coincidence of those particular parts. It has been suggested that "law" should not be defined but should be viewed as a series of "clusters of attributes".[57] So, perhaps, "judicial power" might be considered as a "cluster of attributes" rather than as a precisely defined concept to be identified by reference to one particular attribute. The analysis of Kitto, J. tends in this direction.

Kitto, J., as we have seen, was of opinion that by the new section "a typically judicial procedure is laid down".

> An application must be made; it must be made by a member, that is to say, a person who has an interest to procure the elimination of any legally objectionable provision from the rules of his organisation, whether the provision has a direct disadvantageous impact upon him or not. The Court's function is described as a jurisdiction. The process which it is to follow is described as hearing and determining an application. The organisation must be given an opportunity of being heard. And the process is confined to the ascertainment of a pre-existing state of affairs, the question for decision being only whether a rule is or is not contrary to provisions of the Act or regulations or of the law as found elsewhere, or whether its operation is or is not of one of the described kinds. The order to be made is in terms merely declaratory, and does not purport to effect any change in the legal situation.[58]

It may be, in short, that there is no single attribute for testing judicial power and that the quest should be for the typical "cluster of attributes". The "cluster" found by Kitto, J. in the new s.140 is very much the sort of "cluster" which earlier courts have found in earlier powers which have been held to be judicial.[59] But difficulties would still remain. For, at the same time, it is not markedly different from the "cluster" detectable in the old s.140, which laid down a procedure of which with equal justice it might be said, "This is a typically judicial procedure". The truth is that "the typical", "the average", affords no precise scale for measuring the difference between two concrete quantities.

Mere comparison of the two "clusters of attributes" respectively presented by the old and new versions of s.140 seems to reveal no clear basis for distinguishing the old from the new section. By this approach, as by our earlier analysis, we are led to the conclusion that, so far as concerns the nature of judicial power, the alterations made to s.140 by the 1958 amending Act were verbal merely and did not go to the substance of the section. If this be so, it follows that there was (with respect) no warrant for distinguishing the two provisions, and that the *Builders' Labourers' Case* and *Shearer's Case* cannot stand together. In the apparent absence of any other basis for distinguishing the *Builders' Labourers' Case*, we may be led to speculate upon the possible reasons, of policy or otherwise, which led to the inconsistent decision in *Shearer's Case*. That matter, however, goes beyond the scope of the present note.

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OCCUPIER'S LIABILITY FOR INJURY TO PROPERTY
DRIVE-YOURSELF LESSEY'S PTY. LTD. v. *BURNSIDE & OTHERS*

Does the law distinguish between injury to person and injury to property

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[57] See K. N. Llewellyn, "The Normative, the Legal, and the Law Jobs: the Problem of Juristic Method" (1940) 49 *Yale L.J.* 1355. Discussed with approval, J. Stone, *The Province and Function of Law* (1950) 717-721.

[58] (1960) 34 A.L.J.R. 155, 160-161.

[59] See, e.g., *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1925)

in the field of occupier's liability? This question arose in the case of *Drive-Yourself Lessey's Pty. Ltd.* v. *Burnside*,[1] and at least two of the judges felt that the law did not draw this distinction. Taylor drove a car which he had hired from Drive-Yourself Lessey's Pty. Ltd. into a car park which was situated in a public recreation area. The title of the reserve was in the names of Burnside and other defendants, who were trustees of the park. They directed Taylor, who had paid a parking fee, to park his car at the foot of a steep cliff from which a large rock fell and landed on the car, causing extensive damage to it. Taylor was completely unaware of any danger but the defendants had knowledge of the fact that on previous occasions rock falls had occurred from the same cliff. The owners of the car brought the action against the defendant trustees on four counts: (i) Negligence; (ii) Occupier's liability; (iii) Nuisance; (iv) Bailment. The District Court judge ruled for the defendants on counts (iii) and (iv) but the jury found for the plaintiff on the negligence count and awarded £610 damages. The appeal was brought against this judgment.

The plaintiff's first argument was that the property of the plaintiff company was placed on the defendants' land either by invitation or by licence, and was damaged by an imminent danger known to the defendants but unknown to Taylor, the danger being caused by the unsafe nature of the parking area, of which the defendants gave Taylor no notice. Alternatively, the plaintiffs said that even if no relationship of either invitee or licensee had been created, the defendants, nevertheless, owed the plaintiff a duty of care with regard to the plaintiff's motor car.

Modern cases such as *Hawkins* v. *Coulsdon & Purley Urban District Council*[2] have virtually abolished the distinction between licensees and invitees in the field of occupier's liability and the problem did not arise in this case. Taylor was clearly an invitee on the defendants' premises[3] and he was covered by the well-known principle of Willes, J. in *Indermaur* v. *Dames*[4] that "an invitee using reasonable care for his own safety is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which the occupier knows or ought to know". The first problem that arose in the application of these principles was whether this principle was limited to damage to person or whether it also covered damage to the entrant's property? The argument used by the defendants to show that an occupier was not liable for property damage was based, in the first instance, on a recent decision of the Court of Appeal. In *Tinsley* v. *Dudley*[5] a customer at a hotel left his motor bicycle in the yard (which was covered) of the hotel in which he was taking refreshment. The hotel-keeper was unaware that the machine had been left there. The cycle was stolen and the owner sued the hotel-keeper. The owner failed in his action, and Lord Evershed stated:[6]

> The question whether the relationship of one person to another in respect of premises is that of licensor and licensee or invitor and invitee has often been before the courts; but the validity of the distinction bears only I think on matters of personal injury, or, at most, material injury which is incidental or ancillary to personal injury. . . . There is no authority for the view that an invitee, *quoad* his belonging, such as a motor car or motor cycle, has some higher right as against the invitor than has a licensee against a licensor.

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35 C.L.R. 422; *Reg.* v. *Davison* (1954) 90 C.L.R. 353. (Discussed (1953-1955) 1 *Sydney L.R.* 416 ff).

[1] (1959) 59 S.R. (N.S.W.) 390.

[2] (1954) 1 Q.B. 319.

[3] Or at least it is not discussed except for a passing mention by Street, C.J., who said that on the jury's findings the appellants would be liable if only licensors.

[4] (1866) L.R. 1 C.P. 274, 288.

[5] (1951) 2 K.B. 18.

[6] *Id.* at 25.

Jenkins, L.J. seemed to take a similar view, although it is possible to interpret his judgment as a decision that the liability of an occupier does not cover loss by theft. In any event this is not due to a defect in the premises.

To support their interpretation of *Tinsley* v. *Dudley* as a decision which restricted damages recoverable from an occupier to damages for personal injury and, perhaps, incidental property damage, the defendants relied on *Lipman* v. *Clendinnen*—or rather Dixon, J.'s statement:

> But the possession of property is not in itself the source of any obligation with respect to its state or condition. Its use or enjoyment may be attended with as much, or as little, hazard as the occupier chooses, if he retains exclusive enjoyment of the perils as well as of the advantages of occupation. The circumstance which annexes to occupation the duty of care, when it exists, is the presence or proximity of others upon or to the premises occupied. It is because the safety of such persons may be endangered that the obligation of care arises. But as the purpose of the obligation is that those who come may go unharmed, the existence and extent of the duty must depend upon their title to be there, upon the object with which they come and upon the occupier's interest in their presence.[8]

In the *Drive-Yourself Lessey's Case*, Herron, J., interpreting this passage, seems to imply that Dixon, J. was limiting liability to personal injuries. But it must be remembered that no question of injury to property arose in *Lipman* v. *Clendinnen*. Furthermore, the last sentence of this passage seems to indicate that if an invitation had been extended to the owner of a motor car to bring his vehicle on to premises and the car was injured as in the present case under discussion then the occupier would have been strictly liable. It is the title and the object of the entrant, and the interest of the occupier, that are the important considerations and in the *Drive-Yourself Lessey's Case* all three are evident.

In *Lancaster Canal Co.* v. *Parnaby*,[9] not considered in *Tinsley's Case*, a fly boat belonging to the plaintiff was damaged whilst in motion by colliding with an obstruction in the canal which was maintained by the defendant and available to the use of the public on the payment of a certain toll. The defendant knew of the obstruction but did not give any warning of it. The plaintiffs failed to recover under a statute but Tindal, C.J. permitted recovery under common law principles and said:[10]

> . . . the question then arises, whether upon the facts stated in the declaration, another duty of different kind was not imposed by the common law upon the company . . . the facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company. And the common law in such a case imposes a duty on the proprietors . . . to take reasonable care so long as they keep it open for the public use of all who may choose to navigate so that they may navigate without danger to their lives or property.

This statement of the law was approved in *Mersey Docks and Harbour Board Trustees* v. *Gibbs*[11] and *Reg.* v. *Williams*[12] and the passage quoted from the judgment of Tindal, C.J. has been treated as authority by Hamilton, L.J. in *Latham* v. *R. Johnson & Nephew Ltd.*[13] and by Starke, J. in *Aiken* v. *Kingborough Corporation*.[14] In the principal case, Street, C.J. and Owen, J. held that the defendant was liable for property damage, while Herron, J. was noncommittal, preferring to decide the case apart from the law of invitee and licensee.

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[7] (1932) 46 C.L.R. 550.
[8] *Id.* at 554.
[9] (1839) 11 Ad. & E. 223.
[10] *Id.* at 242-43.
[11] (1866) L.R. 1 H.L. 93.
[12] (1884) 9 A.C. 418.
[13] (1913) 1 K.B. 398, 412.
[14] (1939) 62 C.L.R. at 199.

Granted that the defendants would have been liable to Taylor either for injury to his person or to his property brought on to the premises, the second question raised was whether the defendant was liable to the plaintiff for damage to the automobile which was brought on to the premises by Taylor but which was owned by the plaintiff. Street, C.J. said that the invitation was to the world of car owners at large and that *it "was really to the car that the invitation was extended, and it was for injury to the car that the appellants were liable* to answer in damages, if they failed in their duty as invitors".[15] Owen, J. stated: "I am of the opinion that the occupier of premises who invites or licenses car drivers to leave their cars on his premises should be regarded as extending the invitation or licence to the owner of the car."[16]

In the present context it is worth recalling the case of *Ashby* v. *Tolhurst*.[17] The plaintiff parked his car on property belonging to the defendant, paying a fee for this service. He received a ticket which exempted the defendant from liability and the court held that this constituted an effective contractual bar to any suit. Presumably, then, the owners of the parking station could contract out of liability for damage although it is difficult to see how Drive-Yourself Lessey's Pty. Ltd. would have been affected in any way by a contract between Taylor and the trustees of the park.[18] Another way in which the park trustees might have attempted to avoid liability would have been to give notice to the driver of the car that he was parking the car in the area at his own peril. In *London Graving Dock Co. Ltd.* v. *Horton*[19] it was stated that if the entrant was advised of the risk of entry and was shown to have entered despite this advice, the invitor or licensor would not be liable for damages suffered by the entrant, due to the dangerous nature of the premises. On the other hand *London Graving Dock* v. *Horton* did not involve this problem of "vicarious entry", where damage is caused to a person other than the person entering on the land, and the application of the case in this situation is doubtful.[20]

Only Herron, J. dealt fully with the second argument of negligence on which the plaintiffs relied. He invoked the judgment of Lord Atkin in *Donoghue* v. *Stevenson*[21] and continued:

> In this case a duty of care was owed to the respondent company *quoad* its motor car. The motor car had been brought on to the property of which the appellants were the occupiers. It was lawfully there. It was in a part of the land set apart for parking motor cars. The part of the premises where it stood was dangerous. The dangers were known to the appellants and unknown to the respondent or to its bailee. A duty of care thus arose.[22]

The appellants relied on *Revesz* v. *Commonwealth of Australia*,[23] *Lewis* v. *Sydney Flour Pty. Ltd.*[24] and *Davis* v. *St. Mary's Demolition Co. Ltd.*[25] as illustrations of limits to the principles of *Donoghue* v. *Stevenson*. Herron, J. did not specifically deal with the cases on which the appellants relied to show the extent to which Lord Atkin's principle had been limited. However, he implied that these cases could be distinguished on the facts. He supported his own arguments by listing cases in which Lord Atkin's principle had been applied and adopted the principles governing the liability of bodies in charge of places used by the

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[15] (1959) 59 S.R. (N.S.W.) 390, 400.
[16] *Id.* at 402.
[17] (1937) 2 K.B. 242.
[18] In this case a ticket was issued but no special conditions were mentioned.
[19] (1951) A.C. 737.
[20] Such notice might be sufficient notice to the owners of the car who would then have to proceed against the hirer to recover damages in bailment.
[21] (1932) A.C. 569 at 580.
[22] (1959) 59 S.R. (N.S.W.) 390, 410.
[23] (1951) 51 S.R. (N.S.W.) 63.
[24] (1956) 56 S.R. (N.S.W.) 189, 191, 192.
[25] (1954) 1 W.L.R. 989.

public which Dixon, J. stated in *Aiken's Case*:[26]

> They are in charge of the structure provided for the use of people who must in using it rely upon its freedom from dangers which the use of ordinary care on their own part would not avoid. Unless measures are taken to prevent it falling into disrepair or dilapidation or becoming defective; or if it does so to warn or otherwise safeguard the users from the consequent dangers, it will become a source of injury. . . . The general grounds for regarding the situation as throwing a duty of care upon the public authority appear in the already well-known statement of Lord Atkin in *Donoghue* v. *Stevenson*.

One problem which confronts the lawyer in dealing with *Drive-Yourself Lessey's Pty. Ltd.* v. *Burnside* is the definite difference of opinion between Street, C.J. and Owen, J. on the one hand and Herron, J. on the other. It is possible to view Herron, J.'s judgment as inconsistent with the majority view that the rules relating to liability for negligence are excluded by the special rules governing the liabilities of the occupier of dangerous premises, although it is difficult to conceive a situation where the result would be affected by the categorization of the problem. The majority do attempt to formulate a principle of law with respect to occupier's liability for injury to property. A further decision from the full Supreme Court could well lead to the extension of the Willes, J. principle to a statement like this:

> An invitee using reasonable care for his own safety or the safety of chattels brought with him on to the occupier's premises at the invitation of the occupier is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which the occupier knows or ought to know.

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OCCUPIER'S LIABILITY TO VISITORS
RICH v. *COMMISSIONER FOR RAILWAYS (N.S.W.)* *COMMISSIONER FOR RAILWAYS (N.S.W.)* v. *CARDY*

Murmurs are increasing against the approach to occupier's liability to a visitor by the process of first assigning the visitor to a legal category, and then applying a "precisely" defined duty prescribed for the benefit of that class.[1] Though criticism generally proceeds on the wide level of logic and policy, many specific problems spring from the cases of trespassers.[2] In two such recent cases, *Rich* v. *Commissioner for Railways*[3] and *Commissioner for Railways* v. *Cardy*,[4] the High Court re-examined the problem of the occupier's liability.

By way of preface, it should be emphasized that there has been a judical tendency to distinguish between situations where damage results from the statically defective condition of the premises, and those where it arises from activity or operations carried on upon the premises.[5] *Rich's Case* shows that

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[26] *Aikin* v. *Kingborough Corpn.* (1939) 62 C.L.R. 179, 205-206.

[1] J. G. Fleming, *The Law of Torts* (1957) 428; J. Salmond, *Law of Torts* (11 ed.) 549; F. H. Bohlen, *Studies in the Law of Torts* (1926) 160.

[2] This is particularly so in recent times, for the distinction between invitee and licensee is disappearing, and some would say has been obliterated—see Denning, L.J. in *Slater* v. *Clay Cross Co. Ltd.* (1956) 2 Q.B. 264, 269. Indeed, in England this distinction has now been abolished by the Occupier's Liability Act, 1957.

[3] (1959) 33 A.L.J.R. 176.

[4] (1960) 34 A.L.J.R. 134.

[5] See *Dunster* v. *Abbott* (1954) 1 W.L.R. 58; *Slater* v. *Clay Cross Co.* (1956) 2 Q.B. 264; *Riden* v. *A. C. Billings and Sons Ltd.* (1957) 1 Q.B. 46; *Percival* v. *Hope Gibbons Ltd.* (1959) N.Z.L.R. 642, 671; *Spittal* v. *Wellington City Corpn.* (1959) N.Z.L.R. 1095. See also F. H. Newark on *Twine* v. *Bean's Express Ltd.* (1954) 17 *Mod. L.R.* 102, 109; J. L. Montrose, "Negligence and Liability for Dangerous Premises" (1954) 17 *Mod. L.R.* 265.