limit must be put, and some stage must be reached, when one can say: 'This is so immobile that it has ceased to be a mechanically propelled vehicle' ".[20]

It is harder to fit this decision into Fuller's pattern, for the Court in *Smart's Case* would seem to have been preoccupied with finding a positive meaning for the phrase "mechanically propelled vehicle", and not with ascertaining legislative intention. However, it is submitted that the Court may still have had in mind the injustice of compelling dealers in scrap, which happened to take the form of a motor-car, to deal in *licensed* scrap. This would not be the sort of vehicle the legislature had in mind when enacting the rule. Thus the Rover in question was held not to be a mechanically propelled vehicle.

But while the decisions in both *Simmonds' Case* and *Smart's Case* may be twisted to fit either Professor Hart's or Professor Fuller's theory, this can only be done by looking beyond the reasons set out in the various judgments. It is implied but never expressly stated in *Smart's Case* that it would be unjust to compel a dealer to license a scrap motor-car. Indeed all three members of the Divisional Court rested their decisions four-square on the ground of "common sense".[21] The day has not yet come when courts will search for and openly admit the underlying reasons for their decision and judges are probably very often not fully conscious of them. The "creative choice between alternatives"[22] sought by Hart remains a choice exercised not consciously and openly but instinctively by men whose legal training and experience is such that they regularly make a wise choice.[23] And perhaps it is best that this is so. The soul-searching examination of social needs and social facts may make heavy work of a task which is performed simply and efficiently when left to an instinct moulded and sharpened by experience.

In *Simmonds' Case* and *Smart's Case*, then, the courts faced a problem as old as language itself. And they solved it in as satisfactory a manner as is possible, considering tthe nature of the problem. The explanation of the decisions may be found in the theories of Hart or of Fuller, whichever is preferred. But these cases demonstrate at least that the increasing scope of statutory law has in no way lightened the judges' task or solved their difficulties in respect of the so-called "border line cases". Here as in the past the Court must still exercise a legislative function and reach a decision in no way dictated by logic. The point at which a motor-car ceases to be a "mechanically propelled vehicle" has not yet and probably never will be precisely determined. But the courts, faced with the necessity of making a decision in any particular case, will apply their instinctive notions of justice and social experience in the guise of "common sense" to make that case fall on one side of the line or the other.

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STATEMENTS MADE OUT OF COURT ADMITTED AS EVIDENCE

NOMINAL DEFENDANT v. *CLEMENTS*

I. *Introduction*

It is a well established rule of the law of evidence that evidence of statements made out of court by a witness is not admissible, to corroborate the evidence of that witness given in the witness box. This rule only developed in

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[20] (1962) 3 W.L.R. 1325 at 1330.
[21] *Id.* at 1330, 1331.
[22] See *infra.*
[23] Indeed this is recognised by Professor Hart *op. cit.* at 611.

the latter part of the 18th century and indeed is contrary to the earlier principle as stated in Hawkins' *Pleas Of The Crown:* "What a witness hath been heard to say at another time may be given in evidence in order either to invalidate or confirm the testimony that he gives in court".[1] It is still true that evidence of an earlier statement made by a witness, who is a party or able to bind a party, which is inconsistent with his sworn testimony, may be admissible as an admission. However, it became apparent in the latter 18th century that earlier statements which are to the same effect as a witness's evidence should be distinguished. The fact that a witness has earlier and elsewhere made a statement which is consistent with his testimony is no warrant of the truth of that testimony and may be merely the first of two similar falsehoods. Furthermore, the admission of such evidence might lead to abuse, for a person believing that he might be involved in litigation might have the foresight to manufacture evidence for himself by making pre-trial statements which would assist his case to other persons, and then calling those persons at the trial to corroborate his evidence. Accordingly the rule became established that the evidence of a witness cannot be confirmed by proving a previous consistent statement by the witness.

There are said to be two common exceptions to this principle. In sexual cases evidence of complaints made by the prosecutrix at the first opportunity after the offence allegedly occurred is admissible, not to prove the offence, but to prove the consistency of the prosecutrix's conduct with her evidence.[2] Secondly, when evidence of a witness is impeached on the ground that it is a "recent invention", that it is concocted or fabricated by the witness after the event, though not necessarily with fraudulent intent, then evidence is admissible of statements by the witness consistent with his testimony, made contemporaneously with the event or so shortly afterwards as to negate the implication of recent invention, for the purpose of rebutting the suggestion of recent invention.[3]

The two exceptions are similar in that in both cases evidence is admitted, not as evidence of the facts mentioned in the statement, but for a collateral purpose. The two exceptions are dissimilar in that in sexual cases evidence of a complaint is admissible in chief to support the credit of the witness, whereas under the second exception, evidence is only admissible to restore the credit of the witness which has already been impugned either by cross-examination or otherwise on the ground of recent invention.[4]

II. *Nominal Defendant* v. *Clements*—*The Facts*

The second exception was the subject of discussion by the full High Court in the recent case of *Nominal Defendant* v. *Clements*.[5] In this case the plaintiff, an infant, brought an action by his next friend against the Nominal Defendant for damages for personal injuries suffered in a car accident. The accident occurred on 1st May, 1954, when the plaintiff was only six years old.

At the trial which took place more than four and a half years later the plaintiff gave evidence in chief that, while he was standing near the edge of The Strand, Dee Why, looking out towards the ocean and watching other children playing with a ball, he was hit in the back by a car which he did not see, knocked down and injured. The defendant called no evidence but

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[1] W. Hawkins, 2 *Pleas Of The Crown* (8 ed. 1824) c. 46.
[2] See e.g., *R.* v. *Lillyman* (1896) 2 Q.B. 167; *R.* v. *Osborne* (1905) 1 K.B. 551.
[3] See e.g., *Phipson on Evidence* (9 Ed. 1952), 512; 4 *Wigmore on Evidence* (3 Ed. 1940) par. 1129.
[4] See *Nominal Defendant* v. *Clements* (1960) 104 C.L.R. 476 at 492 *per* Windeyer, J.
[5] *Op. cit.* n. 4.

endeavoured in his cross-examination of the plaintiff and the plaintiff's witnesses to make out a case that the plaintiff had joined in the game with the other children and had run out on to the road after the ball just before he was knocked down. The plaintiff denied this, but a boy about one year older than the plaintiff gave evidence that during the course of the game the ball had gone bouncing on to the road and the plaintiff had run after it.

A medical witness called by the plaintiff was asked during cross-examination by Counsel for the Nominal Defendant whether in June, 1958, during an examination of the plaintiff the plaintiff had told him that "He had no recollection of any of the details of the matter at all". To this question the witness replied, "Yes". The medical witness also admitted in cross-examination that in October, 1958, that is shortly before the trial, he had seen the plaintiff again and had made a note, "Tells the story of the accident today". The plaintiff had been cross-examined about his conversations with the doctor but he stated he had no recollection of them.

The plaintiff admitted under cross-examination that he had received some coaching from his father as to the evidence he should give in the months before the trial and had written down a number of statements about the accident at his father's behest. He also admitted memorizing answers to questions he was likely to be asked. Counsel for the plaintiff tendered one of the statements but it was objected to and the objection was upheld. It was during legal argument concerning the admissibility of this statement that Counsel for the defendant said, by way of explanation of his line of questioning of the plaintiff, "I am testing his memory. I am not suggesting the boy is giving false evidence".

At the end of the plaintiff's case a police officer who had previously given evidence for the plaintiff was recalled and produced a statement which he had taken from the plaintiff on 1st July, 1954, two months after the accident and two days after the plaintiff had left hospital. The statement consisted of two sentences and was as follows:

21 The Strand,
Dee Why, 1/7/54

Perry Bruce Clements states:—

I am a schoolboy, and live with my mother and father at 21 The Strand, Dee Why. I was 7 years on 24th May 1954.

About 11.20 a.m. on the 1st May, 1954 I walked up the roadway from Dee Why Surf Club and stood about 6 feet from the gutter in The Strand, at Howard Avenue, I was looking at the grandstand and all I know is I was knocked down.

PERRY CLEMENTS

Witness
Harry R. Turner
Sergeant 2nd Class.

The statement was admitted by the learned trial judge who relied on the following alleged rule of law:

> Where it is suggested a witness is giving evidence which is a recent fabrication, then evidence may be admissible to show, consistently with his story he had made a similar statement, or statement similar to his evidence at some anterior time, which would negative the suggestion of recent fabrication.[6]

A verdict was found for the plaintiff and the Nominal Defendant subsequently appealed to the Full Court on the ground that the statement had been wrongly admitted. This appeal was dismissed by a majority of the Full Court

[6] Reported in *Nominal Defendant* v. *Clements* (1960) 104 C.L.R. 476 at 484.

(Owen J. dissenting)[7] and a further appeal to the High Court was dismissed by a unanimous court. All judges of the two appellate Courts held that the trial judge's statement of the law was substantially correct. All judges except Owen J. in the Supreme Court also held that a proper case had arisen for the application of the rule, and that the statement tendered should be admitted by virtue of the rule. The importance of *Nominal Defendant* v. *Clements* lies in the discussion, particularly by the High Court, of the latter two questions.

III. *Circumstances in which the Rule is Properly Applied*

It is clear that great care is called for in applying the rule, firstly because it is an exception to the general and salutary principle that evidence of statements made out of court is not admissible, and secondly because the effect of applying the rule may be to admit self-serving statements by the witness. It is not a sufficient condition for the operation of the rule merely that evidence of a witness has been attacked or that his credit as a witness has been impugned, but it is at least a necessary condition that the evidence of the witness should have been impugned, for the function of the evidence of similar statements, if admitted, is to restore the witness's credit.

It would appear that before the rule operates, the credit of the witness should have been impugned on the ground that his evidence has been fabricated by him at some intermediate time between the time of occurrence of the facts to which he deposes and the time of the trial. According to Windeyer, J. the kinds of imputations which will let in prior consistent statements are "First, that the witness's testimony is a recent fabrication, in the sense of being invented at or after a particular time . . . Secondly, that his testimony was the result of some motive, bias, influence or moral duress operating from some particular time and not before".[8] In each case evidence is admissible that the witness said the same thing before the relevant time. Another possible ground of admitting such evidence is that an imputation has been made that because a witness failed to mention some matter given in his evidence on an occasion in which the circumstances were such that he might well have mentioned it, that therefore he has invented his evidence since that occasion.

It is for the judge to decide whether the rule of evidence is applicable and whether the particular evidence tendered is admissible. There has, however, been some doubt as to what test the trial judge should apply. In the Victorian cases of *Woodward* v. *Shea*[9] and *Franklin* v. *Victorian Railway Commissioners* (unreported), Sholl, J. held that evidence is admissible if the cross-examination and the witness's answers might reasonably have been taken by the jury, or perhaps even by a single juror, to imply recent invention. However, in *Nominal Defendant* v. *Clements*, Menzies, J., after referring to *Woodward* v. *Shea* and *Franklin* v. *Victorian Railway Commissioners*, held that such evidence is admissible only when the court considers that evidence has been impeached as a recent invention. It is for the trial judge to decide whether in his view an allegation of recent invention has been made. The principle was established beyond doubt by the case of *Transport and General Insurance Company Limited* v. *Edmundson*,[10] in which the above view of Sholl, J. was stigmatised as "erroneous".

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[7] (1962) S.R. (N.S.W.) 97.
[8] *Nominal Defendant* v. *Clements* (1960) 104 C.L.R. 476 at 494.
[9] (1952) V.L.R. 313.
[10] (1960) 35 A.L.J.R. 401.

IV. *Condition of Admissibility of the Particular Evidence Tendered*

Assuming that an allegation of recent invention has been made and that evidence of statements by the witness is tendered in rebuttal, it would appear that the trial judge must satisfy himself of two things before he admits the evidence. Firstly, the statement, evidence of which is tendered, must be to the same effect as the evidence already given. Secondly, the statement must have been made at such time and in such circumstances that it tends rationally to rebut the allegation of recent invention. The first condition presents no difficulty in principle. It is clear that an account given out of court which is not to the same effect as the evidence given in the witness box will be ineffectual to rebut the imputation of recent invention. Of course, the statement may be admissible as an admission if it is inconsistent with the evidence given and the witness is a party or able to bind a party by his admission. The second condition presents more difficulty. Windeyer, J. gives a clear example of the operation of the rule. Suppose it is alleged that the witness and another person X on a given date concocted the story given by the witness in the box. Proof that at an earlier date and before the witness met X he had made a statement to the like effect as his evidence will tend to rebut the allegation of recent invention and will be admissible.[11] However, His Honour concedes that difficulty arises when it is sought to apply the rule in circumstances which are not so clear. The earlier statement need not be made contemporaneously with the happening of the facts to which it relates. However, it will often be difficult to fix the point of time at which a motive to fabricate or some other influence began to operate on the witness, before which a statement must be made in order rationally to rebut the allegation of recent invention. In particular in the case of an interested witness it will often be impossible to determine precisely when the possibility of litigation occurred to his mind. Presumably, any statement made with litigation in mind would not be admissible.

V. *Should The Rule Have Been Applied?*

All judges of the two appellate courts, with the exception of Owen, J. in the Supreme Court, agreed that conduct of the case by counsel for the Nominal Defendant had been such that the rule was properly applied and that the particular evidence admitted was properly admitted. However, an examination of the judgment of Dixon, C.J., in whose judgment Kitto, J. concurred, shows that the learned Chief Justice was beset with doubts as to whether conduct of the trial by counsel for the Nominal Defendant really gave sufficient ground for letting in the statement in evidence. His Honour considered this to be usually a difficult question to answer, as counsel, realising the risk he is running, may merely hint obliquely at recent invention rather than impute it. It follows that the decision of the trial judge who has had the opportunity of observing the cross-examination in all its nuances, is to be given great weight. The Chief Justice's decision in *Nominal Defendant* v. *Clements* was in fact based on his reluctance to overrule the trial judge.[12] His Honour also decided, though with the reservations which are discussed below, that the particular statement was admissible. As an alternative ground for dismissing the appeal, His Honour held that even if the document had been wrongly admitted, it was not sufficiently important for its wrongful admission to warrant a new trial.

Menzies, J. and Windeyer, J. both devoted the greater part of their judg-

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[11] (1960) 104 C.L.R. 476 at 493.
[12] *Id.* at 480.

ments to an examination of principle and authorities and contented themselves with the bald statement that in the circumstances the rule had been rightly applied and the evidence rightly admitted. Windeyer, J. agreed with the Chief Justice, that even if the statement had been wrongly admitted, nevertheless it would not follow that a new trial should be allowed.

Owen, J., the sole dissenting judge, considered that the objective of the defendant's cross-examination of the plaintiff was to show that the plaintiff had no independent memory of the accident and that the evidence given by him at the trial was the result of coaching by his father.[13] This interpretation is similar to that placed on the cross-examination by the High Court. In the opinion of Owen, J., the statement made by the boy to the police officer in 1954 could throw no light on the imputation that the plaintiff had no recollection of the accident at the time of the trial in 1958. On his view then the statement should have been rejected on the ground of relevancy.

VI. *Admissibility of Statement*

It is therefore not as clear, as at first sight would seem, that *Nominal Defendant* v. *Clements* was a proper case for the application of the rule. However, assuming that the rule was properly applied, it is still open to doubt whether the particular statement should have been admitted. As mentioned above, evidence should not be admitted unless it satisfies two conditions.

As regards the first condition of "consistency", one may well ask, as Dixon, C.J. did, whether the two-sentence statement really says enough, to be characterized as being to the same effect as the evidence. As His Honour pointed out, the statement can be regarded, not unreasonably, as the kind of thing a policeman might put down after hearing but the barest account of an accident from a small child. It is, however, conceded that this view was not taken by either party at the trial. It is certainly open to doubt whether the condition, that the similar statement should have been made in such circumstances as rationally to rebut the imputation of recent invention, was satisfied. The accident occurred on 1st May, 1954, the boy came out of hospital on 29th June, 1954, and the statement was taken on 1st July, 1954. Hence two months elapsed between the happening of the accident and the making of the statement, a not inconsiderable period in the life of a child of six. Moreover, in Windeyer, J.'s opinion when his son came out of hospital the father was already contemplating litigation on his behalf. According to His Honour's own test, the statement would appear to have been made at a time when such pressures as would induce the plaintiff to fabricate evidence were already operating on him, and the statement ought not to have been admitted. In this connection it is instructive to note the case of *Jones* v. *South-Eastern & Chatham Railway Co.'s Managing Committee*,[14] discussed at some length by Menzies, J. in *Nominal Defendant* v. *Clements*. In that case a rather different principle was under discussion, but one ground given for the rejection of the evidence was that the earlier statement was not made sufficiently soon after the accident, though made only two days afterwards. It is also worthy of note that all the High Court Justices were apparently quite undisturbed by the father's coaching of the plaintiff.

VII. *Counsel's Dilemma*

Counsel, therefore, is confronted by a dilemma whenever it appears to him that evidence given by a witness called by the other side may have been

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[13] (1962) S.R. (N.S.W.) 97 at 99.
[14] (1918) 87 L.J.K.B. 775; (1918) 118 L.T. 802.

recently fabricated by the witness. It is said that he may with safety suggest that the witness is lying or that he is mistaken or that his memory is faulty, but if he suggests recent invention by the witness he runs the risk of letting in evidence of statements by the witness which would otherwise be inadmissible. It is submitted that these formulations of what Counsel may and may not do with impunity are not mutually exclusive. For example, it would seem that Counsel is on dangerous ground if he suggests that the witness has no recollection of the facts being described. It is true that several judges stated that a mere imputation of faulty recollection is not a sufficient ground for applying the principle. However, if a witness has given evidence and Counsel suggests that the witness has no recollection of the facts described, then Counsel would seem of necessity to be implying that the evidence given at the trial has been concocted.

Nominal Defendant v. *Clements* also indicates that Counsel may not be able to avoid the consequences of his conduct merely by disclaiming that he is suggesting recent invention. In *Nominal Defendant* v. *Clements*, it will be recalled, counsel for the defendant said, "I am testing his memory. I am not suggesting the boy is giving false evidence". On the appeal this statement was relied on as a disclaimer of any imputation that the evidence had been fabricated. The High Court Justices merely stated in their judgments that they had reached their conclusion despite the disclaimer without discussing the effect of the disclaimer. The disclaimer was, however, discussed by Collins, J. in the Supreme Court, who made the following points:

1. If Counsel suggests recent invention, he cannot avoid the consequences by a bland disclaimer that he is doing any such thing.
2. In *Nominal Defendant* v. *Clements*, the supposed disclaimer was made during re-examination of the plaintiff before the medical witness was called, and it was the doctor's evidence of his conversation with the plaintiff which provided the defendant with much of his ammunition for his attack on the plaintiff's evidence.
3. It is possible to interpret Counsel's statement in *Nominal Defendant* v. *Clements* as merely a denial that he was suggesting that the plaintiff's evidence was deliberately false and hence the statement would not be a complete disclaimer.[15]

VIII. *Conclusion*

Nominal Defendant v. *Clements* shows that a rule such as that formulated by the trial judge[16] exists as an exception to the general principle that evidence may not be given of statements made out of court. In clear cases such as that given by Windeyer, J.,[17] the rule accords with common sense, especially when it is considered that evidence of similar statements is not admissible for the purpose of corroborating sworn testimony. However, it is submitted that too free an application of the rule may lead to abuses, and that some of the *dicta* in *Nominal Defendant* v. *Clements* do not narrowly enough define the circumstances in which the rule may be properly applied.

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[15] (1962) S.R. (N.S.W.) 97 at 107.
[16] *Supra* n. 6.
[17] *Supra* n. 11.