) 65 T.L.R. 225, 231.
[20] (1952) 2 Q.B. 329, 342.
[21] (1893) A.C. 351.
[22] (1959) 3 W.L.R. 219.
[23] (1909) 2 K.B. 820, 829.

by letter, give us his name. So we sued him and succeeded. But it seemed to me that there was something wrong with the law if redress depended on the chance whether the hospital authorities were willing to give us the dentist's name or not.

As it happened, later on in my practice, I had another poor person's case on the same subject. A little girl had gone into the Essex County Hospital for treatment for warts on her face. The radiographer treated her so badly that her face was badly burnt and she was disfigured. We did not know the name of the radiographer so it looked as if we should be in difficulties. But by this time Professor Goodhart had written his famous article in the *Law Quarterly Review* on this subject.[24] He had given good reasons for thinking the law had been misunderstood. So we brought an action against the Essex County Council for damages. The case was tried by Tucker, J. He felt he was bound by the old principle that the hospitals were not liable for their professional staff and he dismissed the claim. We appealed to the Court of Appeal and there, with the aid of Professor Goodhart's article, we succeeded. Lord Greene held that the County Council had undertaken the obligation of treating patients and were liable if the persons employed by them acted without due care (*Gold* v. *Essex County Council*).[25] I received, of course, no fee, but my clients were so pleased that I found afterwards in my chambers a very nice new reading lamp, which I believe came from them. But I rather think that it ought to have gone to Professor Goodhart.

You will not wish me, I am sure, to go through all the later cases in the courts. I happened to be sitting in the Court of Appeal when *Cassidy's Case*[26] came before us. In that case the plaintiff went into the Walton Hospital at Liverpool for treatment for two stiff fingers. He came out with four stiff fingers. If he had had to prove that some particular nurse or doctor was negligent, he could not have done it. But as somebody on the staff had undoubtedly been negligent, the Ministry was held liable. I was given to understand later that the Ministry considered an appeal to the House of Lords, but the law officers of the Crown advised against it. So the law became settled and the old principle was overthrown.

Who was the iconoclast? I suggest it was Professor Goodhart by his article in the *Law Quarterly Review*. He made Oxford on this occasion the home of a winning cause.

Now I hope that I may, with your leave, turn from the law of contract to the law of property: and in particular to the cherished belief that no one has a right to remain on the land of another against the will of the owner unless he has an interest therein—a proposition of which the implications will not be fully grasped unless you remember that a licence to go on the land passes no interest in the land and can be revoked at will. When I was at Oxford no one doubted these propositions. They were based on *Wood* v. *Leadbitter*.[27] No one thought that the decision in *Hurst* v. *Picture Theatres*[28] had really touched them. In that case, you remember, Hurst paid for a ticket to see a film: and, before it was over, the manager ejected him. The Court of Appeal held he was entitled to damages. The case was much criticised because Hurst had no interest, legal or equitable, in the land, and it was wrong to treat him as if he had. And in 1936 the High Court of Australia held that it was

[24] (1938) 54 *L.Q.R.* 553.
[25] (1942) 2 K.B. 293.
[26] (1951) 2 K.B. 343.
[27] (1845) 13 M. & W. 838.
[28] (1951) 1 K.B. 1.

wrongly decided (*Cowell* v. *Rosehill Racecourse Co.*).[29] I do not remember having to consider this controversy closely until after I was a judge: and then it was not in a case that was argued before me. It was in the *Winter Garden Case* and Viscount Simon was good enough to show me a draft of his speech in the House of Lords before he delivered it. That was an unusual thing to do. Needless to say I was full of admiration for it. He made it clear that, since the fusion of law and equity, no court in this country would refuse a remedy to a plaintiff in *Wood's* situation or *Hurst's* situation, for that matter. This was indeed a major event. A man with a contractual licence was held entitled to remain on land against the will of the owner, even though he had no interest therein.

As it happened, in the next term I was presented with a problem which raised an analogous question. A husband had left his wife and gone off to live with another woman. But he was the owner of the house, and wanted to get his wife out of it. The wife had remained in it with her son, who was an invalid. She had nowhere else to go. It was in the days of the most acute housing shortage. The Master who heard the case thought that there was no defence in law to the husband's claim for the house. The wife and son had no interest, legal or equitable, in the house. He ordered them out forthwith. An appeal was brought before me sitting in chambers. Counsel then referred me to a judgment of Goddard, L.J. in which he had pointed out that a husband could not sue his wife for a tort but could only recover possession under s.17 of the 1882 Act. Founding on those observations I held that the Court had a discretion in the matter. I refused to order the wife and son out of the house. And seeing that the case was of general application at that time, I did not deliver judgment in chambers. I gave it in open court (see *H.* v. *H.*).[30] This was the first of the many cases in which deserted wives have been held entitled to remain in the matrimonial home.

I need not take you, I am sure, through the rest of them. Suffice it to refer to the judgment of Upjohn, J. in *Westminster Bank* v. *Lee*,[31] when he held that a deserted wife, although she has no equitable interest in the house, she has nevertheless an equity which is available, not only against her husband but also against all claiming through him save only a purchaser for value without notice. This line of decisions has been criticised in some quarters—and indeed flatly dissented from in Australia. But I would remind you of what the Royal Commission on Marriage and Divorce said about them (para. 664): "We think that it has been right to afford this protection to a deserted wife, to allow her to keep a roof over her head: it would be shocking to contemplate that a husband could put his wife and children into the street so that he could himself return to live in the home, perhaps with another woman." The Royal Commission go on to point out that "the law is not firmly settled since it does not as yet rest upon a decision of the House of Lords"; and they recommend that a statute should be passed to make the position clear beyond doubt. But no statute has been passed. Several statutes have been passed on other matters recommended by the Royal Commission, but none on this point. It may reasonably be presumed that those responsible for introducing legislation are satisfied with the law as it stands.

So you see, another cherished belief has broken down. It is no longer true to say—in England at least—that no one has any right to remain on land

[29] (1937) 56 C.L.R. 605.
[30] (1947) 63 T.L.R. 645.
[31] (1956) Ch. 7.

unless he has an interest therein. A deserted wife has a right—she has an equity. At once, the question arises: Has not a contractual licensee—for example a licensee who has the "front of the house rights" in a theatre—a similar equity? Will you not help with the answer? And when you find the courts of England and of Australia differing on this matter, will not you help to say which are right? Or may it simply be due to the fact that the housing shortage was more acute in England than in Australia?

Let me turn now to the field of public law and refer you to the cherished belief that, when Parliament entrusts a Minister or Tribunal with determining any question, without giving a right of appeal from the decision, then the only remedy known to the law is by certiorari to quash the decision and by mandamus to compel him to hear it again. This belief was no doubt inherited from the days of the old common law—before the fusion of law and equity—when certiorari and mandamus were indeed the only remedies. This belief was accepted by everyone when I was at the Bar. Indeed in 1932 in the famous *Report of the Committee on Ministers' Powers*, these old remedies were still assumed to be the only remedies. They said (at p. 99): "The existing procedure (by way of certiorari prohibition and mandamus) is in our opinion too expensive and in certain respects archaic, cumbrous and too inelastic"; and they recommended "the establishment of a simpler and less expensive procedure and one more suited to the needs of the modern age." Nothing was done to implement this recommendation. As late as 1943 Lord Wright in the House of Lords said of a statutory body (the General Medical Council): "The only control of the Court to which the Council is subject (apart from proceedings by way of mandamus) is the power which the Court may exercise by way of certiorari." (*G.M.C.* v. *Spackman.*)[32] There were, fortunately, practising lawyers who were ready to challenge this accepted view. They were Sir Frank Soskice and Mr. Platts-Mills. They did so in a dispute about unloading sugar in the London Docks. The masters of the lightermen ordered the men to alter their customary hours of work. The men refused to comply. Thereupon the Dock Labour Board suspended them from work. They appealed to the Appeal Tribunal, who confirmed the suspension. The men sought to test the legality of this suspension. They brought an action for a declaration that the suspension was unlawful—on grounds which do not now matter—but in the course of the action they had discovery of documents, and they found that the Dock Labour Board had never themselves suspended the men—the Port Manager had done it on his own, which he had no right to do. When Sir Frank Soskice and Mr. Platts-Mills sought to raise this point before the Court the Dock Labour Board objected. They said that the decision of the Appeal Tribunal was binding on all persons unless and until it was set aside by certiorari—which it was too late to do. McNair, J. decided that point in favour of the men. I remember still the surprise—and excitement—with which I read the head-note of his decision in saying that "The decision of a statutory body from which no right of appeal is given, may be questioned *either* by certiorari or alternatively by bringing an action for *a declaration* and injunction" (see *Barnard* v. *National Dock Labour Board*).[33] The case came before the Court of Appeal, where I happened to be sitting. Mr. Paull, Q.C. (as he then was) submitted most emphatically that McNair, J. was wrong. The consequences of allowing remedy by declaration, he said, would be disastrous. It would mean that the courts would be flooded

[32] (1943) A.C. 627, 640.
[33] (1952) 2 T.L.R. 309.

with actions for declaration: and they would be giving in effect a right of appeal in cases when Parliament had said there should be none. But the Court did allow the remedy. It was indeed the only way of correcting the injustice to the men.[34] And the decision has since been applied by the House of Lords, so that it is now beyond question (*Vine* v. *National Dock Labour Board*).[35] Subsequently efforts have been made to cut down the effect of the decision by saying it was confined to cases where the tribunal had acted without jurisdiction. But these have not succeeded. The recent decision of the House of Lords in the *Pyx Granite Case*[36] shows that the remedy by declaration is being given a broad and liberal scope. Lord Goddard himself gave the *coup de grâce* to the old belief when he said: "It was also argued that, if there was a remedy in the High Court, it must be by certiorari. I know of no authority for saying that, if an order or decision can be attacked by certiorari, the Court is debarred from granting a declaration in an appropriate case. The two remedies are not mutually exclusive".

Side by side with this liberal development of the remedy by declaration, it is interesting to contrast the decisions on certiorari. A few years ago the courts made a notable advance by holding that certiorari applies not only to want of jurisdiction, but also to error of law on the face of the record. But the latest case in the House of Lords shows that the word "record" in this connection may mean no more than the actual order or decision as recorded (see what Lord Tucker said in *Baldwin & Francis* v. *Patents Appeal Tribunal*).[37] If this is so, it is one more drawback to certiorari and may presage its gradual replacement by declaration. At any rate, the old belief that certiorari is the only remedy has completely disappeared. The iconoclasts here were the practising lawyers who were ready to challenge the old belief. It is as well to remember that, unless the practitioners raise the points, the judges will not receive them.

What then is the way of an iconoclast? It is the way of one who is not content to accept cherished beliefs simply because they have been long accepted. If he finds that they are not suited to the times or that they work injustice, he will see whether there is not some competing principle which can be applied to the case in hand. He will search the old cases, and the writers old and new, until he finds it. Like the woman in the parable, he will sweep the house and search diligently until he has found it. Once found, this principle will be invoked to modify the old beliefs and to mitigate the injustice produced by them. Only in this way can the law be saved from stagnation and decay. And, as so modestly defined, it is the way, I hope, of the Society of Public Teachers of Law. Will you not follow the way of an iconoclast?

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[34] See (1953) 2 Q.B. 18.
[35] (1957) A.C. 488.
[36] (1959) 3 W.L.R. 346.
[37] (1959) 2 W.L.R. 826, 839.