

COMMON SENSE AND LAW

By F. K. H. MAHER*

In this article, Mr Maher examines the role allotted by the courts to common sense in the formulation and application of legal principles. The first part of the article contains a discussion, from a philosophical viewpoint, of the concept of common sense and an assessment of the extent of its reliability as a basis for judicial action. In the second part, Mr Maher draws examples from many different areas of the law, ranging from constitutional law to the law of torts in order to illustrate the lengths to which judges have gone—or have refused to go—in their efforts to reach common sense decisions and to evolve legal principles based on the dictates of common sense. He reaches the conclusion that although an essential element in legal reasoning, common sense alone does not provide an adequate basis for a philosophy of law.

I THE COMMON MAN

Sir Bernard MacKenna, of the English High Court, visiting Durham on circuit in 1969, told his University audience¹

There is no difference between the judge and the Common Man, except that the one administers the law, and the other endures it: that is all.

Modestly he would not claim that judges as a group possessed, or needed, heroic virtues—or even very exceptional qualities ‘in the performance of their humdrum tasks’. One required some feeling for people and for words and a little logic and some imagination, but not necessarily great intellect.

Yet what a judge says and does certainly affects the common man; and Sir Bernard MacKenna went on to add common sense to his list of desirable judicial qualities. No one would deny that judges do possess common sense in much the same way as the common man. But obviously more is needed: otherwise palm tree justice would suffice for a legal system. His special competence must be added: his special skill in evaluating a piece of evidence, in construing a will or a contract, in getting the grasp of a statute or the weight of a precedent.

This has always been so; even in quite primitive communities the law must supplement native shrewdness. Even later, in the 17th century, Coke, in his famous debate with James I, had to remind the King that even the wisest monarch was not necessarily competent, by general Reason, to understand the mysteries of the law. Today the relation between Law and

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¹ McKenna, ‘The Judge and the Common Man’ (1969) 32 *Modern Law Review* 601.

Sense is even more complex, much harder to estimate. It is surprising that this topic has been so tentatively explored; for it is more important today to both citizen and lawyer than it ever was before.

This, we are so often reminded, is the Age of the Common Man. The world exists for him; society is constituted to provide for his needs; the law to protect his interests. The Captains and the Kings have departed (though the Colonels remain powerful in many lands). The common man is supreme! Newspaper reporters, television interviewers, ambitious politicians seek his opinions and claim his support. This is democracy!

We are also reminded of the winds of change so strongly blowing even in the courts and legislative chamber. Law Commissioners have been set to work removing unpopular or antiquated rules of law and bringing others up to date.² In these reforms the wishes of ordinary folk—housewives, car buyers, indigent sick and aged, trade unionists and small shareholders—are being seriously canvassed and analysed.

Even the most cautious judges are now talking more than they used to about the task of 'adapting ancient doctrines to the changing necessities of the age'. They are ready to keep one eye at least on what the community is thinking, fearing or hoping. Above all, those high appellate courts who have to interpret Constitutions and to hand down decisions which necessarily have impressive social or moral consequences, are being brought willy-nilly into the arena of public debate where political consequences count as much as strict law.

Together with this open deference to the plain man goes a kind of pragmatism—that the test of *goodness* in a rule is 'that it works well'. Practical success vindicates theory! Even in the sober *Law Quarterly Review* an editorial note contained these reflections on the appointment of Mr Burger as the new Chief Justice of the Supreme Court of the United States:³

It is unlikely that he will prove to be doctrinaire as his approach to the law has always tended to be pragmatic, but this does not mean that he will disregard the established precedents.

'Logic' is coming off poorly in some academic circles in its contest with 'experience' (as Holmes predicted). Even forty years ago Lord Atkin caused no surprise when he finished his great speech in *Donoghue v. Steven-*

² Ruoff, *Letter* in (1969) 43 *Australian Law Journal* 590, 591 reported that the Commissioners proposed to get rid of 207 old Acts, some dating back to the thirteenth century.

³ (1969) 85 *Law Quarterly Review* 449, 452. Kurland has recently shown the degree of judicial restraint displayed by the Burger court in its first two years: University of Chicago, *Law School Record* (Spring, 1971) 7. There are some signs that, following recent appointments, the winds of change are at work. See also Kurland, *Politics, The Constitution and the Warren Court* (1970).

son⁴ with words expressing satisfaction that 'the law in this matter, as in most others, is in accordance with sound common sense'.

How important is the power of common sense in the law? Is it a dominating factor in laws and decisions? Indeed, we ask: can common sense be seriously regarded as the very foundation of a legal order? To put the test bluntly: if a rule or a decision does flout common sense, is it thereby bad or invalid? If popular feeling contradicts legal logic, must legal doctrine to that extent go by the board? One's first reaction is of shock. Are we not pushing our data too far? Not necessarily. It was Whitehead himself who insisted:⁵

The Platonic and Christian doctrines of the Soul, the Epicurean doctrine of a Concilium of subtle atoms, the Cartesian doctrine of Thinking Substance, the Humanitarian doctrine of the Rights of Man, the general Common Sense of civilised mankind—these doctrines between them dominate the whole span of Western thought.

So it is not extravagant to speak of a Philosophy of Common Sense, that must directly affect the thinking and the decisions of lawmakers—whether in passing statutes or judging cases. By philosophy I do not here mean simply a set of explanations, or an epistemology, a technique of discovering legal rules. Rather, I ask, does it amount to an ideology? The terms people use range in a long spectrum, from manifest 'nonsense' to 'ordinary sense', to 'good sense'; they vary from the vagueness of 'public opinion' to the 'enlightened attitudes of right thinking men'. We are aware that the 'reasonable man is not to be confused with the rational man'. Yet the spectrum is long. The terms do not mean the same thing; 'good sense' is very close to academic Reason; 'public opinion' is often not enlightened. 'Nonsense' is perhaps most easily identified: it needs no subtle or learned skill to recognise it when one sees it. Does Sense play the role that Kantianism or Hegelianism played in Continental legal orders in the 19th century and that Nazism or Marxism played in the present century: in that it informs, sustains, penetrates the whole system? Or does one merely say that the law is the law, whether the common man likes it or not, though where possible we shall try to bring sense to bear where we can; that Principle and Authority, Precedent and Statute shall continue to decide human problems in the courts, not the notions of popular intuition or folk lore?

It is not always realised on the other hand that common sense has at certain periods been the very foundation of the law, and has even been widely accepted as an ideology, a sufficient guide to the discovery of truth itself.

⁴ [1932] A.C. 562, 599. Heuston, 'Liversidge v. Anderson in Retrospect' (1970) 86 *Law Quarterly Review* 33, 40 stresses the point that in his equally celebrated dissent in *Liversidge v. Anderson* [1942] A.C. 206, Lord Atkin showed that he was anxious to forestall 'any criticism that he was theoretical, impractical, or lacking in common sense—always serious charges in English public life'.

⁵ Whitehead, *Interpretation of Science* (1961) 234-5.

Take two recent accounts of common sense as a philosophy—S. R. Grave and Bernard Lonergan, both professional philosophers, have made independent valuable assessments.⁶ Grave begins by examining the *negative* use of this ‘compound phrase’ as having prominently the force of good sense as opposed to nonsense, something obviously nonsensical. Lonergan provides us with a more graphic phrase: it is ‘what everybody knows’. Both expressions leave a good deal open; but they give us a start.

Aristotle, Grave suggests, was probably the first ‘common sense philosopher’, because of his confidence in the support the wise man could get from widespread beliefs about Truth.⁷ Aristotle fully realised that prudence is something more than a knowledge of general principles. It must acquire familiarity with particulars also, for conduct deals with particular circumstances, and prudence is a matter of conduct.⁸ Lord Pearce said something to the same effect a long time later: ‘. . . to demand too great precision in the test of foreseeability would be unfair to the pursuer since the facets of misadventure are innumerable . . . The law is practical . . .’⁹

This is true also of the arguments the common man uses. It is now clear that formal logic is inadequate to explain the reasoning of lawyers to reach a conclusion in any novel situation or, indeed, in many human situations that have not previously come before the higher courts. Here ‘practical reasoning’, the kind of argument that would convince the judge as an ordinary man or an ordinary jury, is again being recognised and applied. Sense is increasingly important in this kind of persuasion—as it is at the other end in sentencing convicted persons, assessing the use of private or official discretions, or where necessary, anticipating social and moral consequences.¹⁰

The members of the House of Lords have recently, as qualified observers of the common man, decided what he ought to have done in a situation where a child trespasser got through a clear gap in a railway fence, touched a live rail on the line and was severely injured.¹¹ To give him redress against the British Railways Board their Lordships extensively considered nearly 90 cases on the subject. They were obliged to follow the

⁶ Grave, ‘Common Sense’ in Edwards (ed.), *The Encyclopedia of Philosophy* (1967) ii, 155; Lonergan, *Insight* (1958) esp. chapters VI and VII.

⁷ Grave, *op. cit.*, 157.

⁸ Aristotle, *Nicomachean Ethics* (Thomson, ed., 1965) 180.

⁹ *Hughes v. The Lord Advocate* [1963] A.C. 837, 857. Note too, *Whittaker v. The Minister for Pensions* [1966] 3 W.L.R. 1090, 1099, which provides a simple test of the practical answer to the master-servant relationship. On the contrary in *Brandish v. Poole* [1968] 1 W.L.R. 544, 547, the court held that although, as a matter of common sense, a wife selling goods in her husband’s shop during his absence was really his ‘servant’, she was not so on a necessarily narrow reading of the Act.

¹⁰ The references on non-stringent reasoning collected in Stone, *Legal System and Lawyers’ Reasonings* (1964) are complete up till that date. The basic ideas appear in Perelman, *The Idea of Justice and the Problem of Argument* (1963).

¹¹ *Herrington v. British Railways Board* [1972] 2 W.L.R. 537.

doctrine laid down by their predecessors in *Addie v. Dumbreck*¹² forty years ago; but found various paths by which they could hold that this principle did not apply to all trespassers in all circumstances. The law, Their Lordships all said, had also recognised another principle: that an occupier must take reasonable care to avoid harm to a trespasser—especially if he is a young child—whom they knew might well be on the premises. This duty was based on what one could expect from a ‘conscientious humane man’ (*per* Lord Reid);¹³ a ‘common sense or common humanity’ (*per* Lord Morris);¹⁴ ‘a person who treats others with common humanity’ (*per* Lord Pearson);¹⁵ ‘an ordinary humane man’ (*per* Lord Diplock).¹⁶ And Lord Morris cited Lord Macnaghten’s ‘private individual of common sense and ordinary intelligence’, and Brett M.R.’s ‘persons of ordinary sense’, uttered in earlier cases.¹⁷

Yet one could not correctly assert that *Herrington’s* case¹⁸ was decided on ‘common sense’ alone. Sense supported the principle of law: as Lord Morris remarked:¹⁹ ‘It must at any time be a matter of regret and of concern if the answer of the law does not accord with the answer that common sense would suggest’. But it is not the dominant factor in all such cases as may be seen from the Privy Council’s earlier opinion in *Commissioner for Railways v. Quinlan*.²⁰ *Herrington’s* case²¹ illustrates the continual tension between the rules of law and popular opinion.

II THE SPHERE OF SENSE: COMMON SENSE A PHILOSOPHY?

Aristotle, however, did not develop in detail this aspect of Truth. Others have gone much further. Many ambitious thinkers have in the past seen philosophy as a set of universal principles from which all practical rules and decisions can be derived, as a source of an ideal system of norms. Such universal principles and rules, they hoped, would answer the vital question: how does one know whether one is on the right track in seeking the truth? Is popular opinion the most effective guide to an epistemology? Does it amount to an ideology. *The Shorter Oxford English Dictionary* supplies a variety of ways in which the term has been used. One was ‘an internal sense which was regarded as the common bond or centre of the five senses’, another is ‘good sound practical sense’, a third ‘the general sense of mankind, or of a community’, more philosophically, ‘the faculty of primary truths’. All of these are capable of providing an ideology. (There is also a meaning which was current in the philosophers’ debates: how far one could rely on one’s senses or *sensations* as criteria of reality?)

¹² *Addie (Robert) & Sons (Collieries) Ltd v. Dumbreck* [1929] A.C. 358.

¹³ *Herrington v. British Railways Board* [1972] 2 W.L.R. 537, 547.

¹⁴ *Ibid.* 552.

¹⁵ *Ibid.* 569.

¹⁶ *Ibid.* 586.

¹⁷ *Ibid.* 552-5.

¹⁸ *Ibid.* 537.

¹⁹ *Ibid.* 549.

²⁰ [1964] A.C. 1054.

²¹ *Herrington v. British Railways Board* [1972] 2 W.L.R. 537.

Or is some extra non-sensory faculty or insight needed? This is not our concern here.)

The common lawyers have been suspicious of this kind of theorizing; therefore their usage is quite imprecise. Yet they have, as we see, not disregarded in their cogitations some element of simple reason, justice, honesty, normality, consistency. They have always been happy to accept the support that might be provided by some popular aphorism, some elementary axiom that any 'sensible man' would accept or reject without giving it a second thought—'Of course, that's so—or not so'—but one looks in vain in legal encyclopaedias such as *Halsbury*, or legal text books or digests, for some account of Sense. Someone has to start to look at the term and ask the elementary questions about how it works and how much notice the courts take of it. This sketch may stimulate more erudite minds to further questioning.

For, as an ideology, common sense does recur. As with Natural Law, even if you dig it out with a fork, it keeps coming back. In the eighteenth century the Scottish School of Common Sense won wide support. A revival, led by George Moore in our own century, had the backing of some able minds as the basis of personal approach to truth. Obviously in any mass society, even if tempered by pluralism, the claims of the General Will must always be powerful. If government and legislation are to rest on public opinion, why should not the decisions of courts and the writings of jurists? The German Historical Jurists would not have doubted this proposition. Common sense, however, differs from other ideologies. All the other philosophies claim to represent a *consciously intellectual* process: they proclaim theories, the result of ratiocination, upon which human conduct can safely be fashioned. Cicero, Boethius, Aquinas, Bodin, Locke, all have employed Reason to solve the problems raised and would have had only a modified confidence in general intuitions (even the Natural Lawyers used 'inclinations' only as a starting point).

Reid, Oswald and the Scottish writers, irritated by the vague speculations based on Reason (as well as by the acid attacks on Reason by Hume and Berkely) proclaimed that this general fund of popular wisdom provided an alternative system which could provide greater certainty for conclusions and actions. Reid's fervent eulogy is worth citing to *show how far* the Scottish School was ready to go:²²

Admired Philosophy! daughter of light! parent of wisdom and knowledge! if thou art she! surely thou has not yet arisen upon the human mind nor blessed us with more of thy rays, than are sufficient to shed a "darkness" visible upon the human faculties and to disturb that repose and security which mortals enjoy, who never approached thine altar, nor felt thine influence! But if indeed thou hast not power to dispel those clouds and

²² Quoted in Boorstin, *The Mysterious Science of the Law* (1958) 111-2, referring to Reid, *Enquiry into the Human Mind*. It was, as Boorstin points out, considered essential to emphasize the 'Mystery' as well as the 'Science' of the common law.

phantoms which thou hast discovered or created, withdraw this penurious ray; *I despise philosophy and renounce its guidance! Let my soul dwell with common sense . . .* The belief of the material world is older and of more authority than any principles of philosophy. It declines the tribunal of reason, and laughs at all the artillery of logicians (*italics mine*).

In this spirit Tom Paine at the same time was assaulting the existing order. On *Common Sense* he was ready to build a new world. He showed that the apostles of abstract Reason had no agreed programme and fought bitterly about practical solutions. Surely it was safer to trust one's own intuitions than those of one's fellows! Daniel J. Boorstin's study of this movement, and particularly of Blackstone's *Commentaries*, stresses this feature at length, showing that even Blackstone admitted that Reason needed to be supplemented by Mystery.²³ He was probably thinking of that skill in practical reasoning which enables one to make sound judgments in a crisis and of those habits of conformity to the native customs which give rough and ready answers to the daily questions of what to do, here and now. In this faith, the Americans, after the Revolution, thought that liberty and equality required that their judges be elected, so that they would be in close touch with the simple men of the frontier and the township.

Bentham's Utility principle gave birth to the celebrated practical calculus by which any man could estimate for himself the balances of pleasure *versus* pain and act accordingly. The law should leave men alone to do their own calculating, society was the product of a natural harmony of enlightened self interest. So Plucknett rightly avers that 'Benthamism was at bottom as sound common sense as it was dubious philosophy'.²⁴ Those strong-minded judges who marched through the common law in the 19th century—Bramwell above all—held common sense displayed as a bright banner before them—and took for granted the self-evident truths Bentham asserted. Even the staid Austin affirmed that 'God has not relied on our reason to understand his laws, but on our sentiments'.²⁵ In our own time,

²³ *Ibid.* 25. There is an excellent account of the Scottish school in Copleston, *A History of Philosophy* (1964) v, Part II. See also Ayer, *Metaphysics and Common Sense* (1969) for some very pertinent criticisms.

²⁴ Plucknett, *A Concise History of the Common Law* (3rd ed., 1940) 75. Discussing the influence on American education of the Scottish philosophy, Cohen, in his *Reason and Law* (1961) 18, declared that it dominated the whole American system for over a century. For particular examples see: Heuston, *Lives of the Lord Chancellors 1885-1940* (1964) which sets out the contemporary debate on the virtues and dangers of appointing good, sound, practical men as judges, men with a sturdy common sense judgment of fact (e.g. Lord Buckmaster, pp. 39, 301). Note that Bentham himself would not have necessarily accepted common sense as equivalent to Utility in all respects. He made some scathing attacks on it in his *Introduction to the Principles of Morals and Legislation* (Burns and Hart eds, 1970) 26. Nor did J. S. Mill have a high faith in the ordinary man's grasp of political reality: Letwin, *The Pursuit of Certainty* (1965) 264.

²⁵ Austin, *The Province of Jurisprudence Determined* (1954) 36; Austin further asserts (at p. 88) that moral sense is 'the common sense of mankind'. (He was a Natural Lawyer after his own English fashion.) Lord Halsbury adopted a similar approach in *Leach v. R.* [1912] A.C. 305, 310.

various types of linguistic philosophers have concerned themselves mainly with 'the ordinary chap's use of language'—when applied to law does it make sense to ask certain questions, or can concepts be defined, or only described in the light of general legal usage? This school does not pretend to ascribe values or rational proofs to assertions but is concerned only that problems be either dismissed or examined with precise language. Linguistics—the 'vulgar tongue'.

The 'ordinary chap' features largely in the literature of a whole powerful school of English philosophy since Wittgenstein—and the lawyers, led by H. L. A. Hart, were not slow to stress the analysis of legal terms in this light—how it is most commonly used, whether it 'makes sense' to ask this question or to give that answer.

Grave, (after giving a succinct account of other professional philosophers of similar trends: Hamilton, C. S. Peirce, Sedgwick, G. F. Stout, Russell, G. E. Moore), goes on to praise the influence of Wittgenstein in pulling the experts away from debates about proofs of propositions, and evidence of the senses, to the analysis of ordinary language which does not provide answers but asks how ordinary words are in fact used.²⁶

So there is still a strong non-professional faith by the world at large—and even by lawyers—in the validity and power of the native, even naive, views we hold or oppose *without having to work them out for ourselves*. No one can doubt that 'sense' is deeply embedded in the common law: what is unclear is when and how it operates.

We are not, like Don Quixote, seeing giants where there are only wind-mills. It is a serious and urgent matter as to whether law shall remain primarily the construction of experts and learned men, or become the simple reflection of popular instinct. For shorthand I shall employ *Theory* to express ideas that rely on the work of the wise men—scientists, theologians, jurists, economists and so on—I shall use *Sense* (as Lonergan does) as the simplest phrase to express that unreflective general mass of attitudes which may best be summed up as 'what everybody knows'.

Nothing is to be gained by trying here to *define* 'Sense'—we have seen that it is many-coloured, yet I must attempt to describe it in terms I consider legitimate. For my purpose it stands for that *vast conglomerate mass of received information, beliefs, likes and dislikes, half-conscious judgments, practices, prejudices we all possess*. Its contribution is often sound, occasionally silly; it is learning that has been picked up at mother's knee, from the family conversation; from what one's favourite author, one's teacher or some idolised person has said; from the chat in the club and the pub; from the daily paper, the *Readers' Digest* or the week-end maga-

²⁶ Grave, *op. cit.* 157-9, and for a general criticism, Kelly, *The Hungry Sheep* (1955) 132-6.

zine. It may be proved or disproved, correct or silly. But its essential quality is that it is knowledge sucked in, accepted *uncritically*, not reflected on, received without analysis. 'What everybody knows' is an amalgam of sound knowledge, inherited wisdom, inaccurate data, popular instincts and stupid prejudices, plus the legacy of current sagacity and the experience of the tricks of the trade.

It may work as the stuff of one's primary axioms and assumptions—or the method of one's logic—or in the assumed facts from which one draws conclusions. *But essentially it is unorganized, rigid, passive.*²⁷

Today there is another kind of rivalry—between the existentialists and the common man's outlook—though both are in revolt against the metaphysicians. Ayer acknowledges that 'in the eyes of many contemporary philosophers the fact that such assertions do conflict with common sense is sufficient to condemn them'. And he adds—what is very much to our purpose here—that 'this is something of a new departure in the history of philosophy, where common sense on the whole has not been treated with very much respect'.²⁸ So, the matter is still a serious source of debate, even for philosophers.

This dispute, it is true, also goes to more profound problems of whether there are any 'actual objects', and whether one can 'trust one's senses' (which dispute I carefully avoid in this paper); Sense is used in the main negatively to refute palpably absurd theories, though it also positively confirms practical judgments of desirable action. What matters for us here as lawyers is that, at all levels, Sense is a force to be reckoned with in every sphere of life, including law, as a factor more powerful than ever before in our history.

The reader of Lord Atkin's concluding comment in *Donoghue v. Stevenson*,²⁹ which we referred to above, asks himself, therefore, why there was any need for that addendum.

Lord Atkin may indeed have been making no more than a casual observation. He had already shown from considerations of morality, justice and precedent that Mrs M'Alister ought to win, that the law as to negligent manufacturers was in her favour. Why, then, bring in common sense? Was it merely a wish, natural enough, to justify the decision to

²⁷ This description corresponds fairly closely to that of Dicey himself: 'There exists at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion, and, as regards at any rate the last three or four centuries, and especially the nineteenth century, the influence of this dominant current of opinion has, in England, if we look at the matter broadly, determined, directly or indirectly, the course of legislation'. Dicey, *Law and Public Opinion in England* (2nd ed., 1962) 19-20. In the present article, no effort is made to relate common sense to more formal similar attitudes described as Empiricism, Natural Law, etc.

²⁸ Ayer, *op. cit.* 64.

²⁹ [1932] A.C. 562, 599.

his audience? When he said law and sense went together in most matters, it is hard to believe he was hinting that if the law had been repugnant to ordinary sentiments, he would have repudiated it! After all, Lord Buckmaster, renowned for his shrewd practical approach, had in fact reached the opposite conclusion.³⁰

We do not know the reasons. But the very puzzle invites attention. One cannot read through any set of reported cases without finding a dozen cases where common sense is invoked as one criterion of a sound judgment. 'Law' and 'convenience' are constantly contrasted and, where feasible, reconciled.

One could cull from the more outspoken judges themselves innumerable *dicta* of this kind. For instance, Lord Shaw,³¹ speaking of the unforeseen case, where one has to use 'anything from *jus summum* to common sense, from *rectio ratio* to a square deal . . . Again, the words of Lord Du Parcq: 'If an argument has to be put in terms which only a schoolman could understand, then I am always very doubtful whether it can be expressing the common law'.³² Judges praise the enormous contribution of the jury to legal doctrine, as well as that of the man on the bus—or his superior kinsman 'the reasonable man'. It is not only Lord Denning who asserts that 'the English approach is empirical. The solution to every problem depends on the question: Will it work?'³³

This would be convincing—if one could not also select many citations that deny that 'a change in the outlook of the public, however great, must necessarily be followed by a change in the law of this country'.³⁴ Nor

³⁰ *Ibid.* 566.

³¹ Shaw, 'Legislature and Judiciary' (public lecture delivered in London in 1914) cited in Abel-Smith and Stevens, *Lawyers and the Courts* (1967) 124. See Dowrick, *Justice According to the English Common Lawyers* (1961) 92, 215 for other illustrations.

³² *Smith v. Harris* [1939] 3 All E.R. 960, 967.

³³ Lord Denning was speaking in a series of lectures reprinted as *The Changing Law* (1953) 15-6. For recent praise of juries' estimates of damages in tort actions, see *Broome v. Cassell* [1971] 2 W.L.R. 853, 887 per Phillimore J.

³⁴ *Best v. Samuel Fox* [1952] A.C. 716, 727 per Lord Porter. Dicey himself declared that even judges 'are guided by professional opinions and ways of thinking which are to a certain extent independent of and possibly opposed to the general tone of public opinion. They are men far advanced in life. They are for the most part men of conservative disposition . . . They are more likely to be biased by professional habits and feelings than by the popular sentiment of the hour': Dicey, *op. cit.* 364. Doubtless this criticism is less true now than it was then. Lord Wilberforce has denied that 'the judiciary and the judicial pool are class-bound', and cites many examples of persons of humble origins rising to the highest judicial offices: Wilberforce, 'Educating the Judges' (1968) 10 *Journal of The Society of Public Teachers of Law* 254, 258. Yet, whatever their origins, even the best of judges are wary of relying on popular opinion: see *Westwood T.V. Ltd v. Hart* [1968] 3 W.L.R. 480, 489 per Salmon L.J.: 'Common Sense and Justice are perhaps uncertain guides in ascertaining the highly complicated and artificial rules which govern tax liability.' See also *John Danks and Son Pty Ltd v. Comptroller of Stamps* [1944] V.L.R. 172, 174, per MacFarlan J.: 'It has been said on many occasions that the law on the subject of stamps is a matter *positivi juris* and involves nothing of principle or reason. Everything depends entirely on the language of the legislator.'

would one describe the law of stamp taxation or real property, for example, as a compendium of popular attitudes.

One is then forced to ask—without being guilty of mere ‘professorializing’—what the lawyers are really getting at.

1. When they say ‘common sense’, are they really saying ‘Reason’, ‘Intelligence’, ‘Justice’, ‘enlightened views’? Or do they really mean those simple intuitions or beliefs that we have described, which are potent merely because they are widely held?
2. What would they do in any concrete situation where the law goes flat contrary to Sense? Which is the stronger criterion in the ‘trouble case’?
3. Is a seriously held sentiment the real *foundation* of any democratic legal order, whether primitive or mature, so that one is entitled to disobey a law that is widely or generally disliked? The protests of the genuine pacifists, of the negroes in the United States, of the fervid disciples of Marcuse, of discontented minorities, of all those who regard ‘the system’ as basically hostile or wrong, force us to rethink the whole foundation of law in this light—in the hope of finding some real consensus.

The common lawyers give no consistent answers to those questions. Sometimes they equate Sense with Custom, sometimes with the ‘Artificial Reason’ beloved of Coke, sometimes with Natural Law (*quod semper, quod ubique, quod ab omnibus*); sometimes—and more often today—with that ‘enlightened public opinion’ on which Bentham and Dicey set such store and about which Lord Devlin and Professor H. L. A. Hart have of late been contending. For instance, should attempted suicide or abortion, or taking marijuana, or falsifying tax returns, or defrauding one’s shareholders, cease to be crimes because people at large are no longer so shocked at them as they used to be? Or even if they were, is it the law’s business to punish sin as such, in order to keep high the community’s standards, and therefore to penalize commercial sharp dealing, the abuse of economic power, standardized contracts, reckless stock exchange speculation?

When we look at the way the judges use the term in solving problems before them, we are also left in doubt. The most obvious force of Sense is in legal argument also *negative*—in destroying an argument that will not stand up once it is clearly perceived. One recalls numerous examples where a court has bluntly rejected a line of argument which would lead to a conclusion ‘repugnant’, ‘manifestly wrong’, ‘plainly unjust’. There spring to mind the fervent protests of Lord Macmillan in *Donoghue v. Stevenson*,³⁵ of Lord Denning in *Candler v. Crane Christmas and Co.*,³⁶ of Lord Devlin

³⁵ [1932] A.C. 562.

³⁶ [1951] 2 K.B. 164, 176, 182.

in *Hedley Byrne & Co. Ltd v. Heller and Partners Ltd*³⁷. There is an automatic response—'This simply can't be so!'; 'I cannot believe that our system would stand for that'; 'This goes beyond any sane possibility'. One sees the same reaction in *Ashby v. White*³⁸ in 1703 to denying a right to vote as one does in the terse refusal of Dixon C.J. to taking an ultra-objective view of criminal guilt some 260 years later:³⁹

There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I shall not discuss the case. There has been enough discussion . . .

This kind of retort is not the product of painful and meticulous meditation: it springs spontaneously from the legal heart: 'I don't have to work it out; everything I know about law and life makes me revolt against such a contention'. Typical is the primary retort of Lord Radcliffe in a case when a worker whose injuries resulted from an explosion due to his own negligence, yet claimed damages:⁴⁰ 'I start then with the assumption that something must have gone wrong with the application of legal principles that produce such a result,' referring here to a supposed deduction from a House of Lords' decision in an earlier case. Every lawyer has his own list of decisions he snorts at as 'preposterous', 'shocking'.

One has to go further: one famous text promised enlightenment for the lawyer: Vinogradoff's *Common Sense in Law*.⁴¹ But one looks there in vain for a definition or even a description. The nearest he got to describing his theme was the remark that

. . . all legal rules are supposed to be reasonable and natural; even the worst having probably some considerations of reason to support them, and the

³⁷ [1964] A.C. 465. Why should not a judge consult the map annexed to a document of title to land? See *Leachman v. L. & K. Richardson Ltd* [1969] 1 W.L.R. 1129.

³⁸ *Ashby v. White* (1703) 2 Ld. Raym. 938; 1 Smith's Leading Cases (13th ed.) 253.

³⁹ *Parker v. The Queen* (1963) 111 C.L.R. 610, 632 (concerning the House of Lords decision in *D.P.P. v. Smith* [1961] A.C. 290). These outbursts 'coming straight from the heart' reinforce Jerome Hall's aphorism: 'the importance of moral value in law is demonstrated positively by intuition and common sense': Hall, *Living Law of Democratic Society* (1949) 72. Sir Owen Dixon was no simple pragmatist; he never tired of citing Maitland's scepticism about 'vulgar common sense and the reflection of the layman's unanalysed instincts' and affirming his own faith in strict logic and high techniques: Dixon, 'Concerning Judicial Method' in Woinarski (ed.), *Jesting Pilate* (1965) 152, 153.

⁴⁰ *Imperial Chemical Industries Ltd v. Shatwell* [1965] A.C. 656, 676. Per Viscount Radcliffe, commenting on the conclusions wrongly drawn from *Stapley v. Gypsum Mines Ltd* [1953] A.C. 663. Obviously a workman could not claim damages for injuries when he disobeyed his orders. In *R. v. Bow Road Justices, Ex parte Adedigba* [1968] 2 W.L.R. 1143, the English Court of Appeal disregarded the old view that Parliament, when altering the law, must have known of the existing relevant cases and approved them if it had made no alterations in the new Statute. 'This view has now been rejected for the common sense conclusion that the draftsman may not have had the precedent cases in mind': Note, in (1968) 84 *Law Quarterly Review* 299.

⁴¹ Vinogradoff, *Common Sense in Law*, (1913).

more important doctrines of a legal system generally correspond to more deeply rooted requirements of Society.⁴²

This does not help the seeker very much; the learned scholar's criteria are far removed from those of the man on the bus.

What does our common man expect of a sensible legal system? He would like it to be clear in its demands, consistent in its attitudes, just and fair between competing interests, between rich and poor. It should not demand too much or too little in the way of 'proper behaviour', should make some allowance for human frailty without protecting those who defraud or assault, rob or annoy their neighbours. Generally it must be 'in touch with life' for he is not impressed with merely historical reasons for rules that do not meet present needs.

On the negative side he also dislikes the reliance on fine points by courts, the jargon of the more technical areas, the law's delays, the strident demands by cross-examiners that he should remember details of events in which he participated years ago. He himself rarely looks far into the future, or anticipates possible consequences of individual acts or omissions with the clarity and logic of a lawyer. He would have approved of the action of the Victorian Supreme Court in *Anstee v. Jennings*⁴³ where the court, acting on the so-called golden rule of interpretation, inserted words in a section of the Licensing Act in order to prevent a conviction that, to anyone, would have appeared unjust, even ludicrous. And any frustrated motorist, faced with a traffic signal that had stuck on the red, would applaud the judicial solution of McInerney J. in 1969 in the Victorian Supreme Court that such a light was no longer a *signal* within the purpose of the Act as being one that could operate as a 'command' which a driver was bound to obey.⁴⁴ Nor can he appreciate that a given ruling in one case might throw the entire system out of gear. While he does not object to theories, he does not take them seriously—he prefers precise, clear rules, and the fewer the better. Indeed, there is something in Wedderburn's contention that 'most workers want nothing more of the law than that it should leave them alone'.⁴⁵

Let us distinguish, moreover, between 'popular' common sense (what everybody knows) and that technical common sense, which any intellectual discipline has acquired for itself. This is 'what every lawyer knows'. *General* common sense and *special* common sense come from different sources and have different values. Sometimes one, sometimes the other,

⁴² *Ibid.* 168. It would not answer, for instance, the problem that has faced courts in modern times about obscene literature. If the test is that it would 'offend the bulk of the community' what is a court to do with a pornographic novel which has topped the best seller lists for a whole year?

⁴³ *Anstee v. Jennings* [1935] V.L.R. 144.

⁴⁴ *Turner v. Ciappara* [1969] V.R. 851.

⁴⁵ Wedderburn, *The Worker and the Law* (1966). Quoted in Jackson, *The Machinery of Justice in England* (5th ed., 1967) 373.

may be the better guide to a good result. There will be occasions when the lawyer's professional skills will obviously be superior to simple amateur reasoning. There will be other occasions when legal rules and attitudes run contrary to Senses either because (unhappily) some rules have become fossilized, or because an over-emphasis on rigid logic has produced results which, however justifiable in one historical situation, have now become irrelevant or unjust. Legal common sense has the same virtues and defects as general common sense.

Yet this does not fully answer our query whether either general or special sense is an adequate yardstick by which any given legal rule or decision can be measured—'Is it good law?' Does the common man expect law to be simply common sense—with the needed technical trimmings? One would have to undertake a full investigation to know the truth.

In a recent talk to law teachers,⁴⁶ Lord Reid pointed out that judges do not like reaching unjust and unreasonable results. In trying to avoid them, however, they sometimes create an 'impenetrable maze of distinctions and qualifications'. Looking at precedents, he said:⁴⁷

We should, I think, have regard to common sense, legal principle and public policy in that order. We are here to serve the public, the common ordinary reasonable man . . . Sometimes the law has got out of step with common sense. We do not want to have people saying: 'If the law says that the law is an ass'.

Yet he had to add:⁴⁸

But common sense alone is not enough. The law is or ought to be organized common sense and that brings me to my second guide, legal principle. That is not very easy to define.

Lord Reid does not define common sense either, though we can easily grasp what he means. He admits that it ought not to be 'static' and hopes that if it is 'organized' it will be brought closer to developments in legal principles and policies. But this still leaves us with the task of describing common sense, of showing its use and abuse and of seeing how in practice it can be combined with legal doctrines. For while, as Lord Reid says, it is not static, it does lag behind expert learning.

III THEORY AND SENSE CONTRASTED IN GENERAL

The contrast we have made is that between skilled scholarly knowledge (Theory) and unreflective, practical knowledge (Sense).

Sense is not a synonym for Empiricism, Rationalism, Pragmatism or any other carefully thought out explanation of life—still less for Natural Law or historical determinism. As Whitehead saw, common sense, although it 'at once tells you what is meant' cannot be adequately analysed.

⁴⁶ Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of the Society of Public Teachers of Law* 2.

⁴⁷ *Ibid.* 25.

⁴⁸ *Ibid.* 26.

'Nor can one define it so as to cut it off from other ways of grasping relations'.⁴⁹ The late John Courtney Murray relied greatly on the Public Consensus; Walter Lippman lauded the Public Philosophy, but neither would have extended consensus beyond 'good sense'—the opinions of educated, skilled men—certainly not dictated by any kind of blind mass-reaction.⁵⁰

Theory and Sense, though separate processes, often team together. Both rely on 'received' learning; both demand some degree of intelligence. What is subconsciously known, as Polanyi and Jung have emphasized, is fundamental to all thinking and action. 'Tacit knowledge' is of major importance in every science.⁵¹ Conant and Bronowski have written of the amateur's influence on physical science. 'Science', says Conant, 'began as common sense and to some extent so remains', though, as he goes on to show, such simple knowledge does not enable one to solve the great scientific problems.⁵²

A leading theorist of history, Patrick Gardiner, puts the whole matter very well, though he is talking mainly to fellow historians:⁵³

'Common sense' may be conveniently regarded as a name for those skills used by human beings in making their way about the world. To say that a person has common sense is to say, roughly, that he can be relied upon to act in ways that are likely to enable him to achieve such ends as he sets himself with a reasonable degree of success. Practical life requires for its effective conduct a capacity to make rapid *ad hoc* decisions and judgments guided by past experiences recognized to be relevant to situations as they arise. It does not always, though it may, require lengthy ratiocination, since there are occasions when—as experience again teaches us—delay is often fatal. For the same reason, one cannot always attain a high degree of certainty about the facts of any situation and the possible consequences of various courses of action before acting.

Gardiner understands that Sense does not aim at high certainty. It also deals with the recipes, maxims, and hand-to-mouth expedients we utilize to cope with the innumerable and varying problems that everyday

⁴⁹ Whitehead, *op. cit.* is excellent on this entire topic. Winfield recalled that some cynic had commented that for Baron Bramwell to exercise reasonable foresight meant one had to combine the agility of an acrobat with the foresight of a Hebrew prophet—a standard too high for most of us: Winfield, *The Law of Tort* (5th ed. 1950) 410, n.(f).

⁵⁰ Murray, 'Natural Law and Public Consensus' in *Natural Law and Modern Society* (1963) esp. 48, 58. Newman's great treatise, in which 'the common sense of mankind' played no mean role, similarly does not imply a reliance on mass institutions but rather on the thoughtful and sage: Newman, *The Development of Christian Doctrine* (1890) 195.

⁵¹ Polanyi, throughout his work, is concerned with the inheritance of knowledge we are born with and grow up with. See especially, among his later works, *The Tacit Dimension* (1961). He has support from Hardy, *The Living Stream* (1965) 276.

⁵² Conant, *Science and Common Sense* (1951) 27. See also Bronowski, *The Common Sense of Science* (1960) which praises the achievements of intelligent amateurs (p. 18) though he also warns against premature ordering of their discoveries (p. 51).

⁵³ Gardiner, *The Nature of Historical Explanation* (1952) 5-8.

life sets us to solve. When we act according to common sense we fall back upon past experience but we do not concentrate our attention upon any particular feature of it.

Sense cannot provide really adequate explanations—it cannot get close enough to the truth of any complex situation, nor give us satisfactory guide-lines. Essentially, it is too poorly informed, too variable, too individual, too open to bias⁵⁴ as the psychologists well know.

Let us be content to stress three major defects:

First, *in any field, Sense can give only an incomplete knowledge.* It supplies the sort of capacity that a competent plumber or electrician possesses. He knows how to do his ordinary work, and what he does requires 'information'. This information comes from the experience of others, who have shown him what to do—and from trial and error on his own part. But his grasp of the 'patterns of the facts' is necessarily weak. *If he has to explain the process to another, he has difficulty.* How often do we hear a skilled workman complaining of his son (or some apprentice) that 'the lad simply does not catch on; he's no good'. The fault generally lies not so much with the pupil as with the 'teacher'. The latter knows *some* of the answers, but not enough; he has not asked himself the deeper questions. Because his 'learning' is so far removed from the complete knowledge of a properly educated electrical-engineering graduate, he can describe *appearances*, but cannot explain *relationships*.

Such limited knowledge cannot make up for a Theory based on full information, combined with that grasp of reality that comes from having patiently sought answers to the *related problems* in a field. The theorist has grasped that relation. He has learned about the properties of copper, wire, rubber, brass, as well the features of electric currents; he knows what is needed to be known about the allied mathematics, chemistry, physics. Because he has the answers to so many more questions; because he can draw on the experiences of other experts (set down in the books); because his curiosity has driven him to think harder, he understands the deeper significance of even the simplest operation (*e.g.*, installing a power plug). The technician is competent enough where he faces familiar difficulties; he is apt to be lost if some unexpected problem presents itself. The 'academic' engineer is not only more competent to handle the unexpected, he is also more able to make clear to others what is to be done. Despite

⁵⁴ Jung had a point when he observed: 'the pendulum of the mind escalates between sense and nonsense, not between right and wrong'. Jung, *Memories, Dreams, Reflections* (1967) 177. The detailed analysis in Lonergan, *op. cit.* also is worth investigation. And for the physical scientists, Medawar, *Induction and Intuition in Scientific Thought* (1969) has stressed that, although initial educated guesses may start off a line of investigation, rigorous proofs and tests by experts must follow. Chomsky, *Language and Mind* (1968) 7, is interesting on sense and science in the pre-nineteenth century stages of linguistics.

the occasional Edison, the great new discoveries are born in the minds of experts.

Second, *Sense varies* from one country to another, from one generation to another. In Alabama perhaps 'everyone knows' that negroes are inferior; in Russia 'everyone knows' that capitalism is doomed. In Imperial Rome it was 'normal' to have people eaten by lions. To even the noblest Greeks, slavery was part of the order of things. What everyone knows quickly gets out of date; this is why older men are so uncomfortable with change. The wisdom of the past needs constant preserving and reshaping (not destroying). Physicians, historians, theologians all have to make constant efforts to understand the *new* questions that are being put and the new replies available. Tired theories easily degenerate into 'common knowledge' and are not comprehended but only acquired by rote.

Finally, Sense—the limited outlook of a limited grouping—yields easily to the pressure of *prejudice*. Social groupings, rich or poor, have home-made notions leading to superior attitudes to other groups. Farmers despise townfolk; employers patronise workers; the proletariat detests the bourgeois; students distrust everybody over thirty. The common standards of an Albanian are not those of a Jivaro or a Japanese.⁵⁵ Each profession, confident in its own know-how, tends to deprecate that of other professions—'these narrow accountants'—'these forgetful plumbers'—'these cold lawyers'. Attitudes to religion or national pride (considered obviously sensible by their members) may grow bigoted, unreasoning—that disease which Toynbee called 'schism in the soul' destroys entire cultures. The security of feeling 'right' without thinking is the reward one pays for simple conformism. But for the man who wants to understand, Sense is little help for it is too dependent on mere vagaries of fashion. Men of affairs tend to have closed minds, even when they unconsciously change their opinions, which are so easily manipulated.

Practical sense is not Reason (though there be reason in it); nor is it even a sufficient test of Morality. It does not mark off the just deed from the unjust; though it often triggers a primitive and valuable reaction against gross cruelty, fraud or unfairness. And, while its arguments are often reasonable, it cannot prove either its conclusions nor its first principles. As with folk-lore, 'what everyone knows' is often so; but it is equally often false—at best it expresses truth swallowed without criticism. Theory is far superior in its effort 'to break up the inert bulk of the given', to

⁵⁵ Experts on theories of Knowledge, like Werner Stark, impute this state of mind to the national temperament. This is probably excessively argued, though it is true that politics, philosophy and moral beliefs do tend to be—at least in the last hundred years or so—pragmatic and functional: Stark, *Sociology of Knowledge* (1958) 7-8. Starke is referring particularly to the English attitude. Similar ideas are found in Aron, *The Opium of the Intellectuals* (1962) 215.

elicit from it 'more or less independent subsystems within which correlations of varying degrees of precision and universality may be established'.⁵⁶

The pyramid builders of Egypt must have known a good deal about practical geometry and mechanics; but, if we can today construct bigger roads, bridges, buildings—and speed to the Moon, it is largely because we have more theoretical mathematics. 'Book-learning' is the lever of technological civilization. Its foundations were laid by classical and medieval scholars, who had little practical knowledge, and even less desire to make practical uses of their abstract learning, but who, aroused by some practical problem, became possessed by a craving for a more complete knowledge of reality. The concepts, the formal language, the strictly defined terms, the nice distinctions, invented by thinkers within what Madariaga referred to as the 'famous quadrilateral of learning'⁵⁷ (London, Madrid, Rome, Berlin), largely established the culture and the material progress of the Western world, now spreading all over the globe. Many of these thinkers had little practical experience of the world of industry and business. The capitalist entrepreneur made effective use of the applications of pure science.

Despite its contributions, no scientist, no musician, no linguist would dream of treating the practical sense of the man in the street as more than one of the many elements he should consider.

Yet, to gain a balanced account of knowledge, we must acknowledge that both Theory and Sense have separate but useful roles. I like best Susanne Langer's epigram . . . 'Common sense knowledge is prompt, categorical and inexact'.⁵⁸

For the Man of Sense does not work *merely* on personal 'hunches', feelings, what the psychologists call 'sensations'. He, too, uses his head. Your competent mechanic does not assemble your car engine by a sixth-sense; nor does your trained plumber adjust your hot water service by some happy inner-feeling. Both artisans employ intelligence; but intelligence does not depend on training. Social habits are normally sound at

⁵⁶ Gardiner, *op. cit.* 8. That able French historian, Marc Bloch, agrees that 'the criticism of ordinary common sense, for long the only one in use, and still somehow seductive to certain minds, cannot lead very far. In reality, this pretended common sense usually turns out to be nothing more than a compound of irrational postulates and hastily generalised experiences': Bloch, *The Historian's Craft* (1963) 80-1. One excellent school text-book on 'Clear Thinking' for Matriculation students in Victorian schools by Gwyneth Dow is aptly entitled *Uncommon Common Sense* (1962).

⁵⁷ Madariaga, *Portrait of Europe* (Hollis and Carter eds, 1952) is a brilliant and balanced study of the common principles of the various peoples who, despite their tensions and differences, constituted the great cultural achievements of Western Europe.

⁵⁸ Langer, *Philosophy in a New Key* (1951) 224. See also Ayer, *op. cit.* 145; Strom, *Invention and the Evolution of Ideas* (1967) Ch. 5, which examines the tension between common sense concepts and the need to adapt them to new requirements by a process of displacement; Toulmin and Goodfield, *The Fabric of the Heavens* (1961).

their core. A carpenter may be more 'intelligent' than a computer programmer. Both Theory and Sense can give us knowledge—each gives *some* grasp of reality. Each has its own vocabulary, different but suited to its special needs—that of theory more precise, that of common sense more bluntly expressed.

Why then the debate between the two approaches to reality?

Many theoreticians between the 16th and 19th centuries brought deserved criticism on themselves because they sought truth solely in abstract, logical and mathematical propositions and treated the practical man as a 'clod'. The criticism of Theory in turn by the man of affairs, by way of reaction, is usually beside the point. It is absurd to say that 'one can know too much' about a subject, or to despise absent-minded egg-heads. Chesterton's paradox is apt: 'absence of mind in one place means presence of mind in another'. The proper objection is to 'paper logic', to theories which do not take account of the ordinary facts of life—of types of experience other than what one encounters in books, like Dr Johnson's famous retort to what he thought Berkely meant by perception. The further you apply a general principle to particular cases, the less exact it becomes, the more exceptions become apparent, as Aquinas admitted of Natural Law. We still await the successful philosopher-king! In fact we today seem rather short of philosophers who can make use of practical instincts and habits.⁵⁹

IV SENSE AND THEORY IN LAW

Sense—even lawyers' special common sense—has the same defects when applied to law as when applied to other crafts—

1. Its contribution is incomplete. Alone it does not enable one to understand the law: it repeats rules.
2. It varies from culture to culture and from age to age, so greatly that, if used alone, it would even destroy the essential continuity, or choke the growth, of any living 'organic' legal order.
3. It is too tainted by bias, fixed attitudes, bigoted formulae to provide justice for all.

If we had stuck to Sense we might never have emerged from the forests or the caves, at best we would have produced something hard and like the laws of the Medes and the Persians. The common sense of the Anglo-Saxon folk-moot is not that of the 20th century Municipal Council. It is

⁵⁹ George Santayana, among others, makes a pertinent criticism of Kant. He saw Reason as following on experience: Santayana, *Reason In Common Sense* (1962) 7, and thought that the European philosophers of the nineteenth century, following Kant, never solved the dialectic of experience and theory (p. 75). Santayana perceived that it required Reason to harmonise the opposing tendencies, desires and interests of this world (p. 174).

the professionals who construct, usually without realizing it, a viable working, growing system.

On the other hand there is plenty of room for Sense in law—despite its limited grasp it both prevents legal follies and leads to wise judgments when nothing else would work so sharply.

If, as we said, its negative value is more normal, more effective than its positive pressures, it works in both directions. In the best of all legal miscellanies, the distinguished author puts the contract effectively:⁶⁰

The reasonable man may thus be found standing with a flaming sword in the path of counsel *arguendo*. 'The common law is, or ought to be, the common sense of the community crystallised and formulated by our forefathers. If a proposition of law is put forward by counsel, and that proposition seems to me to be repugnant to common sense, I am disposed to think that the argument is at fault rather than the law.'

And any good judge will use every valid legal device to escape a nonsensical consequence.

Firstly, one can use the argument of nonsense, as judges often do, to dispose of conclusions *palpably absurd*. Brett M.R. put the matter most emphatically, when assailing a ridiculous contention about the value of evidence given by a donee of a gift: 'And what is ridiculous and absurd never is, to my mind, to be adopted whether in law or Equity'.⁶¹ Thus without much demur, courts are ready to assert that a decision is so wrong that no reasonable man could have reached it. Regulations of a municipal council are forthrightly declared *ultra vires* on the grounds that no reasonable body of men have made them.⁶² It is not unknown for a court to upset even a jury's verdict without qualms because it was so perverse that no reasonable jury could have reached it. Similarly the courts never had any scruples in rejecting the very existence of customs that they thought ludicrous or improper or contrary to reason.⁶³

Standards of behaviour are mainly tested by Sense.

⁶⁰ *Barker v. Herbert* [1911] 2 K.B. 633, 644, per Farwell L.J. quoted in Megarry, *Miscellany at Law* (1955) 268. There are many excellent observations in Reynold, *The Judge as Lawmaker* (1967). See also Gavan Duffy J. in *Stehn v. Minogue* [1940] V.L.R. 320, who declined to convict a person who had given away a copy of a newspaper in a public gathering on Sunday, partly because His Honour doubted whether the strange results that would follow were intended by Parliament.

⁶¹ *In Re Garnett, Gandy v. Macaulay* (1885) 31 Ch. 9.

⁶² *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223, provides one well known example of such an attitude. Of course, the judgment of what is 'so unreasonable' is made by judges, not juries, but the high degree of absurdity required as a standard assures that no person of intelligence would be in doubt. See Brett and Hogg, *Administrative Law, Cases and Materials* (1967) 306-31.

⁶³ See Allen, *Law in the Making* (7th ed., 1964) 614 which gives a long list of particular and local customs firmly repudiated on such grounds. See also, on the force of custom, Harding, *A Social History of English Law* (1966) 216; and on the dynamic function of changing concepts on the other hand, *ibid.* 234-5.

The actions of persons accused of crimes must be tested by what one could expect of the normal man. In construing criminal statutes, modern courts have proved reluctant to accept a construction of words which obviously would make sheer nonsense.⁶⁴ The 'peace-maker', who in 1964 argued that, because during an anti-war demonstration he was actually *on* prohibited defence premises, he could not be 'in the vicinity of' such premises, got short shrift.⁶⁵ And the very foundations of tort liability for negligent manufacture were laid by Brett M.R. in his celebrated judgment:⁶⁶ 'the relationship', he said (specifying when a duty of care exists) is established 'because anyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill under such circumstances there would be such danger'. Here the habitual standards vaguely recognized by the ordinary man have proved vital. In the area of torts law it is reassuring to be told that 'there is no room today for mystique in the law of negligence. It is the application of common morality and common sense to the activities of the common man'.^{66a}

In such matters courts keep asking 'how could one expect a man in the position of X to behave'. A case in 1964⁶⁷ applied normal standards to property law, when the Privy Council held that an occupier of land could be liable for the damage caused by the roots of his trees penetrating his neighbour's land and damaging buildings thereon. That decision was hailed as sensible by a learned commentator, 'because there is no reason why an occupier of land who receives all the benefits from it, should not in return be bound to exercise all reasonable care to see that it is properly maintained'.⁶⁸ Sense requires a modicum of consistency!

The 'customary use' of words in a statute is preferred to special meanings. The interpreters, say the English Law Commissioners, ought to ask 'to whom is this Statute addressed', especially if the use of a technical meaning would be grossly unjust.⁶⁹ And in general, to conclude our list,

⁶⁴ Take one old Irish case: *Mary R.* (1887) cited in Williams, *Criminal Law: The General Part* (2nd ed. 1961) 567. Palles C.B. is there reported as declaring, when considering the liability of an accused affected by drink, that '[i]f a person from any cause—say long watching, want of sleep, or deprivation of food—was reduced to such a condition that a smaller quantity of stimulant would make him drunk than would produce such a state if he were in health, then neither law nor common sense could hold him responsible for his acts, inasmuch as they were not voluntary but produced by disease'. More recently to the same effect: *Lawrence v. Same* [1969] 2 W.L.R. 1002; *Brandish v. Poole* [1968] 1 W.L.R. 544; *R. v. Bow Street Justices, Ex parte Adedigba* [1968] 2 W.L.R. 1143. Note also *R. v. Turner* (1811) 13 East. 228; 104 E.R. 357, where Wright J. refused to extend the notion of conspiracy beyond proper limits contrary to common sense.

⁶⁵ *Adler v. George* [1964] 2 W.L.R. 542.

⁶⁶ *Heaven v. Pender* (1883) 11 Q.B.D. 503, 508.

^{66a} *Doughty v. Turner Mfg Co.* [1964] 2 W.L.R. 240, 248 per Diplock L.J.

⁶⁷ *Morgan v. Kyatt* [1964] 1 W.L.R. 475.

⁶⁸ Note in (1964) 80 *Law Quarterly Review* 305, 306.

⁶⁹ United Kingdom, *Report of the Law Commission and of the Scottish Law Commission on the Interpretation of Statutes* (1969). With such a variety of modern legislation, passed in the interests, or for the control, of distinct groupings, this is a very wise precaution. The High Court of Australia once dryly pointed out that in

all lawyers would surely approve Lord Brougham's caution in *re Millis*,⁷⁰ where he 'shrank from the effect of declaring void a vast number of marriages and declaring bastard the numerous progeny of such liaisons and unseating a host of titles to real property', of persons who had gone through a form of marriage thought on good authority to be valid.

Such examples as we have cited merely make our point that so often Sense is a valuable shortcut; it saves futile argument and tedious judgments. Like Molière's newly-made gentleman, we find we have been talking Sense (as well as prose) without realising it!

Sense also has its value in reaching sound conclusions. It solves in a practical fashion some of the endless debates of the philosophers about concepts. Foreseeability, causation and duty have caused, for example, enormous confusion in torts of negligence; happily there is now abundant authority that questions as to what could have been foreseen 'can only be answered by applying common sense to the facts of each particular case'.⁷¹ Juries used to be quite good at this job, but now the technicalities of evidence and proof have helped to push juries out of civil actions; the judges have had to take up this role and therefore to justify their decision in logical, and often lengthy form. The modern law of torts is largely what the reasonable man has considered it ought to be.

Causation has received a largely practical treatment. Lord Wright pointed out: 'The law must abstract some consequences as relevant, not perhaps on the grounds of pure logic but simply for practical reasons ...'⁷²

The law's practical requirements cut short a great deal of pointless legal discussion—so important to logicians and scientists—about the scope and limits of this concept. The law's attitude was trenchantly and lucidly expressed by Smith J. in a Victorian case,⁷³ in which a man injured in a motor car collision later committed suicide while gravely affected in his

a Sales Tax Act, where the tax was laid on the 'manufacture' or 'production' of goods, and the goods in question were fish and chips, it was 'an odd and inappropriate use of terms to describe cooked fish as either produced or manufactured' (whatever economists might say about those terms): *F.C.T. v. Rochester* (1934) 50 C.L.R. 225, 226.

⁷⁰ *In re Millis* (1884) 10 Cl. & F. 534, 669-742 discussed in Dowrick, *op. cit.* 122-3.

⁷¹ E.g., Eggleston, 'Probabilities and Proof' (1963) 4 *M.U.L.R.* 180, 200. He refers to the standard laid down by Cussen J. in *King v. Parker* [1912] V.L.R. 152, 156: 'evidence such as reasonable men would act on in their own serious affairs'. He himself advocates the test of what was 'in the course of common experience the more probable inference' when confronted with a variety of possible conclusions.

⁷² *Liesbosch Dredger v. S.S. Edison* [1933] A.C. 449, 460 *per* Lord Wright. See Note in (1969) 85 *Law Quarterly Review* 305, 313, where it was suggested that if all references to 'direct consequences' and 'remoteness of damage' were deleted from the law then the problems could be dealt with on a satisfactory practical basis.

⁷³ *Haber v. Walker* [1963] V.R. 339. Lord Evershed also uses a practical test on what amounted to an 'eviction' at law: *Commr of Crown Lands v. Page* [1960] 3 W.L.R. 446, 449.

mind by the injuries he had received. One major issue was whether at common law or under the relevant statute the injuries 'caused his death.'

Smith J. said in the Full Court:⁷⁴

The legal principles governing questions of causation are in some respects unsettled. It is, of course, clearly established that the ideas of causation with which the law is concerned when attributing responsibility for harm suffered are not those of the philosophers or the scientists but are those of the plain man, guided by common sense considerations: compare *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* . . . *Rothwell v. Caverswall Stone Co.*, . . . But the statements to this effect that are to be found in the cases are not uncommonly accompanied by observations suggesting that common sense considerations do not provide clear principles for the solution of problems of causation: compare *National Insurance Co. of New Zealand v. Espagne* . . . ; *The Wagon Mound* . . . The number of causation problems, however, to which this view is today applicable has been much reduced by the detailed analysis of the subject of causation that has taken place in recent years. The concepts relating to causation that are latent in ordinary thought and speech have been closely examined, together with the decisions of the courts giving effect to them. And I venture to think that, at least in its main principles, the legal doctrine of causation based on common sense considerations has now been made reasonably clear. Moreover, it has now become plain, I consider, that the fears which have sometimes been entertained that reliance upon such considerations might lead to an undue extension of responsibility for harms were not well founded.

A solid professional tradition produces remarkable results even in constitutional matters. In 1935 Sir Owen Dixon set out to explain why Australian courts were so unwilling to give full expression to the abstract doctrine of the separation of powers set out in the Commonwealth Constitution, which we designed in so many ways in close imitation of the United States model. The failure of the doctrine to achieve a full legal operation in this country, he thought, was fortunate. It could best be ascribed to 'judicial incredulity'. To the judges, he went on, it must have 'seemed unbelievable that the executive should be forbidden to carry on the practice of legislation by regulation—the most conspicuous legal activity of a modern government'. And courts therefore treated an apparently rigid law as if it was a mere matter of drafting convenience. 'Legal symmetry gave way to common sense'.⁷⁵ This Dixon considered a practical virtue, though it represented a blow at the notion of the supremacy of the law.

In administrative law, local planning authorities may be given a good deal of discretion, but in any concrete situation, they must 'have regard to all relevant considerations and they must produce a result that does not offend against common sense'.⁷⁶ The tension between 'convenience' and

⁷⁴ *Haber v. Walker* [1963] V.R. 339, 357-8.

⁷⁵ Dixon, 'The Law and the Constitution' in Woinarski (ed.), *op. cit.* 38, 52.

⁷⁶ *Fawcett Properties Ltd v. Buckingham County Council* [1961] A.C. 636, 678 *per Lord Denning*.

'principle' is often tightly stretched, but in practice both virtues can be employed in happy conjunction.

Legal Sense has many advantages in daily practice. It equips the practitioner with expertise gained from experience. This expertise includes what he vaguely remembers from his University studies, from discussions and classes in Law School, what he has picked up from his seniors and colleagues: conversing, watching them at work, listening to arguments in court, receiving odd pieces of advice, making mistakes and not repeating them. But a competent man needs also that academic knowledge that comes from 'the learning in the books'; doctrines stated not only in statutes and reports, but also in articles and text books. The able lawyer has a more complete grasp of situations, not only because he possesses more 'law-facts' (decisions, practices, rules), but that he has pondered more fully on what he has learned, and is therefore able to assess more deeply any novel concrete situation. Whereas Sense supplies a direct knowledge, his more subtle and total insights come only after anxious questioning and searching for conceptual patterns. He will beware (for example) of relying on *rulings on facts* in tort actions without viewing them against the general principles involved (a danger frequently emphasized of late by the highest courts). Similarly the sentencing of convicted persons requires much more than one's private opinions.

The wisest practical lawyer rightly relies on his own experience—and that of others—in giving his judgment on a familiar issue. This develops his confidence and shrewd assessment of the risks involved in any decision. His expert conclusions have what one may call a 'moral certainty' in those situations in which a full review would cost too much time and money. Experience is the best guide until something better turns up—or a novel situation obliges one to think again. This is the basis of the use of 'judicial notice' and of much of the accepted rules of evidence, as Wigmore demonstrates.⁷⁷

Practical wisdom serves also to despatch the daily business: running the office, drawing simple documents, using the stock techniques of advocacy, advising on routine problems, making decisions in minor cases where law and facts are clear (as every busy magistrate does daily). Sense shows him quickly the practical effects of those principles relevant to a concrete case and helps him to advise his client on whether it is worth while fighting an action or settling the claim as where counsel admits: 'Yes, there is something in that point; but this particular court won't buy it. You have no hope of success'. Or, 'Your witnesses won't stand up to examination'; or 'You might succeed, but you cannot afford to fight your way up to the highest court . . . take their offer now'.

⁷⁷ As to the influence of 'the fund of common experience and knowledge, through data notoriously accepted by all', see Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940) ix, 542.

V THE AREAS OF CONFLICT

Unfortunately, Sense does not always triumph. There are frequent laments from the Bench that, though the weight of the cases leads to some injustice, it is too strong to be rejected. A distinguished American judge told his student audience at Columbia that 'the development of the criminal law has been marked by successive irrationalisms that have matched the potions and blood letting of medicine'.⁷⁸ An equally distinguished English judge lately declared that 'lawyers should be ashamed that they had allowed the law of defamation to have become bogged down in a mass of technicalities'.⁷⁹ Ordinary men are not always unanimous about a sensible result. Not every judge agrees on what ordinary men might think. A case in the English Court of Appeal illustrates the dilemma. Russell L.J. had to ask himself whether the 'man on the bus' is the same person as the 'officious intermeddler' so disliked by the law. Posing the instant issue he asked: 'Common man, how say you? Allow the appeal or dismiss it'.⁸⁰ The Court itself was divided on what the common man would do. (The 'bystander', on the other hand, is often called on to help; he stands for the detached, prudent man of affairs with solid judgment of human nature—especially on the intentions for acts of testators and trustees.)

Even the 'general feeling of the profession' is not always a sound guide; in the past it has produced obstinate clinging to now useless forms, mistaking shadow for substance, relying on stiff conventions of 'good' and 'bad' practice. Sense keeps on telling us what we already know; whereas Theory aims to teach something that not 'everyone knew'.⁸¹

The most severely criticized doctrines in our law have resulted from this narrow outlook; they were too closely tied to the fashionable prejudices of a past age. Thus Lord Abinger in 1837 was (not unreasonably) impressed by the 'flood-gates' argument as to the danger of making a

⁷⁸ Traynor, *Legal Institutions: Today and Tomorrow* (1959) 56-7.

⁷⁹ *Boston v. W. S. Bagshaw & Sons* [1966] 1 W.L.R. 1126, 1135 per Diplock L.J. On the absurd rule of evidence about the use of a criminal conviction in a subsequent civil action, see *Barclay's Bank Ltd. v. Cole* [1967] 2 W.L.R. 166, 169.

⁸⁰ *Indyka v. Indyka* [1966] 3 W.L.R. 603, 617, 618. Russell L.J.'s query goes to the heart of the matter. Whose judgment, when opinions differ, is to be taken? Does a judge know best what common men think (he himself being by training an uncommon kind of common man, despite the modesty displayed in MacKenna, *op. cit.*)?

⁸¹ Conant's tribute to practical exponents by ordinary folk as laying down some useful foundations for physical science (see Conant, *op. cit.*) does not prevent him from showing that the subsequent developments owe most to the Theorists. On the other hand, the well-known American writer, Ayn Rand, uses 'common sense' in her defence of the business man using self-interest against the attacks of the 'Attilas' and the 'Witch Doctors', who, she considers, preached a stupid code of bewildering morality. . . . '[h]e would have welcomed eagerly the guidance of Aristotle, but he had no use for Immanuel Kant. That which today is called 'common sense' is the remnant of an Aristotelian influence, and that was the business man's only form of philosophy. The business man asked for proof and expected things to make sense . . .': Rand, *For the New Intellectual* (1961) 41. This carries the term 'Sense' far beyond the limits we maintain in this article.

master in a Victorian household liable for the harm done by his servants to one another (especially when insurance schemes were not yet widespread).⁸² He was right to be cautious; but the examples he took to show the danger of a negligence of a fellow-servant were too topical and limited. All around him the Industrial Revolution was in full flood; new relations between masters and servants in factories, mines and ships were being created. The new poor needed protection for injuries that led to unemployment and starvation—especially as the injuries were often caused by the ignorance or incompetence of supervisors or foremen. Legislation later had to make the master personally responsible for such managers and deputies in large industrial organizations which he could not personally supervise. But Lord Abinger missed all this; for his Lordship was too much ‘a man of his time’, consequently his doctrine was inadequate for our time. To quote Lord Reid again, the doctrine ‘seems nonsense today, but look at the cases from Chief Justice Shaw in Massachusetts to the House of Lords just over a century ago. They thought it was plain good sense.’⁸³

Equity’s use of Conscience was for many centuries soundly based on what a normal decent man would have regarded as repulsive, unfair, cruel, oppressive, dishonourable. In the harsher air of later times, the best that could be said of it was that it was ‘common sense crystallised in the chill atmosphere of a Chancery Court’.⁸⁴

Fictions often save law from some of the worst excesses of logic. The ordinary man’s instinct rightly dislikes fictions as being obvious untruths; the lawyers’ special skill approves them as making a poor system work until the legislature gets around to reforming it. Fifoot is right in his caustic comment on the old property lawyers and their brilliant but odd artificial concepts: ‘The legal mind has never been afraid of appearing ridiculous’.⁸⁵

The 19th century distinction between invitees and licensees make the tort lawyer appear ridiculous, but that also took an unconscionable time in dying!

⁸² *Priestley v. Fowler* (1837) 3 M. & W. 1. Holdsworth has made caustic criticisms of the rank and file of medieval lawyers who, ‘immersed in the routine of practice, never attain to a conception of law as a reasonable and logical science. What they want is short rules about writs . . .’: Holdsworth, *History of English Law* (4th ed., 1966) ii, 326. This disjunction of logic and experience comes out in the famous debates on foreseeable consequences in torts. One logical extension of liability demanded full responsibility for quite remote damage, but sense revolted against imposing such a grave burden: *Overseas Tankship (U.K.) v. Morts Dock and Engineering Co. Ltd (The Wagon Mound (No. 1))* [1961] A.C. 388.

⁸³ Reid, *op. cit.* 5.

⁸⁴ O’Connor, ‘Thoughts about the Law’ (1928) 3 *Cambridge Law Journal* 161, 164. The advantage in preserving the intricate, esoteric rules of the conveyancer is well brought out in Birks, *Gentlemen of the Law* (1960) 206-8.

⁸⁵ Fifoot, *History and Sources of English Law* (1949) 99. Milsom has many examples of the useful manipulation of fictions in his survey of English legal history, especially in the artificiality of obligations, and the old forms of pleading: see Milsom, *Historical Foundations of the Common Law* (1969).

There are fortunately those many other situations when the lawyers, in Llewellyn's homely phrase: 'have achieved a semblance of sense in the result only through smuggling bits of horse-sense into action and discussion by techniques akin to those of the wizard's hat, though largely unconscious of their operation'.⁸⁶ The doctrines of Public Policy have proved double-edged weapons sometimes (as in restraint of trade) giving needed protection to the helpless against the powerful.⁸⁷

Double-edged also have proved those species of homespun legal common sense exhibited in maxims and presumptions. These, like most proverbs, may be contradictory or obtuse, though they incorporate a certain practical sagacity. Parke B. exhibited this two-faced attitude.

When there was not any point of pleading before the Court, no man could handle matters of principle with greater clearness or broader common sense, yet on pleading points the right was nothing, the mode of stating it everything. Conceive of a Judge rejoicing at non-suiting a plaintiff in an undefended case, and reflecting only that those who drew loose declarations brought scandal to the law.⁸⁸

The 19th century courts have left us with similar deplorable legacies, which the common sense of one age approved: Professor Milner listed some only in 1962:⁸⁹

[But] how shall we justify the continuing immunity of the lessor of ruinous houses; or of the owner of cattle straying on to the highway; or our charter for the malicious abuse of rights, what Gutteridge called 'the consecration of the spirit of unrestricted egoism'; or the absence of protection against shameless intrusions on privacy and searing assaults on dignity and self-esteem; or the invitation to dishonesty implicit in the rule *caveat emptor*; or the power to repudiate serious bargains for want of consideration—that grotesque little monster which has outlived generations of criticism; or the stubborn rejection of contracts for the benefit of third persons? And is it not discreditable to a modern system of law that it continues to rely on fiction and subterfuge, such as basing the action for seduction on loss of services, or the remedies in quasi-contract on implied services; or that it retains senseless distinctions, like that between libel and slander; or that it ties the hands even of the highest court by a rigid rule of *stare decisis* which assumes that nothing ever changes.

⁸⁶ Llewellyn, *Jurisprudence* (1959) 16. Of course the courts of Equity had no hesitation in fixing the standards of some groups (e.g. mortgagees and trustees) as extraordinarily high: Pound, *Jurisprudence* (1959) i, 242 and ii, 115.

⁸⁷ *Rodriguez v. Speyer Bros* [1919] A.C. 59, 88-91 *per* Lord Haldane. Paton, *Jurisprudence* (3rd ed., 1967) contains a useful discussion of the effect of changing views on public policy, e.g. in restraint of trade. See also Lloyd, *Public Policy* (1953) 1-4 which discusses the principal factors which influence judges. An excellent illustration of competing views of sensible public policy is evident in *Beresford v. Royal Insurance Society* [1938] A.C. 586 (the effects of which had to be altered by legislation in some jurisdictions).

⁸⁸ Cited in Holdsworth, *op. cit.* xv, 488.

⁸⁹ Milner, 'The Common Law and the Common Market' (1962) 15 *Current Legal Problems* 18, 30. It is only fair to add that the reformers are now active with both political and judicial support in removing many of the absurdities. But it is another lawyer who declares that 'lawyers' rules on what is evidence are so fantastic that if a

Every lawyer knows, in conclusion, how the maxim *communis error facit ius* (though defensible in some aspects) has led to a similar stultification of doctrine. C. K. Allen has dealt very fully with its excessive use. We need not try here to extend his formidable list of unhappy examples of the nonsense it produced,⁹⁰ as well as its usefulness in providing a rational security of some kind to guide men in their daily affairs.

VI SENSE, LAW AND DEMOCRATIC VALUES

Politically organized and expressed *public opinion* remains fortunately very important both in the passing of legislation, and as a curb on arbitrary use of power. No one today can assess with the confident air of a Dicey the precise relation between law making and public opinion, fears, hopes and prejudices. That complex relationship is rather for teams of political scientists and social anthropologists.

Yet clearly the fond hopes of so many liberal reformers in the last century (and so many revolutionaries in this century) that law could be made utterly simple, scientific and complete, have sadly failed. The dream of a set of simple orders in simple terms, of justice recognized and awarded by the plain man—have proved an illusion even in the most splendid codes.⁹¹ But the common man wants a share in law-making and he is getting it. Sometimes he is ahead of the experts; sometimes the lawyers are ahead of him.⁹²

Jacques Ellul, the great French sociologist, has emphasized that *the law itself possesses value*; because its very existence reassures the ordinary man, so long as it does represent his current ideas of Justice and Reason.⁹³

Beyond the objectivity of the law, which, as is the result of a rigorous

research worker were to follow them he would be rebuked for being silly and incompetent': Jackson, *op. cit.* 435. *Faramus v. Film Artistes Association* [1964] A.C. 925, posed difficult issues of individuals' rights sadly defeated by strict adherence to a legalistic interpretation of the relevant statute.

⁹⁰ Allen, *op. cit.* 321, 329.

⁹¹ For a classic illustration of the optimistic approach to what was thought to be the simple task of formulating law, one should read the resolution passed by the Goulburn Branch of the United Australia Party in New South Wales, republished in (1936) 9 *Australian Law Journal* 354. One object, it stressed, was 'the writing of all laws and legal documents in a language that would be plain to a man of average intelligence'. A judicial disagreement on the value of practical tests emerged sharply in the High Court decision, *F.C.T. v. French* (1957) 98 C.L.R. 398, 421 *per* Taylor J.

⁹² A. V. Dicey explored this topic at great length for his own age. But Dicey was concerned primarily with the achievements of a minority of 'enlightened amateurs', who brought powerful pressure on the legislators. In some ways he thoroughly distrusted popular opinion. A more varied picture emerges in a later study: Ginsberg (ed.), *Law and Public Opinion in the 20th Century* (1959). Doubtless, as we suggested, the man in the street is now, in political effectiveness, coming more and more to outweigh the small groups of 'right thinking citizens', experts, clergy, and disinterested reformers.

⁹³ Ellul, 'Law as Representative of Value' (1965) 10 *Natural Law Forum* 54, 62-3. Now that 'values' are coming back into the thinking of philosophers and sociologists their influence on law will become more apparent: see Rescher, *Introduction to Value Theory* (1969).

analysis by a philosopher or a jurist, contains an expression of the value of justice, there are what every man feels as justice and the image which he makes for himself of the content of the actual juridical system.

If that relation exists, it therefore strengthens the general sense of obligation to respect or obey the law; thus morality and law are more united and this unity is fundamental to the operations of both.

This feeling for law, as tested by practical consequences and thus deserving respect, is not new. Even the erudite Story stressed law as *social utility*, therefore deserving the deepest reverence: 'One of the remarkable tendencies of the English Common Law upon all subjects of a general nature is to aim at practical good rather than theoretical perfection'.⁹⁴ And Cardozo, in the shadow of William James, could aver that 'the juristic philosophy of the common law is at bottom the philosophy of pragmatism'⁹⁵ (although what he was doubtless reacting against was the vague Idealism of his youth and the dullness of slot-machine decisions). To him also, as to Roscoe Pound, the test of approval was functional: the *system worked well*. (This is a useful test but not fully adequate. For a while, nothing could have been more functional and practically successful than Hitler's Germany!)

Compromise may often prove the simplest solution, of course, and Sense may dictate a mutual agreement or a judicial splitting of responsibility. Certainly a wise mixture of the attitude of the practical lawyers who went to win *that* case for their clients, and the learning of the judge who knows his law, has been the powerful propellant in the rise of our common law system.

Professor Milsom has developed this dual aspect of the common law in his latest brilliant historical study of our system.⁹⁶ He asks first, how has it been so versatile and so durable? How can a system of law, a system of ideas whose hypothesis it is that rules are constant, adapt itself to a changing world? Professor Milsom is well aware that no one planned the growth of the English legal system, that most developments took place because particular disputes arose which the courts had to solve in a way that would please that community (though in strict legal form); that

⁹⁴ Story, *Equity Jurisprudence* (14th ed., 1918) 173.

⁹⁵ Cardozo, *The Nature of the Judicial Process* (1966) 102. It is interesting to recall that the true father of the 'pragmatic approach', C. S. Peirce, was never happy with William James' use of the doctrine. See Gallie, *Peirce and Pragmatism* (1952) 13, 19, 22, 45.

⁹⁶ Milsom, *op. cit.*, especially introduction and p. 30ff. in *Ingram v. Little* [1961] 1 Q.B. 31 Lord Denning's comments on the doctrine of diminished responsibility in crime, the apportionment of damages in some tort actions, the encouragement by the system to settle actions before trial, exhibit the same 'realistic approach' to concrete problems. Du Cann, *Art of the Advocate* (1964) 80, stresses that the pleader needs a 'hefty dose of common sense' and 'a degree of foresight' in establishing his case, as well as 'a knowledge of form, precedent and law'—which is as it ought to be.

concepts shifted with the needs of the times and the realization that new mischiefs required new remedies. But, much as Sense and case-by-case progress helped, it was a slow business and there grew constantly a large body of Theory which could never be ignored. Milsom points out that in the whole earlier medieval system of pleading and deciding claims the ancient pattern of law suit was already being broken up by the subversive action of common sense, which had already gained access to the legal process through the various events usually known as the introduction of jury trial. The common law was packed full of ideas, it was never given a structural framework before Blackstone but it grew as new problems, seen often quite narrowly, came up to the courts for solution.

Yet this process of development contains within itself the danger of the divorce of Sense and Theory. Aristotle was alive to this problem in his own day, when at the end of his *Ethics*, he spoke so rudely of both the Sophists and the politicians:⁹⁷

[t]he Sophists, who profess to teach the subject, are never practising politicians.

The practising politicians for their part seem to rely more on a natural gift strengthened by experience than upon a habit of thinking about principles.

Even in Athenian society at its most mature, Sense and Theory were tragically divorced; and the same disturbing problem is apparent today—especially in the relation of law to politics.

The Constitution of the United States for instance, has been widely copied, with its elaborately vague declarations of human rights, binding both executive and legislature. But in practice the Supreme Court, which has never pretended to be constituted by the most learned judges or by constitutional law experts, throughout its history has had not only to consider carefully the demands, claims, fears, of individual citizens and of pressure groups, but also to endure the harsh scrutiny of both President and Congress. Such a dilemma was posed sharply by *Time Magazine* on the segregation issue:⁹⁸

the justices confront a hard choice. They may conclude that a desegregation decision in the middle of a school year would produce widespread disorder in Mississippi—and would risk a collision between the Court and the Nixon Administration.

In these burning issues it is not enough to declare 'the law is the law'.

Again, the Privy Council in 1969 had to consider the appeal of an inhabitant of Sierra Leone who had been deprived, by *retrospective* legislation, of his former citizenship. The Constitution of 1961 contained the most admirable sentiments about freedom and equality (Section 23(1) allowed laws subjecting persons to disabilities or restriction only if 'reasonably justifiable in a democratic society'). The Chief Justice of Sierra Leone thought the constitutional restriction in question rendered the

⁹⁷ Aristotle, *op. cit.* 314.

⁹⁸ *Time Magazine*, 31 October 1969, 58.

retrospective Act *ultra vires*. Nevertheless, the Appeal Court took the opposite view. In turn, the Privy Council reversed the Appeal Court, stressing as primary qualities of legislation that it must be 'reasonably justifiable in a democratic society'.⁹⁹ Here is a plain conflict-situation. For undoubtedly the retrospective legislation was passed by a majority in the Parliament of Sierra Leone, and would perhaps—despite its racist implications—have been supported in a mass referendum. Should the law as theorized about by judges in London, contradict the wishes of the common people of a free African State?

Again, how genuine is public opinion—how far is it the consequence of manipulation by the mass media, publicly or privately controlled, which are called in to create popular images? Wisdom then counts less than appearance, reasoned argument may be drowned by bitter slanging and abuse. In this atmosphere can a sound public opinion be constructed; can we really find the necessary healthy *consensus*?

Unhappily the intellectuals are often no help. The Schools of Philosophy are at loggerheads; the sociologists and economists openly disagree on morals, finance, urbanization, social services. Hugh Stretton's recent study of this sad phenomenon paints a most effective and disturbing picture of the confusions of the social scientists.¹ The 'treason of the intellectuals' is still operating: too many scholars are mere camp-followers.²

A final difficulty in our own legal system is presented by the mass of new legislation in democratic societies, which not only substitutes statute for common law in many areas but also endows fresh armies of officials with numerous and wide *discretions*. Ministers of State, policemen, tax gatherers, social workers and other officials have to decide whether to interpret the rules strictly or to 'use their common sense'. An absurd example hit the headlines in England when a Scots doctor who advertised for a housekeeper who could properly prepare haggis was warned he was violating the Race Relations Act.³ The Chairman of the Board, in reply to protests, openly pleaded for the right to interpret the Act sensibly. But by what criteria is the official to act in doubtful cases?

Law ought indeed keep in touch with general demands—but how quickly, how thoroughly? New legislation does reflect contemporary claims, but tends more easily to get out of date as situations change and new

⁹⁹ *Akar v. A.-G. of Sierra Leone* [1970] A.C. 853, 854. It is an interesting example of the dilemmas that face courts in all modern acute constitutional and social issues. Are the judges the fittest to decide such matters? The High Court of Australia has made strong, persistent efforts to prevent sociological factors from playing any major part in its decisions, without entirely ignoring the changing facts of life; but then it does not have to give official reasons closely related to written Bills of Rights.

¹ Stretton, *The Political Sciences* (1969) 216-20.

² See Benda, *The Treason of the Intellectuals* (1969).

³ Reported in *The Australian*, 27 November 1969.

fashions emerge. The history of the Continental Codes illustrates the ingenuities of interpretation required to keep the Codes up to date, since the law, once formalized, becomes a set of rules, whose original purpose and choice of language are forgotten or ignored. Their jurists have to face unexpected situations by torturing the language to make sense of it, to use judicial discretion in order to balance competing demands.

The world we live in reveals a series of conflicts: between rules of law and old principles, between courts and the legislators, between rival presumptions and principles, between the well-reasoned knowledge of the expert and the imperfect understanding of the layman. How far is precedent to give way to new customs, how far is the efficiency of administrators to outweigh the protection of liberties? Most politicians understand these dilemmas; so do most judges; but it is much harder for the courts to abandon the technical rules in the name of practical good sense, unless some settled rule is *manifestly* unworkable.⁴

Law, as in some earlier times, ought to reflect the reasonable custom of the realm. But custom today changes with remarkable speed. The strong moral sense that once supported capital punishment now opposes it; the attitude that the buyer should beware is giving way to 'let the seller beware'.⁵ Collective bargaining is replacing individual contract as a basis of major industrial agreements; the public philosophy now advocates trade unions instead of suppressing them; the State gives cheerful aid to the poor (deserving or not); and courts punish property owners who use excessive means to protect themselves from invaders. Public opinion, though much altered in detail, supports again the 17th century principles of 'public relief'.

Even the respected 'rules of interpretation of statutes' illustrate the confusion lawyers find hard to dispel. The Law Commissioners have set out in detail in their 1969 Report the doubts and debates on this vital aspect of judicial expertise; they confess to grave defects; they offer few optimistic solutions, especially where law and convenience are in conflict.⁶ The frank cynicism of Langton J. is often heard:

Unfortunately the application of so-called 'common use' to questions of interpretation is apt to result in diversity rather than clarity of opinion. Many

⁴ Even the enlightened Higgins J. had to admit that one possible interpretation of the Conciliation and Arbitration Act 1904 (Cth) 'seems to be a conclusion revolting to common sense, but it must be accepted if according to law': *Jumbunna Coal Mine N.Z. v. Victorian Coal Assoc.* (1908) 6 C.L.R. 309, 316. And the High Court of Australia was not impressed by earlier views of its own of what the plain man would regard as a 'source of income': *Commissioner of Taxation (N.S.W.) v. Freeman* (1956) 30 A.L.J.R. 42. Similarly in *F.C.T. v. French* (1957) 98 C.L.R. 398, 421. Again, on the class-ascertainability rule *re* trusts, see *I.R.C. v. Broadway Cottages Trust* [1955] Ch. 20, 27 where Jenkins L.J. did not follow the common sense test.

⁵ Cohen, 'Sellers Beware' (1969) 22 *Current Legal Problems* 148.

⁶ See United Kingdom, *op. cit.* For further criticism, see Bloom, 'Law Commission: Interpretation of Statutes' (1970) 33 *Modern Law Review* 197.

a man would shrink from construing a document and say modestly that he felt the matter was beyond him, but I have never yet met a man who was so modest as to say that he had not sufficient common sense to decide any matter under the sun.⁷

Adam J. in the Victorian Supreme Court wisely pointed out that the policy against interpreting Statutes retrospectively rests not on mere convenience: 'the rule in question expresses no rigid or absolute rule. It is founded on a presumption of common sense that in a well-ordered society the legislature would not intend what is unjust'.⁸ Here the general notion of justice wins. But it is a presumption that often yields to what is called the plain meaning of a section. 'Common sense and justice are perhaps uncertain guides in ascertaining the highly complicated and artificial rules which govern tax liability' is another often-heard phrase. Here the expert prevails! And of course, even lawyers so often disagree on what would be sensible.⁹ The courts have lately listened to contrary arguments on such issues as to whether it makes sense to declare that a boy who has left his home is still 'in the custody of his parents',¹⁰ whether a crematorium is 'dealing in goods and materials',¹¹ whether it is necessary to be a Romany to be a 'gypsy' in England today.¹²

The answers vary. Mackinnon L.J. once told a plaintiff that 'in all decency he is able to recover against these defendants, if the law allows it; my own concern is to see whether, upon the cases, the law does allow him so to recover'.¹³ In another situation Donovan L.J. took the opposite stand: 'logic here must yield, I think, to common sense and justice'.¹⁴

⁷ *The Aldington Court* [1932] P. 21, 25. Among many close psychological studies of the practical difficulties of identifying human behaviour and judging it by any single standard, two of the most competent are Strawson, *Individuals* (1959) and D'Arcy, *Human Acts* (1963).

⁸ *Doro v. Victorian Railway Commissioners* [1960] V.R. 84, 86 per Adam J.

⁹ For various other examples, see Megarry, *op. cit.* 358; Williams, 'Language and the Law' (1945) 61 *Law Quarterly Review* 71, 179, 293, 384; (1946) 62 *Law Quarterly Review* 387.

¹⁰ *Hewer v. Bryant* [1969] 3 W.L.R. 425.

¹¹ *Bourne v. Norwich Crematorium* [1967] 1 W.L.R. 691.

¹² *Mills v. Cooper* [1967] 2 W.L.R. 1343. The older 'classical cases' still cause controversy among lawyers as to the degree of responsibility a person should bear for undertaking certain risks of ordinary life. For severe criticisms of the confused uses of sense, see Harari, *The Place of Negligence in the Law of Torts* (1962), especially Part II. On *Bolton v. Stone* [1951] A.C. 850 he remarks: 'Here we have common sense plus legal training pulling in one direction, and a bad doctrine plus a misnamed legal principle pulling in the other' (p. 171). See also *The Miraflores and The Abadesa* [1967] 1 A.C. 826, 848 per Lord Pearce for a sensible criterion of normal behaviour in a crisis.

¹³ *Heap v. Ind Coope & Allsopp Ltd* [1940] 2 K.B. 476, 483 per McKinnon J. Professor Rupert Cross, who refers to this comment in Cross, *Precedent in English Law* (2nd ed. 1968) 49, adds the comment that it illustrates the proper use of analogy, and sense is a subject worth exploring for its own sake, since the final test of a good analogy is that it be sufficiently close and not too 'far fetched'.

¹⁴ Lord Donovan, declining to follow the strict 'logic' that, if a solicitor continues to act for his client after he becomes aware that champerty is involved, he is aiding and abetting: 'Logic here must yield, I think, to common sense and justice': *Re Trepcá Mines (No. 2)* [1962] 3 W.L.R. 955, 970. But *contra*, even Lord Denning had to give way to distinctions he admitted to be illogical, in *I.R.C. v. Educational Grants Assoc. Ltd.* [1967] 3 W.L.R. 41, 52.

It took a lot of debate before it could be decided what practical precautions the owners of a wharf ought to take to ascertain the depth of water surrounding it at a given time.¹⁵ There will always be some debate as to what ordinary men would have agreed to if they had foreseen unexpected events, for example, how far parol evidence of what they really meant (or would have done had they known the future) ought to be admitted to vary what they wrote in their contract. Fortunately few judges, even in the last century, went as far as Parke B., who was reported by Erle C.J. as loving 'strong decisions', by which he meant those at which one arrived inescapably at a conclusion—plainly one which no layman could have foreseen.¹⁶

One has to sympathize with that Canadian Judge who wanted to combine the best of both worlds.¹⁷ Mr Justice Sullivan had to conclude that

although common sense must not be allowed to play any part in the decision of a point of law, and admittedly no judge of the court has jurisdiction to go into the merits of assessment, it is of some gratification to know that 'after reading of the evidence in the case' the members of the Assessment Appeal Board would seem to be in concord regarding the result which should follow the application of common sense to the situation here.

VII FINAL THOUGHTS

The tensions between Law and Sense are therefore powerful and real. Is there any solution?

Theory and Sense can certainly work in harmony together. This we have seen to be true in other spheres. It is also possible for the practical lawyer and the academic writer to combine their special skills.

Lord Devlin told an assembly of practitioners in 1958 some fundamental truths which are worth recording here at length.¹⁸

There is very much more need for the work of the academic lawyer and the student of law in this country than there is in most, because we base our administration of justice on judges who are—if I may put the matter in a neutral way—not necessarily selected for their erudition in the law. The English believe that the administration of justice is a practical matter. They like what they call practical and common sense solutions of the cases that are brought before the judges and they pick their judges with that object in view. But the consequence of that is, I think, that in England you cannot leave it to the judges—certainly not to the judges of first instance—to build up unaided a coherent system of law: they are far too much concerned with the facts and needs of the cases they are dealing with. The practice and tradition of extempore judgments means that they throw off things that are

¹⁵ *The Moorcock* (1889) 14 P.D. 64.

¹⁶ Llewellyn, *The Common Law* (1960) 39 cites Pound as his authority. Some judges showed perennial joy in this process. Pound in turn gives as his authority an old work: Senior, *Conversations with Distinguished Persons* (1880) 314.

¹⁷ Sullivan J., in his judgment in *Re Mercer's Appeal* (1961) 36 W.W.R. 199.

¹⁸ Devlin, *Samples of Lawmaking* (1962) 67. On the historical approach to precedent, there is an interesting analysis in Simpson, 'The Source and Function of the Later Year Books' (1971) 87 *Law Quarterly Review* 94.

better left unsaid. Moreover, if you do not reserve a judgment, it means that you are dependent very largely on the industry of counsel to get all the relevant information together. If it has not, you may miss some things or depart from some principle.

There has always been a body of men to correct this tendency in English law. I believe that in the early days it was done very largely by the work of the law reporters. The great text book writers have done it too—Salmond, Winfield and Dicey—they have extracted from the case law the principles which govern the subjects with which they dealt. Books of that sort are no mere collection of cases: they are books of principles which use cases as illustrations of what the authors conceive to be right principles of law.

Fortunately the recent techniques and the attitudes of our judges and jurists, plus the case-by-case growth of our law, have made such an alliance workable.

Principle and practice have usually gone together in our courts, as we see in the judgments of the great men of law. From Fortescue and Brian, Holt and Blackburn and Bramwell, up to Atkin and Buckmaster, Scrutton and Dixon and Holmes, our greater judges understood that logic and experience must be combined. They knew often how to reconcile embattled propositions to confine their conclusions to concrete cases, to draw the line at the right place, to utter the vivid aphorisms that light up a murky field. 'The duty of the weekly tenant is to do the little things about the house';¹⁹ 'The Statute of Frauds is a Shield, not a sword'; 'the onus of proof in English law follows common sense, not magic';²⁰ 'It sometimes helps to assess the merits of a decision if one starts by noticing its results and only after that applies to it the legal principles upon which it is said to depend'.²¹ The researches of Mr Justice Megarry provide a multitude of such examples of horse sense. When in 1967 a celebrated judge asked himself where he was to draw the line, he found comfort in the answer given by Lord Wright: 'Only where in the particular case the good sense of the judge decides'.²²

Worthy of inclusion is Diplock L.J.'s sharp dismissal of far-fetched arguments about police officers said to be trespassing: 'The points are so simple that the combined researches of counsel have not revealed any

¹⁹ *Warren v. Keen* [1953] 3 W.L.R. 702, 706 per Denning L.J.

²⁰ Questions of the onus of proof are by no means simple to resolve—even when stated in statutory form. Meeting the particular argument that a vast financial organisation was not a money lender within the meaning of the relevant Act and the general argument that organisations not specifically included in a list were *ipso facto* excluded, Diplock L.J. was moved to this epigram: *United Dominions Trust Ltd v. Kirkwood* [1966] 2 W.L.R. 1083, 1106.

²¹ *Imperial Chemical Industries Ltd v. Shatwell* [1965] A.C. 656, 675 per Viscount Radcliffe. This comes close to the words of Fullagar J., dealing with the question of the liability of a corporation to pay for goods sold to it: 'It may seem curious that there is so little in the books bearing directly on the argument now raised. But a not uncommon reason for dearth of direct authority on a point is that there has been a general consensus of opinion that the point is not tenable': *Re K. L. Tractors* [1961] A.L.R. 410, 416.

²² *Cook v. Swinfen* [1967] 1 W.L.R. 457, 462, per Lord Denning, referring to Lord Wright's test in *Bourhill v. Young* [1943] A.C. 92, 110.

authority upon them. There is no authority because no one has thought it plausible up till now to question them.²³

Both law and sense continue to be used. The Privy Council wisely commented in a case in 1965 dealing with a complex taxation problem:²⁴

The solution of the problem is not to be found by any rigid text or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in another . . . It is a common sense appreciation of all the guiding features which must provide the ultimate answer.

Practical sense helps when a line of logical argument is being *pushed too far*. Principle (and authority) supply an overall insight, a synthesis of order uniting fact and law; propositions that are the starting points for all thinking. Common sense comes out best in litigated disputes *where alone* the rational can be related directly to the actual predicament.

Formal logic enables sound deductions to be made from rules or cases brought by induction into principles; practical reasoning must be added for a good solution. Only the theoretical norm can provide a solid basis on which to integrate the cases so that *further sensible development becomes possible*. Sir Frederick Pollock resolved that dilemma many years ago:²⁵

A statesman may have very just notions of legislation with little technical knowledge of law, while a great lawyer's notions of legislation may be exceedingly narrow and perverse. Again, a man may be a master of jurisprudence in its general or historical aspects, while his opinion on a particular case would be less trustworthy than that of a counsel skilled in case-law, or the special department of it under which the case falls; and at the same time the legal conceptions and knowledge of this last counsellor in matters outside his own special experience may perhaps be very crude and defective . . .

His conclusion makes sense today: 'The wider knowledge is nevertheless to be sought, if possible, in every case, and if other conditions are equal, the man who has most of it is likely to do best even in his own department'.²⁶

What it all adds up to is that all whose business it is to understand the law, advise on it, execute it, judge it, enforce it must be men of sense as well as men of law. Then Sense can prove a good servant, even though it would make a vacillating, ignorant and obstinate master! And there would be no need for Holmes' cynical remark that 'the whole system of law is the result of the conflict between logic and good sense'.²⁷

²³ *Robson v. Hallett* [1967] 3 W.L.R. 28, 39. Also *Griffiths v. J. P. Harrison Ltd* [1963] A.C. 1, 19.

²⁴ *B.P. Australia Ltd v. Commissioner of Taxes* (1965) 112 C.L.R. 386, 397.

²⁵ Pollock, *Essays in Jurisprudence and Ethics* (1882) 263.

²⁶ *Ibid.*

²⁷ Julius Stone, from whose magisterial survey I have borrowed this quotation, comments that Holmes is using the word 'logic' in its narrow, traditional meaning: Stone, *op. cit.* 324. Good sense is related to some notion of justice; but the judgment must fit the reality of the facts.

Lawyers, while respecting common sense, must not become its helots. They can avoid that fate by being good theorists when they are dealing with the theory—the principles, standards, rules of their system—and by showing common sense when they are dealing with *concrete situations* of fact. The wise decisions that emerge from the marriage of law and fact, theory and sense, will be the best way they can serve society, by solving human disputes in a human way. And where the theory has gone sour, by being active in getting it changed.

If common sense alone were sufficient, we should not need law or lawyers! Alternatively let us not pretend that the common law is changeless. If it were, it would long ago have been replaced by statutory codes. It is the function of the courts to mould the common law and to adapt it to the changing society for which it provides the rules of each man's duty to his neighbour. What it means is that judges *and* members of tribunals *and* administrators must all, in their own degree, be humanists as well as men of the law. But the advice of Diplock L.J. in *Indyka v. Indyka*²⁸ ought to be kept in mind by all engaged in the task of development: 'And within the limits that we are at liberty to do so, let us adapt the common law in a way that makes sense to the common man'.

The real purpose of our enquiry, however, was to ask whether common sense of itself could furnish a solid philosophical foundation for a legal order. To that query the answer is clearly 'No'. It cannot tell us whether a law is 'good' or 'bad'. If there be any way of finding out whether a given decision was a good one (in any rational meaning of that term) it is not solely by asking the man in the street, helpful though his ideas so often are.

'Somewhere in the legal pool', Lord Wilberforce believes, and ultimately in the judicial pool, there must always be the probability of finding, when it is needed, every kind of technique, expertise, practical experience and social acquaintance. Lawyers must remain men of enquiring mind conscious of their (or to paraphrase an old crack) conscious of their brothers' ignorance and of the complexity of life. You who teach us must continue to remind us of our inadequacies and help us to overcome them. Who is to teach the teachers?²⁹

This is not the place to consider Lord Wilberforce's query. We have here put aside the vital issues raised by Holmes as to the sharp distinction between 'logic' and 'experience'. That topic has been examined many times, although never with greater force and wit than is displayed by Max Radin in his work which first appeared thirty years ago.³⁰ His treatment of it remains as relevant today to all teachers of law as it was then. Law, he believed, could dispense with neither logic nor experience, but to these it must add 'humanity'.

²⁸ [1966] 3 W.L.R. 603, 614.

²⁹ Wilberforce, *op. cit.* 264.

³⁰ Radin, *Law as Logic and Experience* (1940).

