Sir Owen Dixon: a Strict and Complete Legalist?

His Contract Decisions Examined

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Chapter Four — *McRae v Commonwealth Disposals Commission*¹

In the seminal High Court decision of *McRae v Commonwealth Disposals Commission*² Dixon and Fullagar JJ³ reconfigured the common law treatment of mutual mistake.⁴ They rejected a broadly held view that mutual mistake led to an otherwise valid contract being void, and argued instead that the common law and the leading cases in this area had always proceeded on the assumption that the validity or otherwise of a contract involving a mutual mistake depended upon the construction of the contract and a clear understanding of the obligations contracted for by the parties. This chapter will examine their joint judgment to see if it conforms to Sir Owen Dixon’s strict and complete legalism.

*McRae v Commonwealth Disposals Commission — the facts*

The dispute in this case involved a contract made between the Commonwealth Disposals Commission and two brothers, F E and K McRae, for the sale of an oil tanker lying off the south-east coast of Papua New Guinea. The Commonwealth Disposals Commission was a body set up in 1944 to administer the large quantity of what would soon be surplus defence equipment and material. Butlin and Schedvin report that in its peak years, 1946 and 1947, the Commission was probably the largest commercial enterprise in the Commonwealth. As part of its basic rules of disposal the Commission’s sales were normally on an ‘as is, where is’ basis and tender and public auction were the preferred method of sale.⁵ But the disposal of stores and the like in the then territories of Papua and New Guinea were to prove particularly difficult for

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¹ (1950–51) 84 CLR 377 (‘McRae’).
² Ibid.
³ McTiernan J was the third member of the Full Court of the High Court that heard the appeal against the judgment of Webb J, sitting as a single judge of the High Court. McTiernan J gave a short judgment in which he agreed with the conclusions and orders proposed by Dixon and Fullagar JJ in their joint judgment: (1950–51) 84 CLR 377, 419–20 (McTiernan J). For the sake of brevity I will refer to Dixon J rather than Dixon and Fullagar JJ in the body of the paper. This should not be taken as suggesting that the judgment was anything other than the joint work of both judges.
⁴ Different judges and different writers use these terms in different ways. In this chapter, to avoid potential confusion, the usage of Dixon and Fullagar JJ will be adopted. Hence ‘mutual mistake’ will refer to a mistake shared by both parties while ‘common mistake’ will refer to situations where both parties are mistaken but in different ways.
the Commission. The pressures created by such a rapid growth in the organisation and the special difficulties associated with disposing of war material in the tropics and at a distance from Australia may go some way to explaining what Dixon J described as the ‘reckless and irresponsible attitude of the Commission’s officers involved in the transaction with the McRae brothers.

The Commission had placed an advertisement in two Melbourne newspapers, the Age and the Argus, inviting tenders for the purchase of an oil tanker lying on ‘Jourmaund Reef’ which was said to be ‘approximately 100 miles north of Samarai’. Samarai lies on the extreme south-east tip of Papua New Guinea just to the south of Milne Bay. According to the advertisement the vessel was ‘said to contain oil’. When the McRaes commenced their planning to recover the vessel they found that there was no Jourmaund Reef at the place described. They did find a Jomard Island which lies to the south-east of Samarai and not to the north. They then contacted the Commission requesting the precise longitude and latitude of the vessel. They were told that the oil tanker was at Latitude 11 degrees 16½ minutes South and Longitude 151 degrees 58 minutes East. This position lies about 170 miles south-east of Samarai, and nowadays a view from Google Earth shows that there is a reef at this location.

There was no oil tanker at the location when the McRaes’ expedition arrived at this destination and Dixon J found that there had not been one when the contract was made. Indeed, as Dixon J was to point out in forceful terms, there was never any evidence that such a tanker had existed at this place and he found that the Commission’s officers had acted in a reckless and irresponsible way in advertising for sale a tanker when there never had been any evidence that it existed.

The plaintiffs paid £285 for the vessel and expended a considerable amount of money to outfit a small ship with diving and salvage equipment, as well as incurring expenses in engaging a crew and paying for fuel to sail from Melbourne to the site of

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6 Ibid 797–8 n 18
7 (1950–51) 84 CLR 377, 399 (Dixon and Fullagar JJ).
8 Ibid 396.
9 Ibid 399 (Dixon and Fullagar JJ). There was an oil barge located some 11 miles to the east of this position but both Webb J at trial and the High Court on appeal from Webb J’s decision discounted the claim by the Commission that this oil barge was the vessel that it had advertised: 386 (Webb J), 399 (Dixon and Fullagar JJ).
10 Ibid 399–400 (Dixon and Fullagar JJ).
the non-existent tanker. The plaintiffs sought redress from the Commission but the best that it would offer was repayment of the £285 paid for the vessel. Of course, this was not satisfactory to the plaintiffs as they had expended a far greater amount in preparing for the salvage operation. The plaintiffs then bought an action against the Commission claiming damages for breach of contract, deceit and negligence.

The action was before Webb J in the High Court who held as follows. First, relying on the authority of *Couturier v Hastie*, he held that since at the time of the making of the contract there was no oil tanker to sell, there was consequently no contract. However, he found for the plaintiffs on the ground of deceit, holding that the purchase money and the expense of searching for the tanker were natural consequences of the deceit and thus were compensable, whereas the preparation of the vessel and the purchase of the salvage equipment were not natural consequences and not compensable. He awarded £756 10s 0d as damages. He did not find any actionable negligence. The plaintiffs appealed claiming damages in excess of that granted by Webb J, with the amounts claimed ranging from £10,000 to £250,000. The Commission cross-appealed, arguing that the maximum amount recoverable by the plaintiffs on any ground could not exceed the amount paid for the vessel, £285.

On appeal the High Court varied Webb J’s order, with all three judges deciding that the contract was not void for mistake, that damages could be given for what amounted to reliance loss in excess of the price of the vessel and that, since the plaintiff had established an enforceable contract, the claims based on deceit and negligence did not need to be decided although Dixon J alluded to the difficulties the plaintiffs would have faced in establishing such claims.

11 The exact amount of money spent was a matter of some debate and confusion and raised some difficulties in the calculation of damages. This aspect of the case will not be considered in this chapter.
12 *Couturier v Hastie* (1856) 5 HLC 673; 10 ER 1065 ("Couturier").
14 Ibid 410 (Dixon and Fullagar JJ), 419–20 (McTiernan J).
McRae v Commonwealth Disposals Commission — Dixon J’s judgment

As noted above Webb J had held that Couturier\textsuperscript{15} was authority for the proposition that since there was no tanker to sell, contrary to the belief of both parties, this meant that no contract had been created.

While Dixon J accepted that Couturier\textsuperscript{16} had commonly been treated as a contract avoided by mutual mistake,\textsuperscript{17} he saw this as an error. He noted that Sir Frederick Pollock had suggested in his introduction to volume 101 of the Revised Reports (at vi) that Couturier\textsuperscript{18} and a large number of cases which had been categorised as mistake cases were really cases of construction.\textsuperscript{19} Justice Dixon also noted approvingly Denning LJ’s admonition in Solle v Butcher\textsuperscript{20} that cases that had been classified under the label of mistake now needed to be reconsidered in light of the House of Lords decision in Bell v Lever Brothers, Ltd.\textsuperscript{21, 22}

It is clear then that Dixon J felt it necessary to undertake a root and branch review of the received wisdom on the common law of mistake. His strategy was straightforward. Couturier\textsuperscript{23} was the bedrock of Webb J’s finding that there was no contract between the McRaes and the Commission. Yet, according to Dixon J, Couturier\textsuperscript{24} had been misunderstood and had not received the close examination that it deserved. For Dixon J Couturier\textsuperscript{25} became the proxy for the common law’s treatment of mistake and his review of this area of the law was aided by the comprehensive analyses of common law mistake which had only recently been undertaken by Lord Atkin in Bell\textsuperscript{26} and Denning LJ in Solle.\textsuperscript{27} Of course, Dixon J’s examination of mistake was not intended to be the equivalent of a lengthy scholarly

\textsuperscript{15} This case went through four courts and was finally determined by the House of Lords. The various stages of the litigation are reported at (1852) 8 Ex 40; 155 ER 1250; (1853) 9 Ex 102; 156 ER 43 and (1856) 5 HLC 673; 10 ER 1065. Citations to this case will be to the House of Lords decision except where particular reference is made to the decision of a lower court in this lengthy litigation.
\textsuperscript{16} (1856) 5 HLC 673; 10 ER 1065.
\textsuperscript{17} (1950–51) 84 CLR 377, 402 (Dixon and Fullagar JJ).
\textsuperscript{18} (1856) 5 HLC 673; 10 ER 1065.
\textsuperscript{19} (1950–51) 84 CLR 377, 402 (Dixon and Fullagar JJ).
\textsuperscript{20} [1950] 1 KB 671, 691 (Denning LJ) (‘Solle’).
\textsuperscript{21} [1932] AC 161 (‘Bell’).
\textsuperscript{22} (1950–51) 84 CLR 377, 402 (Dixon and Fullagar JJ).
\textsuperscript{23} (1856) 5 HLC 673; 10 ER 1065.
\textsuperscript{24} Ibid.
\textsuperscript{25} (1856) 5 HLC 673; 10 ER 1065.
\textsuperscript{26} [1932] AC 161 (HL).
\textsuperscript{27} [1950] 1 KB 671.
analysis where time and expense did not matter. So rather than embarking on a time-consuming examination of every case dealing with the topic he concentrated on Couturier, itself a decision of the House of Lords, and then the two recent, authoritative decisions of the House of Lords and Court of Appeal which had conducted similar reconsiderations of mistake in common law contract.

So, what did Couturier hold? According to Dixon J, ‘the question whether the contract was void, or the vendor excused from performance by reason of the non-existence of the supposed subject matter, did not arise in Couturier v Hastie.’

Rather, the case revolved around the meaning of the agreement which the parties had made and this remained the case throughout the litigation. For Dixon J this distinction between mistake on the one hand and an emphasis on construction on the other was the key to understanding the common law’s treatment of mistake. Indeed, he agreed with Denning LJ’s suggestion that Pothier’s civilian theorising on mistake was irrelevant to the common law and then added the following:

When once the common law had made up its mind that a promise supported by consideration ought to be performed, it was inevitable that the theorising of the civilians about ‘mistake’ should mean little or nothing to it. On the other hand, the questions whether a promisor was excused from performance by existing or supervening impossibility without fault on his part was a practical every-day question of which the common law has been vividly conscious, as witness Taylor v Caldwell, with its innumerable (if sometimes dubious) successors. But here too the common law has generally been true to its theory of simple contract, and it has always regarded the fundamental question as being: ‘What did the promisor really promise?’ Did he promise to perform his part at all events, or only subject to the mutually contemplated original or continued existence of a particular subject-matter? So questions of intention or ‘presumed intent’ arise, and these must be determined in the light of the words used by the parties and reasonable inferences from all the surrounding circumstances.

Justice Dixon added further that if Couturier was indeed a case of a void contract (which he clearly did not think to be the case) the Commission was not entitled to rely on its own mistake. For Dixon J, ‘a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any

28 (1856) 5 HLC 673; 10 ER 1065.
29 Ibid.
33 (1856) 5 HLC 673; 10 ER 1065.
reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party." 34

Finally, according to Dixon J the facts and the language of the contract did not show that the existence of the tanker was an implied condition precedent of the contract. 35

As far as the calculation of damages was concerned Dixon J saw the case as coming within the second limb of *Hadley v Baxendale* 36 — namely, those damages such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. 37 The actions of the plaintiffs in preparing a ship for salvage operations and incurring expense in travelling to the site of the supposed tanker were, according to Dixon J, entirely reasonable and were the actions which the Commission would ‘naturally expect them [the McRae’s] to take’. 38 For Dixon J, the facts were analogous to *Pollock v McKenzie* 39 where pursuant to a contract for sale of sheep the buyer sent a drover to collect them. When the drover arrived there were no sheep. The price of sheep had not risen in the meantime and the buyer suffered no loss from the seller’s failure to deliver but, of course, he did incur expense, for which he was recompensed, in sending the drover to the place where the sheep were supposed to be. 40 The quantification of damages, a matter of fact and evidence, will not be examined in this chapter. 41 The final decision of the High Court was to award the plaintiffs £3,285 for damages including the price paid for the non-existent tanker.

Was Dixon J justified in claiming that *Couturier* 42 was decided on the grounds that he identified — that is, as a matter of construction and not as a decision illustrating that a contract is void in cases of mutual mistake? And was he correct in treating *Bell* 43 and *Solle* 44 as signifying that the English courts at the highest level had

34 (1950–51) 84 CLR 377, 408 (Dixon and Fullagar JJ).
36 (1854) 9 Ex 341; 156 ER 145.
37 (1950–51) 84 CLR 377, 413 (Dixon and Fullagar JJ).
38 Ibid.
39 (1866) 1 QSCR 156.
40 (1950–51) 84 CLR 377, 413 (Dixon and Fullagar JJ).
41 The detailed analysis of the plaintiff’s claim can be found at (1950–51) 84 CLR 377, 415–19 (Dixon and Fullagar JJ).
42 (1856) 5 HLC 673; 10 ER 1065.
reconsidered commonly held assumptions about the effect of mutual mistake in the common law of contract? These cases will be considered in turn.

Couturier v Hastie

The facts in this case (ignoring a question of del credere agency which is irrelevant for our purposes) were succinctly stated by Dixon J as follows:

A sold to B ‘1,180 quarters of Salonica Indian corn of fair average quality when shipped, at 27½ per quarter f.o.b., and including freight and insurance, to a safe port in the United Kingdom, payment at two months from date upon handing over shipping documents.’ At the date of the contract the vessel containing the corn had sailed from Salonica, but, having encountered very heavy weather, had put in at Tunis. Here the cargo had been found to have become so heated and fermented that it could not be safely carried further. It had accordingly been landed at Tunis and sold there. These facts were unknown to either party at the date of the contract. On discovering them, B repudiated the contract. After the expiration of the two months mentioned in the contract, A, being able and willing to hand over the shipping documents, sued B for the price.\(^{45}\)

At trial before Martin B and a jury, the judge told the jury that ‘the contract imported that, at the time of the sale, the corn was in existence as such, and capable of delivery’.\(^{46}\) The jury found for the defendant but the Court of Exchequer (Parke B and Alderson B, Pollock CB dissenting) entered a verdict for the plaintiff.\(^{47}\) This decision was reversed by the Court of Exchequer Chamber\(^{48}\) which last decision was confirmed by the House of Lords.\(^{49}\)

At trial, as we have seen, Martin B ruled that the contract should be read as saying that the cargo was in existence and capable of delivery at the time of the making of the contract.\(^{50}\) In the Court of Exchequer counsel for the defendants commenced his argument by explaining the ‘true construction of the contract’,\(^{51}\) which was that the contract was one for sale of an existing cargo. During argument Pollock CB is reported as interposing and saying, ‘This question is purely one of construction. I certainly think that the plain and literal meaning of the language here used imports that the thing sold, namely, the cargo, was then in existence, and capable of being

\(^{44}\) [1950] 1 KB 671.
\(^{45}\) (1950–51) 84 CLR 377, 402–3 (Dixon and Fullagar JJ).
\(^{46}\) (1852) 8 Ex 40, 47; 155 ER 1250, 1254 (Martin B).
\(^{47}\) (1852) 8 Ex 53; 155 ER 1256.
\(^{48}\) (1853) 9 Ex 102; 156 ER 43.
\(^{49}\) (1856) 5 HLC 673; 10 ER 1065.
\(^{50}\) (1853) 8 Ex 40, 47.
\(^{51}\) Ibid 48.
transferred'. Unfortunately for Pollock CB, both Parke B and Alderson B disagreed with him and agreed with the counsel for the plaintiffs who described the contract as one where the defendant had bought the shipping documents and the chance that the goods were in existence when the contract was made.\(^{53}\)

Baron Parke gave the judgment of the Court in the following terms, terms which indicate quite clearly that the case revolved around the interpretation of the specific contract made between the parties:

> It is very true, that, when there is a sale of a specific chattel, ... there is an implied undertaking that it exists; and if there were nothing in this case but a bargain and sale of a certain cargo on the 15th of May, there would be an engagement by the vendor, or a condition, that the cargo was in existence at that time; but in this case there is a great deal more.\(^{54}\)

The ‘great deal more’ consisted of the provision for insurance and the phrasing of the contract, which led Parke B to say that ‘the true meaning of the contract was, that the purchaser bought the cargo, if it existed at the date of the contract; but if it had been damaged or lost, he bought the benefit of the insurance, but no more.’\(^{55}\)

When the case went before the Exchequer Chamber both sets of counsel argued their cases entirely as matters of construction of the contract — for the original defendants it was argued that the meaning of the contract was that the cargo was in existence and capable of being transferred when the contract was made; for the original plaintiffs, that the contract meant that the purchasers had bought an adventure. In delivering the judgment of the Exchequer Chamber Coleridge J made it clear that the case came before the judges as one turning ‘entirely on the meaning of the contract made between the parties’ and that it was to be decided by looking at the words of the contract to see what the parties had agreed to.\(^{56}\) He found that the contract was for the sale of a cargo supposed to exist and capable of transfer, thus denying the original plaintiffs any recovery based on the shipping documents.\(^{57}\)

When the case came before the House of Lords counsel for the original plaintiffs argued, again, that the contract was not one of purchase of cargo assumed to be in

\(^{52}\) Ibid 49.
\(^{53}\) Ibid 52–3.
\(^{54}\) Ibid 54 (Parke B).
\(^{55}\) Ibid 55 (Parke B).
\(^{56}\) (1853) 9 Ex 102, 107; 156 ER 43, 45 (Coleridge J).
\(^{57}\) (1853) 9 Ex 102, 108; 156 ER 43, 46 (Coleridge J).
existence but merely of the expectation of its arrival — that is, the purchaser had bought the shipping documents.\textsuperscript{58} The judges did not hear the counsel for the defendants, having decided that ‘the whole question turns upon the construction of the contract which was entered into between the parties’.\textsuperscript{59} The judges agreed unanimously that the contract imported that there was a cargo in existence which was capable of being transferred at the time of the making of the contract.\textsuperscript{60}

Far from being a case deciding that a mistaken belief shared by both contracting parties renders a contract void, \textit{Couturier}\textsuperscript{61} is instead, as claimed by Dixon J, a case decided purely on the construction of the contract made by the parties. For this reason Dixon J was fully justified in using this case, the principal authority relied upon by the defendants in making their defence and the trial judge in making his decision in \textit{McRae},\textsuperscript{62} as support for his position that the common law has not treated mistake as a reason for holding a contract void. Justice Dixon’s analysis is an example pure legalism in action because he examines closely an authority to determine exactly what it decided. In doing so he cleared up misapprehensions about what \textit{Couturier}\textsuperscript{63} had decided and what effect mutual mistake had in the common law of contract.

As seen above Dixon J read \textit{Bell}\textsuperscript{64} as a restatement of the common law of mistake at the highest level of the English judiciary, in the House of Lords. Was he justified in doing so?

\textbf{\textit{Bell v Lever Brothers, Limited}}

The facts in this well-known case can be summarised in the following simple form. Bell entered into an agreement with Lever Brothers to manage an underperforming company, the Niger Company, which was 99 per cent owned by Lever Brothers. Bell was a successful manager and after some time had passed Lever Brothers accepted an offer from a competing company to merge that company and the Niger Company. This merger necessitated the ouster of Bell who would have no place in the new entity. After amicable negotiations Lever Brothers agreed to pay Bell £30,000 as

\begin{itemize}
\item \textsuperscript{58} (1856) 5 HCL 673, 677; 10 ER 1065, 1067.
\item \textsuperscript{59} (1856) 5 HCL 673, 681; 10 ER 1065, 1068.
\item \textsuperscript{60} (1856) 5 HCL 673, 681–2; 10 ER 1065, 1069.
\item \textsuperscript{61} (1856) 5 HCL 673; 10 ER 1065.
\item \textsuperscript{62} (1950–51) 84 CLR 377.
\item \textsuperscript{63} (1856) 5 HLC 673; 10 ER 1065.
\item \textsuperscript{64} [1932] AC 161.
\end{itemize}
compensation for the termination of his services and the parties signed a contract to that effect. Subsequently Lever Brothers discovered that Bell, while being at the head of the Niger Company, had conducted some secret, relatively small scale trading of cocoa which was in conflict with his duty to the Niger Company. Lever Brothers brought an action seeking rescission of the contract for compensation and return of the money paid. The claim was based on fraudulent misrepresentation and unilateral mistake induced by fraud. At trial the jury negatived the charges of fraud and found that at the time of negotiating the compensation agreement Bell had forgotten about his secret trades. Nevertheless, the jury found that the trades would have allowed Lever Brothers, had they been aware of them, to have dismissed Bell, thus removing the need to compensate him for the termination of his agreement. In other words, both parties contracted on the mistaken assumption about the nature of Bell’s rights under the contract of employment with Lever Brothers, with both assuming that Bell’s rights existed at the time of the making of the agreement to compensate him for giving up his employment when, in fact, it appeared that his secret trading would have been treated as having breached his contract of employment, thus removing any need for Lever Brothers to compensate him for the termination of his contract of employment.

The trial judge held that the statement of claim raised issues of mutual mistake and found that the contract was void on those grounds. On appeal to the Court of Appeal, the judges came to the same conclusion, holding that the original pleadings should be amended to raise an issue of mutual mistake. Much of the discussion in the House of Lords concerned this issue of pleadings and whether the lower courts were correct in holding that mutual mistake was raised by the pleadings and, if not, whether these pleadings should be amended to do so. A majority found against Lever Brothers on this point but the following discussion will be devoted to analysis of what the judges had to say about mistake. Did the fact that both Bell and Lever Brothers contracted on the mistaken assumption about rights of each of them arising from the original agreements affect the compensation agreement? In other words, did this mistake render the contract void?

In a split decision the House of Lords found for Bell. Lord Blanesburgh would not have allowed a case on amended pleadings raising mutual mistake to go ahead but agreed with the other majority judges, Lords Atkin and Thankerton, that if that issue
could be raised, the claim based on mutual mistake would fail. He did not analyse this issue, preferring to rely on the analysis provided by Lords Atkin and Thankerton.\(^\text{65}\)

Lord Warrington (with whom Viscount Hailsham concurred) disagreed with the majority on the effect of the mutual mistake in this case. He took it as established law that a mistake held by both parties about an underlying assumption without which the parties would not have made the contract would render the contract void.\(^\text{66}\) The pivotal judgments in this case are those of Lords Atkin and Thankerton, who provided the analysis of mistake for the majority in the case.\(^\text{67}\)

Lord Atkin commenced his discussion of mistake in the following terms: ‘If mistake operates at all it operates so as to negative or in some cases to nullify consent.’\(^\text{68}\)

Lord Atkin described the three different categories where mistake would affect consent. First, mistake about identity can render a contract void. He gives the example of the mistaken belief of A that he is contracting with B when he is actually contracting with C. This would negative consent if it was clear that the intention of A was to contract only with B.\(^\text{69}\) The second category concerns mistakes about the existence of the subject matter at the date of contract. For Lord Atkin a contract for the sale of an item that had perished before the contract was made where this was unknown to both parties would be void.\(^\text{70}\) However, he then added the following:

Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is naturali ratione inutilis.\(^\text{71}\)

But he was careful to explain how the law stood in such a situation:

Even where the vendor has no title, though both parties think he has, the correct view would appear to be that there is a contract: but that the vendor has either committed a

\(^{65}\) Ibid 189–90 (Lord Blanesburgh).

\(^{66}\) Ibid 206 (Lord Warrington). His analysis of Strickland v Turner 7 Ex 208 to support this claim is puzzling because that case relies, I think, on there being a condition precedent about the existence of the annuity rather than dealing with mistake, per se.

\(^{67}\) It is the judgment of Lord Atkin that is now commonly referred to when Bell is analysed but this chapter will consider Lord Thankerton’s judgment as well.

\(^{68}\) Ibid 217 (Lord Atkin).

\(^{69}\) Ibid.

\(^{70}\) Ibid.

\(^{71}\) Ibid 218 (Lord Atkin).
breach of a stipulation as to title, or is not able to perform his contract. The contract is unenforceable by him but is not void.\textsuperscript{72}

Unfortunately Lord Atkin’s reasoning is not entirely clear here. There seem to be two possible interpretations of his position. First, it may be that he intended to treat the two situations differently so that in one case the contract is void and in the other it is not. In other words, where a good perishes before a contract is made and the parties mistakenly believe that it still exists the contract will be void, but where there is a mistake and someone sells that which he or she does not own the contract is not void. If this is the case one would have to ask whether the fact situation in McRae\textsuperscript{73} is akin to a perished good or non-existent title. Another interpretation is that Lord Atkin dealt specifically with perished goods because the Sale of Goods legislation at that time made particular provision for the destruction of specific chattels where the seller is ignorant of this.\textsuperscript{74} This would explain his terminology (‘corresponding to’) and the qualification made in the two previous quotations from his judgment given above. On this interpretation Lord Atkin intended to treat, in general terms but noting the exception created by the Sale of Goods Act 1893, cases of non-existence and of lack of title as being equivalent and that in both cases mistakes about existence or title would not render a contract void. The latter interpretation fits most comfortably with Lord Atkin’s discussion but it is unfortunate that Dixon J did not deal with this ambiguity in Lord Atkin’s reasoning more directly. Justice Dixon clearly adopted this latter interpretation of Lord Atkin’s position\textsuperscript{75} and this interpretation is in accord with Dixon J’s analysis of mistake in McRae.\textsuperscript{76} Indeed, Dixon J recognised that s 11 of the Victorian Goods Act 1928 corresponded to s 6 of the English Sale of Goods Act 1893, the provision which Lord Atkin relied on, but argued that it did not apply to the facts before him because the oil tanker had not perished; it had never existed.\textsuperscript{77}

But it is to his third category that Lord Atkin devoted most attention:

Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and

\textsuperscript{72} Ibid.
\textsuperscript{73} (1950–51) 84 CLR 377.
\textsuperscript{74} [1932] AC 161, 217 (Lord Atkin).
\textsuperscript{75} (1950–51) 84 CLR 377 405–6 (Dixon and Fullagar JJ).
\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid 410 (Dixon and Fullagar JJ).
is to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.\textsuperscript{78}

This is not consistent with the formulation or understanding of the role of mistake (or, more precisely, the lack of a role) as understood by Dixon J for it suggests that in some cases at least a mistake by both parties will render a contract void. But, as we shall see, there is good reason to wonder whether the application of this test in \textit{Bell}\textsuperscript{79} renders this test illusory. Before examining the authorities on this point Lord Atkin added a significant caveat, a caveat in line with the analysis of Dixon J:

Of course it may appear that the parties contracted that the article should possess the quality which one or the other or both mistakenly believed it to possess. But in such a case there is a contract and the inquiry is a different one, being whether the contract as to quality amounts to a condition or a warranty, a different branch of the law.\textsuperscript{80}

This, of course, is the essence of Dixon J’s analysis of mistake in common law contract.

The two main authorities relied upon by Lord Atkin were \textit{Kennedy v Panama, New Zealand and Australian Royal Mail Co}\textsuperscript{81} and \textit{Smith v Hughes}.\textsuperscript{82} In \textit{Kennedy}\textsuperscript{83} the New Zealand government sent one Ward, the postmaster-general of the colony, to the United Kingdom where he signed an agreement with a company for the carriage of mail to New Zealand. As part of the agreement the company issued a prospectus for new shares so as to increase their capital. Kennedy applied for and was allotted 1,600 shares. In the meantime there was a change of government and the agreement entered into by Ward was repudiated as being beyond the powers granted to him. Kennedy brought an action to recover the two first instalments paid for each share while the company counter-claimed for the remainder of the instalments due. The Court of Queen’s Bench found that the New Zealand government was within its rights in repudiating the contract and that the company had not acted fraudulently by claiming in its prospectus that it had a contract to deliver mail to New Zealand (even though this was not true).\textsuperscript{84} On the question of the mistaken belief of both parties about the existence of a valid contract to carry mail the Court said the following.

\textsuperscript{78} [1932] AC 161 218 (Lord Atkin).
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid 218 (Lord Atkin).
\textsuperscript{81} [1861–73] All ER 2094 (‘\textit{Kennedy}’).
\textsuperscript{82} [1861–73] All ER 632 (‘\textit{Smith}’).
\textsuperscript{83} [1861–73] All ER 2094.
\textsuperscript{84} Ibid 2097–98 (Blackburn J delivering the judgment of the Court).
There, is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind: but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent misrepresentation as to the horse’s soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract.\(^{85}\)

The Court considered that the facts in this case were analogous to the example of the purchase of a horse believed to be sound and therefore the purchase of shares in a company believed mistakenly to have a valuable contract was not substantially different from the purchase of shares in a company that did have such a valuable contract on its books.\(^{86}\)

There are two things to note about the Court’s judgment. First, the Court does claim that in certain cases of mutual mistake if there is misapprehension about a complete difference between what was supposed to be and what was actually taken a contract will be void. But one has to ask under what conditions this would be satisfied given that the serious misapprehension about the nature or the value of the shares that Kennedy purchased did not pass muster. One has to ask how realistic this test is and how often a contract would be found to be void because of a mistaken belief by both parties? The second aspect of the judgment is how closely it tracks Dixon J’s analysis in *McRae*.\(^{87}\) The sound horse example shows that construction lies at the heart of the Court’s reasoning. What did the parties agree to? Did one of the parties warrant the condition of the horse? Was the sound nature of the horse a condition or a condition precedent? What is puzzling about the judgment is the relationship between the first caveat, that in some cases a contract will be void because of a fundamental misconception about the nature of the thing being contracted for, and the Court’s acknowledgment that in such disputes the answer is to be found by construing the

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\(^{85}\) Ibid.

\(^{86}\) Ibid 2099–2100 (Blackburn J).

\(^{87}\) (1950–51) 84 CLR 377.
agreement made by the parties. As we shall see Lord Atkin is not entirely clear in explaining how one can hold both positions.

The second case referred to by Lord Atkin is *Smith*.\(^{88}\) The facts in this well-known case are somewhat more complicated than commonly acknowledged and the decision turns much more on questions surrounding the trial judge’s directions to the jury than on issues of mistake. The action was brought by the plaintiff, a farmer, against the defendant, a horse trainer, over the sale of some oats by sample. The defendant refused to complete the contract because he asserted that the contract was for the sale of old oats (favoured by horse trainers) whereas the oats tendered by the plaintiff were new oats from the latest crop. The jury found for the defendant.

The trial judge left two questions for the jury. First, the jury was asked ‘whether the word “old” had been used with reference to the conversation between the plaintiff and the defendant’. The second question asked ‘whether the plaintiff had believed that the defendant believed, or was under the impression that he was contracting for old oats’.\(^{89}\) The trial judge directed the jury to find for the defendant if the answer to either question was yes. Unfortunately, the jury did not indicate upon which question it found in favour of the defendant. The judges decided however, that the jury had probably decided on the second question and it was the propriety of this question which was to be determined:

We are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right. For this purpose we must assume that nothing was said on the subject of the defendant’s manager desiring to buy old oats, nor of the oats having been said to be old while, on the other hand, we must assume that the defendant’s manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing directly or indirectly to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the minds of the other party.\(^{90}\)

It was this issue that dominated the judges’ reasoning, with all three judges agreeing that even the mere passive acquiescence of the seller in the self-deception of the buyer would not entitle the buyer to avoid the contract.\(^{91}\) On the question of whether, if the plaintiff had intended to sell new oats and the defendant to buy old

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\(^{88}\) [1861–73] All ER 632.
\(^{89}\) Ibid 634 (Cockburn CJ).
\(^{90}\) Ibid.
\(^{91}\) Ibid 634–5 (Cockburn CJ), 637 (Blackburn J), 639 (Hannen J).
oats, this amounted to a failure of the minds to be ad idem Cockburn CJ said the following:

This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of the particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them.92

The two remaining judges agreed with Cockburn CJ but in terms that were more explicitly consistent with Dixon J’s analysis in McRae.93 Justice Blackburn noted that while the parties needed to be ad idem to conclude a valid contract such assent is determined objectively. In this case Blackburn J held that the direction of the trial judge was faulty because it failed to distinguish between an intention on the part of the defendant to buy oats that were warranted to be old and an intention to buy oats which he believed to be old. Only the former would prevent agreement that was binding.94 For Blackburn J the construction of the alleged agreement was crucial and absent ‘a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality’.95

In Hannan J’s eyes the direction was not so much wrong, as misleading.

The jury were asked whether they were of opinion … that the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats; if so, there would be a verdict for the defendant. The jury may have understood this to mean that, if the plaintiff believed the defendant to believe that he was buying old oats, the defendant would be entitled to the verdict, but a belief on the part of the plaintiff that the defendant was making a contract to buy the oats of which he offered him a sample under a mistaken belief that they were old would not relieve the defendant from liability unless his mistaken belief were induced by some misrepresentation of the plaintiff, or concealment by him of a fact which it became his duty to communicate.96

Thus, for Hannan J a mistake about the quality of the good, however fundamental, did not prevent a contract being formed.

What was the effect of these cases for Lord Atkin?

92 Ibid 636–7 (Cockburn CJ).
93 (1950–51) 84 CLR 377.
95 Ibid 637 (Blackburn J).
96 Ibid 639 (Hannan J).
In these cases [Kennedy\textsuperscript{97} and Smith\textsuperscript{98}] I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of consideration.\textsuperscript{99}

Despite this acknowledgment that the authorities that he relied upon did not support the contention that contracts were void when either or both of the parties were mistaken about the nature or quality of the goods promised, Lord Atkin then went on to consider the nature of the difference between an agreement to terminate an unbroken contract and an agreement to terminate a broken contract — that is, the very question before him in Bell.\textsuperscript{100} At this stage it should be acknowledged that Lord Atkin followed an inconsistent path here. His analysis of Kennedy\textsuperscript{101} and Smith\textsuperscript{102} shows that the true issue facing a judge here is the construction of the agreement between the parties and not the essential or fundamental nature of the good being purchased. Yet, having acknowledged this he then investigates the facts to determine whether the mistake of both parties involves the existence of some quality which makes the good without this quality essentially different from the good that it was believed to be. The two approaches are not the same and will not necessarily lead to the same results.

This clearly represented a dilemma for Dixon J. His decision to adopt the first path, that of concentrating on the agreement made by the parties, was sound given the decisions and analysis, relied upon by Lord Atkin, in Kennedy\textsuperscript{103} and Smith\textsuperscript{104}. It is a pity, however, that Dixon J did not allude to the inconsistency at the heart of Lord Atkin’s decision. It is a double pity because the application of the second approach by Lord Atkin shows that this ‘test’ is unlikely ever to be satisfied.

\begin{itemize}
\item I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the
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\textsuperscript{97} [1861–73] All ER 2094.
\textsuperscript{98} [1861–73] All ER 632.
\textsuperscript{99} [1932] AC 161 222 (Lord Atkin).
\textsuperscript{100} [1932] AC 161.
\textsuperscript{101} [1861–73] All ER 2094.
\textsuperscript{102} [1861–73] All ER 632.
\textsuperscript{103} [1861–73] All ER 2094.
\textsuperscript{104} [1861–73] All ER 632.
bargain. A buys B’s horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no misrepresentation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty. ... All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts — ie, agree in the same terms on the same subject-matter — they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.\textsuperscript{105}

One can only be frustrated with the expression of these sentiments. For one thing, if a broken contract is the same in essence as an unbroken contract one has to ask when a test of essentiality will ever be satisfied. And secondly, the examples that Lord Atkin gives and the justification and explanation at the end of the above extract are entirely consistent with Dixon J’s analysis in McRae\textsuperscript{106} but entirely inconsistent with a test based on essentiality. Again, one can agree with Dixon J in seeing Lord Atkin’s reasoning as being consistent with his own. But, again, one can be frustrated that Dixon J did not feel it necessary to point out the inconsistencies in Lord Atkin’s reasoning, inconsistencies which did not have to be seen as challenging his, Dixon J’s, analysis of mistake in common law contract. Of course, one has to be fair to Dixon J. In 1950 notions of deference and comity towards the House of Lords in the High Court were much stronger than they are today. Indeed, Dixon J undoubtedly saw himself as bound by a higher court and good manners and judicial deference would have prevented him from highlighting the confused nature of Lord Atkin’s reasoning. As long as he could derive a clear principle, which he could, there was no need to engage in what might be seen as unnecessary and impolite commentary.

Lord Thankerton, the other judge in the majority who handed down his own judgment was succinct in his reasoning. After examining a series of decisions, including Couturier,\textsuperscript{107} which he described as cases where the subject matter was not in existence at the date of the contract, he said:

I think that it is true to say that in all of them it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral

\textsuperscript{105} [1932] AC 161, 223–4 (Lord Atkin).
\textsuperscript{106} (1950–51) 84 CLR 377.
\textsuperscript{107} (1856) 5 HLC 673; 10 ER 1065.
element of the subject-matter of the contract, or it was an inevitable inference from the nature of the contract that all the parties so regarded it.\textsuperscript{108}

These sentiments are entirely in accord with those of Dixon J. For Lord Thankerton, as for Dixon J, it is the agreement of the parties which determines the consequences that flow from the non-existence of the subject matter of the contract and these consequences will depend on the nature of the obligations contained in that contract, express or implied.

\textit{Bell}\textsuperscript{109} provided Dixon J with what was in effect a binding higher court decision. Unfortunately for Dixon J some of the reasoning provided by the majority, especially in the judgment of Lord Atkin, was not entirely clear. Lord Atkin’s judgment seems to contain two threads which are not entirely consistent. One, and the one that appears dominant, accords with Dixon J’s emphasis on the centrality of construction in cases involving mistake. The other does not. This second thread manifests itself in two ways. First, Lord Atkin is not entirely clear in his treatment of contracts involving non-existent goods and cases where a seller has no title. His treatment is ambiguous even if there are good reasons for reading his discussion as deciding that in \textit{general} mistakes about existence or title do not render a contract void with an exception created by the \textit{Sale of Goods Act 1893} when specific chattels perish before the making of a contract. Justice Dixon adopts this interpretation, with good cause, but the reasons for doing so could have been and should have been made transparent.

The second inconsistency arises when Lord Atkin suggests that where parties are in disagreement about the essence of the subject matter of the contract the contract will be void. One is then faced with the problem that on the facts presented to Lord Atkin - that is, in relation to the difference between a defeasible and indefeasible contract - he refused to find that the two contracts were different in essence. In other words, if the fact situation before Lord Atkin did not lead him to find that there was a fundamental difference in the two understandings of the contract subject-matter one has to ask \textit{when} such an essential difference would be found. Of course, this presented Dixon J with a dilemma. If considered as a matter of reasoning, Dixon J’s choice seems convincing enough. Lord Atkin emphasised several times that construction lay at the heart of these problems and when he did not, his suggested test was, in effect,

\textsuperscript{108} [1932] AC 161, 236 (Lord Thankerton).

\textsuperscript{109} [1932] AC 161.
illusory. Given Dixon J’s own clear understanding of the effect of Couturier\textsuperscript{110} supplemented by Lord Thankerton’s obvious agreement with this approach, it only seems reasonable to agree with Dixon J’s use of Bell\textsuperscript{111} as supporting his understanding of the effect of mistake in common law contract.

As Sir Owen Dixon recognised in his extra-judicial writing, to master the law was an impossibility given the extent of the materials in the common law and because of its intractable nature arising from its creation by judges of varying talent and application. To discern from the often conflicting and sometimes inadequate cases a clear line of authority was not always going to be an easy task. Yet as a legalist Dixon J was compelled to find authority where it existed and in his analysis of Bell\textsuperscript{112} he shows how a good common law judge draws from a case principles that inhere within that case even though the case contains other and competing principles. Lord Atkin’s judgment in particular was not transparent and was, in places, contradictory; yet Dixon J’s analysis is a plausible — indeed, I would argue, compelling — ‘best reading’ of Lord Atkin’s reasoning.

The other leading English decision was the Court of Appeal’s decision in Solle.\textsuperscript{113} What guidance did this provide for Dixon J?

\textit{Solle v Butcher}

The facts in this case can be summarised as follows. The defendant (a former business partner of the plaintiff) let a flat to the plaintiff in September, 1947 for a term of seven years at £250 a year. Both parties believed that the flat was not affected by the various Rent Restriction Acts then in force because of substantial work that had been done on it due to war damage. The plaintiff, on receiving advice to the contrary after the lease was signed, brought an action claiming that the rent for the flat should be £140 (the relevant price under the applicable Rent Restriction Act) and claiming money paid in excess of that since the making of the agreement. The trial judge found for the plaintiff. On appeal to the Court of Appeal the defendant was ultimately successful with the majority (Bucknill and Denning LJJ, Jenkins LJ dissenting) agreeing that the

\textsuperscript{110} (1856) 5 HLC 673; 10 ER 1065.
\textsuperscript{111} [1932] AC 161.
\textsuperscript{112} Ibid.
\textsuperscript{113} [1950] 1 KB 671.
proper rent was £140 but that the lease be set aside on condition that the defendant offer the plaintiff a lease at proper market values but not greater than the originally agreed £250 a year.

On the question of mistake Bucknill LJ found that the parties were mistaken as to the effect of the work done on the flat to repair the war damage and that, as a consequence, the facts came within *Cooper v Phibbs*. In that case the House of Lords set aside an agreement where the purchaser of a fishery (who actually owned the fishery but did not realise it) mistakenly purchased it from sellers who also mistakenly believed that they owned it, but did so on terms that would take into account other interests that the mistaken sellers had in the property. Lord Justice Bucknill cited Lord Westbury declaring that a court of equity could ‘set aside’ an agreement made in such circumstances. Lord Justice Bucknill agreed with the terms proposed by Denning LJ in setting aside the agreement to lease between the two parties. He put it in these terms. ‘[T]he defendant established his point that the lease should be rescinded on the ground of common mistake, on a suitable undertaking being given by him as regards a new lease to the plaintiff.’

It is clear then that for Bucknill LJ the lease here was voidable (ie the contract was sound at common law), subject to terms given by the judges and undertakings given by the defendants. While his judgment is not explicit on this point, it can only make sense if understood in these terms. By contrast Denning LJ was very clear on this point in consequence of having conducted a general examination of the effect of mistake in contract.

Lord Justice Denning commenced his analysis by noting that there were two kinds of mistake; first, mistake which renders a contract void; and, secondly, mistake which renders a contract voidable in a court of equity. On the first kind of mistake he described the law as follows.

All previous decisions on this subject must now be read in the light of *Bell v Lever Bros. Ltd*. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind,

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114 (1867) LR 2 HL 149 ("Cooper").
115 [1950] 1 KB 671, 685 (Bucknill LJ), citing *Cooper v Phibbs* (1867) LR 2 HL 149, 170 (Lord Westbury).
116 [1950] 1 KB 671, 689 (Bucknill LJ). For ‘common mistake’ one should read ‘mutual mistake’ for the purposes of this chapter.
have to all outward appearances agreed with sufficient certainty in the same terms on
the same subject matter, then the contract is good unless and until it is set aside for
failure of some condition on which the existence of the contract depends, or for fraud,
or on some equitable ground. Neither party can rely on his own mistake to say it was
a nullity from the beginning, no matter that it was a mistake which to his mind was
fundamental, and no matter that the other party knew that he was under a mistake. A
fortiori, if the other party did not know of the mistake but shared it.\textsuperscript{117}

For Denning LJ the real issue here was what would a court of equity do with an
otherwise valid contract when circumstances such as those that occurred in this case
arose. In cases of mistake Cooper\textsuperscript{118} had established the following proposition.

A contract is ... liable in equity to be set aside if the parties were under a common
misapprehension either as to facts or as to their relative and respective rights,
provided that the misapprehension was fundamental and that the party seeking to set
it aside was not himself at fault.\textsuperscript{119}

As we have seen Dixon J was happy to endorse the last element of this formulation
as his alternative, and clearly less preferred, answer to the defence of the
Commonwealth Disposals Commission. And, as we shall see, Denning LJ’s
expansive treatment of the capacity of equity to set aside contracts has not met with
universal approval. Indeed, Dixon J was careful to distance himself from some aspects
of Denning LJ’s decision.\textsuperscript{120}

The remaining judge, Jenkins LJ, did not think that the facts raised an operative
mistake. ‘I find it impossible to hold that a mutual mistake of the character here
involved affords a good ground for rescission.’\textsuperscript{121}

This language suggests a difference between the judges about the existence of a
trigger for equitable intervention and not a disagreement about the general effect of
mistake in contract. In other words, Jenkins LJ accepts that cases of mistake can lead
to equitable intervention — that is, the contract is voidable, not void, but that in this
case there was no reason for equity to intervene.

\textit{Solle}\textsuperscript{122} presented Dixon J with a recent, authoritative decision from the Court of
Appeal that looked at mistake in some detail. While by 1950 it was not entirely clear

\textsuperscript{117} Ibid 691 (Denning LJ) (footnote omitted).
\textsuperscript{118} (1867) LR 2 HL 149.
\textsuperscript{119} [1950] 1 KB 671, 693 (Denning LJ).
\textsuperscript{120} (1950–51) 84 CLR 377, 407 (Dixon and Fullagar JJ).
\textsuperscript{121} [1950] 1 KB 671 704–5 (Jenkins LJ).
\textsuperscript{122} Ibid.
whether Dixon J and his fellow judges felt bound by the English Court of Appeal it is likely that they still paid it much deference and would look to it for guidance and as a source of legal principle. The treatment of mistake in Solle\textsuperscript{123} is unambiguous. Mutual mistake is treated as rendering contracts liable to be set aside on equitable grounds, but these contracts were not void. In the leading judgment of Denning LJ is to be found a comprehensive (if, as with many of his judgments, possibly one-sided) analysis of the major cases and a recognition that Bell\textsuperscript{124} represented a watershed of sorts in the treatment of mutual mistake in the common law. There is nothing in Solle\textsuperscript{125} which challenges Dixon J’\textasciiacute;s understanding of the effect of mutual mistake in contract, and much which supports it. To the extent that Solle\textsuperscript{126} was an authoritative decision Dixon J’\textasciiacute;s response to it was that of a legalist.

\textbf{Conclusion}

How does Dixon J’\textasciiacute;s judgment in McRae\textsuperscript{127} fit within his self-described strict legalism?

Mistake is one of the most unsatisfactory areas of contract law. One only has to examine the leading textbooks to find experts in the field who are divided over the nature, effect and doctrinal development of mistake. Dispute over doctrine is not rare, of course, but it is often normative (what should the rule be?) as much as descriptive or conceptual (what is it and how does it fit?). In mistake, disagreement about the latter is rife. The major reason for the lack of agreement over basic principles is that the authorities in this area are unusually unsatisfactory and contradictory.

When presented with the decision of Webb J in McRae,\textsuperscript{128} relying as it did on what Dixon J saw as a misconceived understanding of Couturier,\textsuperscript{129} it is clear that Dixon J saw the need for some serious conceptual tidying up. He was encouraged and justified in doing so by the House of Lords decision in Bell\textsuperscript{130} and the then very recent Court of

\textsuperscript{123} Ibid.
\textsuperscript{124} [1932] AC 161.
\textsuperscript{125} [1950] 1 KB 671.
\textsuperscript{126} Ibid.
\textsuperscript{127} (1950–51) 84 CLR 377.
\textsuperscript{128} Ibid 378–88.
\textsuperscript{129} (1856) 5 HLC 673; 10 ER 1065.
\textsuperscript{130} [1932] AC 161.
Appeal decision in \textit{Solle}.\textsuperscript{131} Dixon J’s response was to conduct a fundamental reconsideration of the main authorities in order to highlight what he saw as mistaken understandings of previous decisions and the subsequent accretion of relatively recent case law based on these misconceptions. We need not be coy here. In \textit{McRae}\textsuperscript{132} Dixon J formulated a radically reformulated understanding of the effect of mutual mistake in common law. This was no mere rediscovery of existing rules that had been forgotten or misunderstood. Justice Dixon reformulated the common law of mistake to give effect to his understanding of the common law’s treatment of mistake and, crucially, to place it within the underpinning doctrinal architecture of consideration-based contract. The formulation was a creative act because it reconfigured the place of mutual mistake with a clarity and rigour that had not been previously available. The judgment of Dixon J in \textit{McRae}\textsuperscript{133} could be described in any number of terms but mechanical it is not. It is indisputably creative.

But it is also indisputably \textit{bounded} creativity. There is not the slightest indication of instrumental or free-wheeling reasoning. At no stage does Dixon J engage in speculative reasoning about what the rules concerning mutual mistake should be. His reasoning is from the first to the last a clear and transparent attempt to make sense of the authorities in light of his best reading of them and of their place within a structure of rules that have developed over the centuries to give form to the consideration-based contract that developed from assumpsit in the sixteenth and seventeenth centuries. True enough, the latest authoritative pronouncement of the House of Lords in \textit{Bell}\textsuperscript{134} was not exactly clear and transparent. Justice Dixon’s analysis of that case is, I think, a fair reading of it. He does not, as he could have and perhaps should have done, acknowledge the contradictions contained in that case, especially in the leading judgment of Lord Atkin. This unusual reticence can be explained as the result of hierarchical deference and comity. But the guidance that Dixon J derived from Lord Atkin, that in cases of mutual mistake contracts are not rendered void, is valid and appropriate. \textit{Solle},\textsuperscript{135} by contrast, offered a recent analysis from a court which in 1950 was still probably considered authoritative in Australian legal circles and which was

\textsuperscript{131} [1950] 1 KB 671.
\textsuperscript{132} (1950–51) 84 CLR 377.
\textsuperscript{133} Ibid.
\textsuperscript{134} [1932] AC 161.
\textsuperscript{135} [1950] 1 KB 671.
consistent with Dixon J's consideration of the place and role of mutual mistake in contract.

It is not intended to suggest that Dixon J's decision and reasoning in *McRae*\(^{136}\) was intended to be or is the last word on mistake. He was to revisit the topic in *Svanasio v McNamara*\(^{137}\) in the context of mistakes over title to land and, as he made clear in both these cases, he was unhappy with Denning LJ’s understanding of when equity would intervene in cases involving mistake. Yet a later High Court bench in *Taylor v Johnson*\(^{138}\) seemingly favoured Denning LJ’s understanding over that of Dixon J. As at least one commentator also makes clear, Dixon J’s formulation does not work at all for the admittedly rare situations analogous to the facts in *Raffles v Wichelhaus.*\(^{139}\)

Rather, the claim of this chapter is that Dixon J was true to his self-proclaimed strict and complete legalism. *McRae v Commonwealth Disposals Commission*\(^{140}\) illustrates the bounded creativity that was part and parcel of his understanding of the role of the common law judge.

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\(^{136}\) (1950–51) 84 CLR 377.
\(^{137}\) (1956) 96 CLR 186.
\(^{138}\) (1983) 151 CLR 422.
\(^{139}\) (1864) 2 H & C 906; 159 ER 375. See the discussion in N Seddon and M P Ellinghaus (eds), *Cheshire and Fifoot’s Law of Contract* (Butterworths, 8th ed, 2002, 596). *Raffles* involved two ships both named *Peerless*.
\(^{140}\) (1950–51) 84 CLR 377.
Chapter Five — *Wilson v Darling Harbour Stevedoring*¹

The chapter will examine in some detail the case of *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*² to see whether Dixon CJ’s judgment is in accord with his self-described judicial method. In *Wilson*³ the High Court was presented with a persistent legal problem – could stevedores and persons in similar situations claim the benefits of exemption and limitation clauses that commonly featured in bills of lading and other contracts arising from the transport of people and goods. By the time that *Wilson*⁴ came before the High Court there was a clear trend in the English courts to confer this protection on stevedores and comparable persons. At the same time, however, it was also clear that the doctrinal justification for what appeared to be a flagrant departure from the privity concept was unclear and uncertain. In a split decision (Dixon CJ, Fullagar and Kitto JJ, Williams and Taylor JJ dissenting) the High Court held that the stevedores involved in this action could not take advantage of the exemption clause contained in the bill of lading issued by the owner of the ship to the consignee, the plaintiff Wilson.

Dixon CJ did not write a detailed judgment, agreeing instead with Fullagar J in the following terms. ‘I have had the advantage of reading the judgment of Fullagar J and entirely agree in it.’⁵

Justice Fullagar’s judgment is a strong endorsement of the traditional view that only parties to a contract can sue under it or claim benefits contained in it, and is critical of the reasoning in a number of English and Australian decisions that derived from the leading House of Lords decision, *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd*,⁶ a justification for the protection for stevedores and the like in circumstances similar to those in *Wilson*.⁷

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¹ (1955–56) 95 CLR 43 (‘Wilson’).
² Ibid.
³ Ibid.
⁴ Ibid.
⁵ Ibid 52 ( Dixon CJ).
⁶ [1924] AC 522 (‘Elder Dempster’).
⁷ (1955–56) 95 CLR 43.
Given the unqualified terms of Dixon CJ’s agreement with Fullagar J’s judgment, in this chapter I will use the latter’s judgment as a proxy for an examination of Dixon CJ’s commitment to his self-described fidelity to ‘strict and complete legalism’ in his judging.

**Wilson v Darling Island Stevedoring — the facts**

GJM Wilson (the plaintiff) was a general importer who brought an action against the defendant, the Darling Island Stevedoring & Lighterage Co Ltd, for damage to goods to the value of £394 19s 4d. The plaintiff was the consignee of a case of clothing material (tulle soie and tulle rayonne)\(^8\) coming from France under a bill of lading issued by the master of the Tremayne. The defendants were engaged by the agent of the ship’s owners to act as stevedore for the ship and to discharge, sort, stack and store all of its cargo. It was the common practice in the port of Sydney for stevedores to handle and store cargo pending its removal by the consignee, and this was known to the parties. While sorting and storing the goods the defendants fractured a water pipe, which flowed onto the plaintiff’s goods, causing mildew and rendering them worthless.

The bill of lading contained three provisions, clauses 1, 6 and 14, which provided for exemption for liability in certain circumstances for the carrier (and anyone else deemed to be the carrier or bailee of the goods) for damage to the goods before loading and after discharge. At first instance Walsh J, at the request of the parties, stated a case for the Full Court of the Supreme Court of New South Wales and the questions of law submitted asked whether the defendant was entitled to the protection of the exemptions set out in the bill of lading and whether these exemptions afforded to the defendant a valid defence to the claim made against it.

The Full Court (Street CJ, Herron and Myers JJ) answered both questions in the affirmative and the plaintiff appealed to the High Court against that decision.

**Wilson v Darling Island Stevedoring — the High Court decision**

In a split decision (Dixon CJ, Fullagar and Kitto JJ, Williams and Taylor JJ dissenting), the High Court reversed the decision of the Full Court.

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\(^8\) Tulle is the name given to a form of netting used for veils and other forms of adornment for clothing and the tulle in this shipment seems to have been a mix of silk and rayon (or viscose) tulle.
Justice Williams interpreted *Elder Dempster*\(^9\) as, in effect, providing a means for a person who is not a party to a contract to take advantage of its provisions.\(^10\) Justice Taylor gave similar reasons for finding that the stevedore should be protected.\(^11\) Justice Kitto agreed with Dixon CJ and Fullagar J that the appeal should be allowed. The main thrust of Kitto J’s judgment went to the interpretation of the exemption clauses and whether the defendants were intended to be protected and whether the plaintiffs had given their consent to this. On both counts Kitto J said that the answer was no. At the same time, however, he made it clear that he agreed with Dixon CJ and Fullagar J in their interpretation of *Elder Dempster*\(^12\) and in their rejection of the claim that that case had established a new principle in contract law.\(^13\) Justice Kitto expressly denied the existence of any rule emanating from *Elder Dempster*\(^14\) which would entitle a stevedore to the benefit of an exemption clause in a bill of lading to which the stevedore was not a party.\(^15\)

After stating the facts Fullagar J commenced his judgment by noting that the defendant was prima facie liable in damages and that the defendant’s defence relied on the exemption clause contained in the bill of lading. His response to that argument was terse.

The obvious answer to that argument is that the defendant is not a party to the contract evidenced by the bill of lading, that it can neither sue nor be sued on that contract, and that nothing in a contract between two other persons can relieve it from the consequences of a tortious act committed by it against the plaintiff.\(^16\)

For Fullagar J this represented a fundamental rule of the common law dating back at the very least since *Tweddle v Atkinson*\(^17\) and one which had no real exceptions.\(^18\) He accepted that this rule could cause injustice in some situations but suggested that equity could and did intervene by treating the promisee as a trustee for the third party, which would have the effect of allowing the third party to enforce the promise. Indeed, he lamented the disinclination of judges to find such a trust in appropriate

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\(^9\) [1924] AC 522.
\(^10\) (1955–56) 95 CLR 43, 56–7 (Williams J).
\(^11\) Ibid 87–98 (Taylor J).
\(^12\) [1924] AC 522.
\(^13\) (1955–56) 95 CLR 43, 80 (Kitto J).
\(^14\) [1924] AC 522.
\(^15\) (1955–56) 95 CLR 43, 80–1 (Kitto J).
\(^16\) Ibid 67 (Fullagar J).
\(^17\) (1861) 1 B & S 393; 121 ER 762.
\(^18\) (1955–56) 95 CLR 43, 67 (Fullagar J).
cases but noted that the defendant in the present case did not rely on a trust.\(^{19}\) Instead, the defendant claimed that there was a rule of law which allowed the third party stevedores to claim the benefit of the exemption clauses in the bill of lading, and that this rule had been established in *Elder Dempster*\(^{20}\) and recognised and elaborated upon in later English and Australian cases.

Justice Fullagar rejected this claim and devoted the bulk of his judgment to an analysis of these authorities in order to show that *Elder Dempster*\(^{21}\) did not establish any such exception to the privity rule and that the cases subsequent to it which purported to extract such a principle from it were poorly reasoned and unconvincing. Justice Fullagar held that the judgment of Lord Sumner, with whom Lords Dunedin and Carson agreed, should be regarded as stating the ratio decidendi and that Lord Sumner’s judgment was limited to the case of an owner of a chartered ship and did not make a general point about third parties in contract.\(^{22}\) He concluded as follows.

The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law — deductible from the *Elder Dempster Case* or from any other case — which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soak cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort.\(^{23}\)

Does Fullagar J’s judgment conform to Sir Owen Dixon’s strict and complete legalism? In particular, is Fullagar J correct in his claim that neither *Elder Dempster*\(^{24}\) nor the other authorities relied upon supported the principle of law claimed by the stevedore in the present case? To answer these questions *Elder Dempster*\(^{25}\) and those other authorities (*Mersey Shipping & Transport Company Ltd v Rea Ltd*,\(^{26}\) *The Kite*,\(^{27}\) *Gilbert Stokes & Kerr Pty Ltd v Dalgety & Co Ltd*,\(^{28}\) *Waters Trading Co Ltd v

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19 Ibid 67–68 (Fullagar J).
20 [1924] AC 522.
21 Ibid.
22 (1955–56) 95 CLR 43, 68–89 (Fullagar J).
23 Ibid 78–79 (Fullagar J).
24 [1924] AC 522.
25 Ibid.
26 (1925) 21 Ll L Rep 375 (‘Mersey Shipping’).
28 (1948) 48 SR(NSW) 435 (‘Gilbert Stokes’).
Dalgety & Co Ltd\textsuperscript{29} and Adler v Dickson\textsuperscript{30} will be examined in detail to see if they support Fullagar J’s contention.

**Elder Dempster**

In *Elder Dempster*\textsuperscript{31} a shipping company ran cargo ships between West Africa and the United Kingdom. The ships were designed to have a ’tween deck\textsuperscript{32} in the cargo hold so that goods could be stored in separate compartments. The company chartered an additional vessel but this did not have a ’tween deck. This ship loaded a quantity of palm oil stored in casks at the bottom of her hold and then a large quantity of palm kernels was loaded on top of the casks. In a vessel with a ’tween deck the palm kernels would have been loaded on that deck and not immediately on top of the casks. The weight of the palm kernels was such that soon after loading many of the casks were crushed and by the time the ship arrived in England a large part of the palm oil was lost.

The bill of lading which evidenced the contract between the charter company and the shippers was awkwardly phrased, mentioning ‘the shipowners’ and ‘the company’ but all the judges read this to mean that the contract was between the charter company and the shippers. The bill of lading contained an exclusion clause protecting against damage arising from stowage. The shippers brought an action against the charter company and the owners of the ship and both defendants claimed the protection of the exclusion clause. Much of the case revolved around the claim of the plaintiff shippers that the damage in this case was caused by the unseaworthiness of the vessel, with the unseaworthiness allegedly being shown by the lack of a ’tween deck. At trial before Rowlatt J and in the Court of Appeal (Bankes LJ and Eve J, Scrutton LJ dissenting) this argument was accepted.

The House of Lords (Viscount Cave, Lords Dunedin, Sumner and Carson, Viscount Finlay dissenting on this point) held that the damage was not due to the unseaworthiness of the vessel but, instead, to bad stowage, which meant that the charterers were protected by the exemptions contained in the bill of lading. On the

\textsuperscript{29} (1951) 51 SR(NSW) 4 ("Waters Trading").

\textsuperscript{30} [1955]1 QB 158 ("Adler Dickson").

\textsuperscript{31} [1924] AC 522.

\textsuperscript{32} A ’tween deck is, in effect, a giant shelf in a hold that allows goods to be stored without all the weight of the goods falling on the lowest stored goods.
issue of whether or not the shipowners, who were the second defendants in the original action, were protected by these exemptions the judges agreed that the shipowners were protected. Unfortunately they came to this conclusion through rather different and not always clear reasons. Viscount Cave found for the shipowners in the following terms.

It was stipulated in the bills of lading that ‘the shipowners’ should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton LJ says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals.\(^{31}\)

Since all the judges accepted that the bill of lading evidenced a contract made between the charterers and the shippers, the reference to ‘the shipowners’ in the bill of lading by itself was of no effect in determining the rights of the shipowners. Now, the stipulation could very well have been intended to be a stipulation on behalf of all the parties interested in the ship but this does not, of course, overcome the requirement for privity; that is, such a stipulation by itself did not make the shipowners parties to the contract. The notion of the shipowners as agents for the charterers is derived from the Court of Appeal judgment of Scrutton LJ, who explained his position as follows.

[T]he shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer.\(^{34}\)

Several points should be noted about this reasoning. First, Scrutton LJ does not explain how the fact that the shipowner was the agent of the charterer (a proposition which is merely asserted with no supporting evidence or reasoning) means that the agent is party to the contract. The bill of lading made no provision for agents except in special circumstances that did not apply in this case. Second, it appears that animating force behind Scrutton LJ’s position is an instrumental one — that is, it

\(^{31}\) [1924] AC 522, 534 (Viscount Cave).

\(^{34}\) Paterson Zochonis & Co Ltd v Elder Dempster & Co Ltd [1923] 1 KB 420, 441-2 (Scrutton LJ)
appears to Scrutton LJ to be anomalous and inexpedient for shipowners not to be covered by the same protections as the charterers of their vessels. The validity or wisdom of this position is, again, asserted rather than justified. Third, if this instrumental reasoning is expedient one has to ask whether Scrutton LJ intended to limit it to the specific problem before him, which was the relationship of shipowner to charterer. In other words, if Scrutton LJ’s formulation were to be accepted one has to ask whether its application was intended to be and should be restricted to this special relationship or whether it should be extended to other relationships. As we shall see Scrutton LJ was in subsequent cases to advocate an expansive understanding but there is no indication that Viscount Cave was thinking beyond the special relationship that was at the centre of the dispute in Elder Dempster.\textsuperscript{35}

Viscount Finlay, who found that the damage was caused by the unseaworthiness of the vessel, nevertheless held that the shipowners would be protected if the charterers had protection. In his words:

> If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort. The Court of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as those referred to by Scrutton LJ, in his judgment.\textsuperscript{36}

It is not entirely clear how, according to Viscount Finlay, the protection contained in the bill of lading attaches to the shipowner. Viscount Finlay certainly agreed with the policy behind protecting the shipowner that was given by Scrutton LJ but, unfortunately, it is not clear whether he agreed with Scrutton LJ’s use of agency as the explanation for this protection. As with Viscount Cave, Viscount Finlay’s seeming endorsement of Scrutton LJ’s position does not tell us whether Viscount Finlay was thinking only of the charterer–shipowner relationship or whether he endorsed the wider proposition that was to be articulated by Scrutton LJ in later cases.

Lord Dunedin concurred with the opinion of Lord Sumner.\textsuperscript{37}

\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid 548 (Viscount Finlay).
\textsuperscript{37} Ibid (Lord Dunedin).
In Lord Sumner’s mind it was important to be clear about the contractual relationships, if any, that existed between the parties.

There is nothing in the charter to bind the shipowners towards the respondents [the plaintiff shippers] at all. Their contract with the plaintiffs is in the bill of lading, if anywhere. As to the relations between the shippers and the charterers, they were not gone into at the trial, but there is no evidence that, even as between these parties, there was any contract but the bill of lading contract.\(^{38}\)

On the relationship between the shipowners and the shippers he said the following.

There was, finally, an argument that the shipowners might be liable in tort, or at any rate, as bailees quasi \emph{ex contactu}, though the charterers and their agents were not. … It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co’s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship’s possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contact, as would be necessary to support the contention.\(^ {39}\)

Lord Sumner here sees problems in the notion that the shipowners were the agents of the charterers in their (the shipowners’) relationship with the shippers. Given the facts any claim for agency here was always going to be difficult. Lord Sumner’s preferred notion, a bailment upon terms, does, however, raise its own problems. In particular, it is not clear whether this is a bailment that is derived from the special relationship of charterer and shipowner or whether it would have wider application — in other words, whether it would also include stevedores and the like in fact situations similar to \emph{Wilson}.\(^ {40}\)

Lord Carson’s judgment was as brief as it was confusing: ‘My Lords, I agree that this appeal should be allowed, and I have nothing to add to the judgments of my noble and learned friends, Lord Cave and Lord Sumner, with which I agree.’\(^ {41}\)

Since Lord Cave had based his decision on agency grounds and Lord Sumner’s preferred understanding was that the relationship was a bailment upon terms, Lord Carson’s position is unclear.

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\(^{38}\) Ibid 552 (Lord Sumner) (emphasis added).
\(^{39}\) Ibid 564–45 (Lord Sumner).
\(^{40}\) (1955–56) 95 CLR 43.
\(^{41}\) [1924] AC 522, 565 (Lord Carson).
So, how did Fullagar J understand the effect of *Elder Dempster*?\(^\text{42}\)

For Fullagar J, Lord Sumner’s description of the relationship between the shipper and the shipowner as a bailment on terms was the ratio decidendi of *Wilson*.\(^\text{43}\) He came to this position, it appears, by noting that both Lord Dunedin and Lord Carson had agreed with Lord Sumner, making this a majority of the judges sitting as well as the majority within the majority of four judges who allowed the appeal. But, as we have seen, Lord Carson also agreed with Viscount Cave, as did the dissenting judge, Viscount Finlay, on this point. As a matter of crude numbers, three of the five judges agreed that the shipowner was protected through agency, rather than according with Lord Sumner’s understanding of there being a bailment on terms — indeed Lord Sumner did accept that agency could be used to protect the shipowner here, which would mean that all the judges accepted the agency argument. What is more significant, however, is Fullagar J’s assertion that no judge in *Elder Dempster*\(^\text{44}\) — either at trial, or before the Court of Appeal or the House of Lords — envisaged creating an exception to the rule that a person must be a party to a contract to claim benefits under it. In Fullagar J’s opinion *Elder Dempster*\(^\text{45}\) stood for a much narrower and very different proposition.

In my opinion, what the *Elder Dempster Case* decided, and all that it decided, is that in such a case, the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is unnecessary to consider any such question.\(^\text{46}\)

Although, as we shall see, Scrutton LJ was to interpret *Elder Dempster*\(^\text{47}\) in an expansive fashion in *Mersey Shipping*,\(^\text{48}\) it is difficult to read into the judgments of the Law Lords in *Elder Dempster*\(^\text{49}\) anything other than an attempt to deal with the specific relationship of shipowner and shipper in a bill of lading between a charterer and that shipper on the specific facts of the case before them. In other words, there is absolutely no indication in any of the judgments, including that of Scrutton LJ in the

\(^{42}\) Ibid.

\(^{43}\) (1955–56) 95 CLR 43.

\(^{44}\) [1924] AC 522.

\(^{45}\) Ibid.

\(^{46}\) (1955–56) 95 CLR 43, 78 (Fullagar J) (footnote omitted).

\(^{47}\) [1924] AC 522.

\(^{48}\) (1925) 1 LR 375.

\(^{49}\) [1924] AC 522.
Court of Appeal, that the judges expressly created an exception to privity along the lines suggested by the stevedores (and accepted by Williams and Taylor JJ) in Wilson. However, even if not expressly created by the judges, could such an exception be inferred from their decision and reasoning? One way of answering this is to examine the cases which followed Elder Dempster to see how that case was understood to apply (or not) in different fact situations.

_Mersey Shipping & Transport Company Ltd v Rea Ltd_

In _Mersey Shipping_ the plaintiffs and appellants, Mersey Shipping Ltd, were master porters who sued for money owing on work done for the defendant/respondent, Rea Ltd, who was the consignee of some barrels of asphalt and who withheld the sum owing as recompense for damage caused by the negligence of the plaintiff. The asphalt had been shipped under a bill of lading which provided that porterage would be arranged by the ship’s agents, De Wolfe & Co. A request was made by the defendant and when this was received by De Wolfe it was stamped with words to the effect that delivery was at the risk of the defendant. Mersey Shipping was appointed by De Wolfe and claimed the protection of the exclusion clause. The trial judge found for the defendant on the ground of insufficient notice.

On appeal before Bankes and Scrutton LLJ, the plaintiffs lost again but for different reasons (from the trial judge and between the two appellate judges). Bankes LJ did not find a contract between the parties. He did not think that _Elder Dempster_ ‘covered’ the situation that arose before him. Although Scrutton LJ agreed in the result arrived at by Bankes LJ he disagreed with him about the possible application of _Elder Dempster_. According to Scrutton LJ,

the reasoning of the House of Lords in the _Elder Dempster_ case shows that, where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the

50 (1955–56) 95 CLR 43.
51 [1924] AC 522.
52 (1925) 21 LJ LRep 375.
53 Ibid.
54 [1924] AC 522.
55 (1925) 21 LJ LRep 375, 377 (Bankes LJ).
56 [1924] AC 522.
second point in the judgments of Lord Cave and of Lord Sumner, with whom Lord Dunedin concurs, in the Elder Dempster case.\textsuperscript{57}

Justice Fullagar disagreed strongly with this proposition, stating categorically that there was ‘no foundation whatever for suggesting that there is any such general rule of law’.\textsuperscript{58} Unfortunately, Scrutton LJ did not explain how he derived this general proposition from Elder Dempster\textsuperscript{59} and given that no other judge in that case expressed himself in such general terms this places a question mark over his formulation.

\textit{The Kite}\textsuperscript{60}

The headnote to this case provides a succinct description of the facts.

The plaintiff cargo owners contracted with a firm of wharfingers for the collection and transport of the plaintiff’s goods from one wharf on the River Thames to another. The wharfingers, who to the plaintiffs’ knowledge owned neither tugs nor lighters, contracted with a firm of lighterers for the transport, and they in turn contracted with the defendants for a tug. The plaintiff’s contract with the wharfingers was on the terms that the latter company should not be liable for any neglect of its servants or others for whom it might be responsible, and that ‘persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to the company’s customers than that of the company hereunder.’\textsuperscript{61}

Although Langton J did not find any negligence and dismissed the claim on that ground he dealt at some length with the claim that the defendants were protected by the contract made between the plaintiffs and the wharfingers. He stated that he ‘could get no assistance from … [Elder Dempster] at all except along a quite general line’\textsuperscript{62} and found more specifically that an agency argument broke down because in the last contract made between the lighterers and the defendant the former were not acting as agents for the wharfingers who had made the original contract with the plaintiffs.\textsuperscript{63} And, as ‘regards bailment, it was of a very light character …’.\textsuperscript{64} He concluded as follows: ‘The two roads opened by the Elder, Dempster case, therefore, appeared to be clearly barred in this case.’\textsuperscript{65}

\textsuperscript{57} (1925) 21 Ll LRep 375, 378 (Scrutton LJ).
\textsuperscript{58} (1955–56) 95 CLR 43, 69 (Fullagar J).
\textsuperscript{59} [1924] AC 522.
\textsuperscript{60} [1933] P 154.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid 178 (Langton J).
\textsuperscript{63} Ibid 181 (Langton J).
\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
Nevertheless, Langton J found that the defendants would have been able to claim the benefit of the exemptions contained in the original contract made between the plaintiffs and the wharfingers. The precise grounds for this, however, are not totally clear.

It seems to me, therefore, that if one treats this case throughout not as a case in which each party has acted as agent for the other, in the full sense — because quite clearly they have not, they are really in many senses completely independent contractors — but if one bears in mind what they each knew about the other’s business, and the language that they used, one can find in it a limited authorization from first to last — that is from the plaintiffs to the defendants — that in each step of the way the independent contractor may reserve … that the people who follow after shall have the same exemption from negligence as he, the first contractor, has got.66

What is clear from Langton J’s judgment is that he was driven by what he saw as accepted commercial practice to find that the contractual exemptions went down the line, so to speak, of the contracts made to move the goods. As I have argued above, this form of instrumental reasoning lies at the heart of much of the reasoning in this type of case. But what is also clear is that Langton J did not derive his answer from Elder Dempster67 because, as he explained, neither of the bases for that decision — that is, the agency or bailment rationales — applied in this case. It is difficult to read this judgment as saying anything other than that he decided as he did because all the parties (except, perhaps, the plaintiffs) would find such a decision in line with their business practices and expectations. The legal rationale for this reasoning is missing, however.

Justice Fullagar expressed his dissatisfaction with the judgment by saying that he was ‘unable to see any justification whatever’68 for Langton J’s decision and that, in any event, he could ‘see no semblance of analogy’69 to Elder Dempster.70 It is difficult to disagree with Fullagar J’s criticism of Langton J’s reasoning. Certainly, it does not appear that Langton J’s judgment gives effect to any of the judgments in Elder Dempster.71

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66 Ibid 182 (Langton J).
67 [1924] AC 522.
68 (1955–56) 95 CLR 43, 72 (Fullagar J).
69 Ibid.
70 [1924] AC 522.
71 Ibid.
In this case two boxes of machinery were damaged when being unloaded from a ship by stevedores who were independent contractors engaged by the ship. The plaintiffs were the consignees of the goods and holders of a bill of lading that limited the liability of the carrier to £100. The goods were damaged before they reached the vessel’s rail, which was the point where the carrier’s liability under the bill of lading ceased. The plaintiffs sued the stevedores for the full value of the goods. Before the action was heard a preliminary point of law, whether or not the stevedores were entitled to the protection of the limitation clause in the bill of lading, was put before the court and it was this question that Owen J answered.

Central to the reasoning of Owen J was a concern to place the transaction in its commercial context. According to Owen J,

it occurred to me as curious that such a simple method should have been found of bypassing the terms of bills of lading. … In modern times shipowners do not personally command their vessels or load or discharge cargo; they employ masters and other servants, and, as a matter of common knowledge, independent contractors for the purpose of performing their obligations under their contracts to carry.

In these circumstances Owen J described as ‘surprising’ the notion that a stevedore would not be protected by any exemptions or limitations contained in a bill of lading agreed to by the shipper and the carrier. Owen J was obviously determined to find for the defendants in this case and identified four separate ways to do so but finally endorsed the suggestion that,

a person employed, as a servant or agent, by a carrier to perform all of part of the contract of carriage and into whose possession the goods come for the purpose of carrying out that contract is a bailee for the cargo owner who takes and holds the goods on terms similar to those to be found in the contract of carriage. The duty to take care of another’s goods is not … a general duty in the air, so to speak; it is a duty which arises from a particular relationship and the extent and nature of that duty in any particular case must be determined in the light of all the surrounding circumstances. … Where, as here, the transaction is one under which goods are being carried on the terms of a contract between carrier and cargo owner, and the bailee is called in by the carrier for the purpose of carrying out that contract … there is an implication that the bailee’s duty to the cargo owner is to handle the goods on the terms of the contract of carriage.

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72 (1948) 48 SR (NSW) 435.
73 Ibid 437 per Owen J.
74 Ibid.
75 Ibid.
It is apparent that commercial practice and expectations have driven the analysis here with the stevedore being protected because Owen J found that any other result would be surprising. This is in accord with a major claim of this chapter that the doctrinal development is often being driven by instrumental concerns rather than doctrinal coherence.

However, Owen J displayed unease with Scrutton LJ’s wider principle that agents are protected to the same extent as their principals.

As to the contention that an agent, as a matter of general principle, is entitled to the immunities of his principal, were it not for the fact that both Scrutton LJ and Lord Cave appear to have accepted the proposition without demur, I would have thought that no such general principle was to be found in the law of agency... 76

Justice Fullagar noted the ‘great difficulty’ that Owen J had found in extracting any clear principle from Elder Dempster 77 that would allow him to find for the defendant stevedore, despite his careful examination of that case. 78 He did not find Owen J’s answer to the legal question before him at all convincing. Since the goods had not passed the vessel’s rail, Fullagar J could not see how the stevedores were bailees at the time of damage, much in the same way as the tug-owners were not bailees in The Kite. 79 80 At the same time, Fullagar J decided that the stevedores were neither servants nor agents of the shipowner. 81 It should not surprise that Fullagar J found Gilbert Stokes 82 to be wrongly decided and that he thought that it should be overruled. 83

Waters Trading Co Ltd v Dalgety Co Ltd 84

Cargo was shipped from India to Sydney under a bill of lading which exempted liability for damage occurring to goods which had been discharged from the vessel but were still in the custody of the shipping company. The goods had been discharged by the defendant stevedoring company and stored on a wharf where they were damaged by rain. The plaintiff consignees sued the stevedoring contractor in tort and

76 Ibid 443 per Owen J.
77 [1924] AC 522.
78 (1955–56) 95 CLR 43, 72–73 (Fullagar J).
80 (1955–56) 95 CLR 43, 73 (Fullagar J).
81 Ibid.
82 (1948) 48 SR (NSW) 435.
83 (1955–56) 95 CLR 43, 79 (Fullagar J).
84 (1951) 52 SR (NSW) 4.
the defendant claimed that it was entitled to the benefit of the exclusion clause contained in the bill of lading.

In a case stated by Owen J the Supreme Court of New South Wales (Street CJ, Owen and Herron JJ) was asked to determine whether or not the defendant was entitled to the benefit of the exclusion clause contained in the bill of lading.

In his judgment Street CJ emphasised that the contract extended beyond mere shipping and included delivery. This meant that the time between the discharge of the goods and their being picked up by the consignee was included. He also noted that the defendant was an independent contractor engaged by the shipping company. Given these facts he was satisfied that the case came ‘completely within the principle of the decision in Elder Dempster’ and rejected a claim that the present case could be distinguished from the House of Lords decision because in the latter the goods had been damaged while on board but in the case before him the goods had been damaged after loading.

Upon what theory in law the House reached its conclusion [in Elder Dempster] it is not necessary for this Court to consider. Whether the defendant be regarded as an agent, or as a bailee holding under a bailment upon terms, is immaterial. The decision of the Court accorded to the defendant in the case the same protection as was given by the contract to the shipowner [surely an error — it should read charterer], and that decision governs the facts of the present case. The liability which rests upon the defendant was the limited liability prescribed by the bill of lading, and it is entitled to rely upon those terms as a defence to this action.

In essence Street CJ’s argument is that the bill of lading’s exemption clause protected the carrier even after the goods were discharged — which is incontestable — and that, therefore, the protection extended to the stevedores because Elder Dempster stood for that proposition. It is the latter which is asserted without any real explanation. Indeed, Street CJ is not able to pinpoint what principle can be derived from that case because, as he admits, there are totally different rationales given by the two leading judges in the case. It is one thing to acknowledge that the shipowners in Elder Dempster were entitled to same protection as the charterers; it is another to extrapolate from the judgments in that case a clear principle which

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85 Ibid 6 (Street CJ).
86 Ibid 5 (Street CJ).
87 [1924] AC 522.
88 (1951) 52 SR (NSW) 4, 6 (Street CJ).
89 [1924] AC 522.
90 (1951) 52 SR (NSW) 4, 6–7 (Street CJ).
91 [1924] AC 522.
92 [1924] AC 522.
extends to placing the stevedores in *Waters Trading*\(^93\) within the protection of the bill of lading entered into by the shippers and carriers. Street CJ asserts that this is the case. What he does not do is explain how this is the case.

Justice Owen, not surprisingly, decided in conformity with his earlier decision in *Gilbert Stokes*\(^94\) and found that the case before him was not distinguishable from *Elder Dempster*\(^95\) and came within either of the two approaches — that is, of Lord Cave or of Lord Sumner — in that case.\(^96\) Although he preferred Lord Sumner’s analysis based on bailment he also held that the defendant stevedore in this case was an agent of the carrier for the purposes of the bill of lading. Justice Owen was warm in his dismissal of claims that *Elder Dempster*,\(^97\) on his understanding of that case, could be distinguished.

I feel that it would be wrong for any court to approach that decision armed with a magnifying glass in an endeavour to discover subtle distinctions between it and other cases which, while appealing perhaps to some legal minds, would be regarded, and not unreasonably regarded, by those whose business is concerned with the carrying trade of the world as affording evidence that the law is out of touch with the realities of commerce and that a commercial causes court is not a suitable tribunal for the trial of commercial disputes.\(^98\)

As with his decision in *Gilbert Stokes*,\(^99\) Owen J makes clear here the instrumentalist thinking behind his reasoning, emphasising the need for the courts to reflect commercial practice and expectations in this area of the law.

In the view of Herron J the commonly understood commercial practice in the port of Sydney meant that the stevedores were agents for the purposes of the bill of lading\(^100\) and he concluded as follows: ‘Whatever may be the precise legal ground on which the immunity of the agent can be supported, I base my decision here on the broad proposition stated by Viscount Cave in the *Elder, Dempster Case*.\(^101\)

In Fullagar J’s opinion the frank acknowledgment by all the judges in *Waters Trading*\(^102\) that they could not glean a clear principle from *Elder Dempster*\(^103\) was fatal to their reasoning. ‘When no precise legal ground for supporting an immunity

\(^93\) (1951) 52 SR (NSW) 4.
\(^94\) (1948) 48 SR (NSW) 435.
\(^95\) [1924] AC 522.
\(^96\) (1951) 52 SR (NSW) 4 at 7 per Owen J.
\(^97\) [1924] AC 522.
\(^98\) (1951) 52 SR (NSW) 4 at 7 per Owen J.
\(^99\) (1948) 48 SR (NSW) 435.
\(^100\) (1951) 52 SR (NSW) 4, 13 (Herron J).
\(^101\) Ibid, 15 (Herron J) (footnote omitted).
\(^102\) Ibid.
\(^103\) [1924] AC 522.
can be found, there must be strong reason for suspecting that the immunity cannot be supported at all.\(^ {104}\)

The judgments in *Waters Trading\(^ {105}\)* are strong on assertions on why the stevedores in that case should be protected but not at all convincing on how the protection afforded to the shipowners in *Elder Dempster\(^ {106}\)* was illustrative of a general principle which would protect persons in the position of the stevedores on the facts before the judges. As with *Gilbert Stokes\(^ {107}\)* Fullagar J thought that *Waters Trading\(^ {108}\)* was incorrectly decided and should be overruled.\(^ {109}\)

**Adler v Dickson\(^ {110}\)**

This case involved an action bought by a passenger who was injured when mounting a gangway of a cruise ship at one of the ports of call on the cruise. The sailing ticket issued by the company to the plaintiff contained a clause exempting the company from all liability for any injury suffered by a passenger. No mention was made of the servants of the company in the clause. The plaintiff brought the action in negligence against the defendant master and boatswain. The case was argued on a preliminary point of law about whether or not the two defendants were entitled to the protection of the exclusion clause, it being conceded that the company was so protected.\(^ {111}\)

At trial Pilcher J considered in some detail the judgments in *Elder Dempster*.\(^ {112}\) He noted that that case dealt with the carriage of goods and had ‘little in common’ with the facts before him.\(^ {113}\) He then added the following.

The facts of the *Elder Dempster* case were, as I have pointed out, somewhat unusual, and the noble Lords in that case were by no means unanimous in the reasons which they gave for holding that the shipowner was entitled to take advantage of the exception clauses in the bills of lading. Whilst it was no doubt proper in the unusual circumstances of that case to invoke the theory of an implied agency or bailment upon terms, it seems to me to be a very different thing to invoke the same principles in the case before me.\(^ {114}\)

\(^{104}\) (1955–56) 95 CLR 43, 73 (Fullagar J).

\(^{105}\) (1951) 52 SR (NSW) 4.

\(^{106}\) [1924] AC 522.

\(^{107}\) (1948) 48 SR (NSW) 435.

\(^{108}\) (1951) 52 SR (NSW) 4.

\(^{109}\) (1955–56) 95 CLR 43, 79 (Fullagar J).

\(^{110}\) (1955) 1 QB 158.

\(^{111}\) According to Denning LJ the company had indicated that it would indemnify the defendants and this suggests that the case was a test case: [1955] 1 QB 158, 180.

\(^{112}\) [1924] AC 522.

\(^{113}\) [1955] 1 QB 158. 170 (Pilcher J).

\(^{114}\) Ibid (footnote omitted).
For Pilcher J to do so would be to accept that any person or company who contracted with the public and used an exemption clause was also acting as an agent for its employees in contracting on their behalf on the same terms, a proposition which he found to be a ‘somewhat startling’.\textsuperscript{115} Of course, Pilcher J was not in a position to do anything other than apply \textit{Elder Dempster}\textsuperscript{116} which, after all, was a decision of the House of Lords. But he was clearly uncomfortable with attempts to draw a general proposition about the protection granted by exemption clauses to employees of companies who enter into contracts that contain such clauses. In fact, he suggested that Scrutton LJ’s derivation of such a general principle in \textit{Mersey Shipping}\textsuperscript{117} was ‘not necessary for the decision of the case which was being considered’ or, in other words, obiter.\textsuperscript{118}

He also explained that the bailment theory of Lord Sumner in \textit{Elder Dempster}\textsuperscript{119} was, for obvious reasons, not applicable in the case before him\textsuperscript{120} and that there was no evidence that the company had acted as agent and contracted on behalf of the defendants.\textsuperscript{121} In these circumstances the defendants were not entitled to the protection of the exemption clause in the ticket.

On appeal the Court of Appeal (Denning, Jenkins and Morris LJ) affirmed the decision of Pilcher J. Lord Justice Denning held that,

\begin{quote}
in the carriage of passengers as well as of goods, the law permits a carrier to stipulate for exemption from liability not only for himself but also for those whom he engages to carry out the contract; and this can be done by necessary implication as well as by express words.\textsuperscript{122}
\end{quote}

However, in the case before him, the steamship company had only stipulated for exemption for liability for themselves and even if the company had intended to protect its servants there was no evidence that the plaintiff knew about this or assented to it.\textsuperscript{123} However, in coming to his general formulation Denning LJ accepted that the

\begin{footnotes}
\textsuperscript{115} Ibid.
\textsuperscript{116} [1924] AC 522.
\textsuperscript{117} (1925) 21 LJ LRep 375.
\textsuperscript{118} [1955] 1 QB 158, 167 (Pilcher J).
\textsuperscript{119} [1924] AC 522.
\textsuperscript{120} [1955] 1 QB 158, 167 (Pilcher J).
\textsuperscript{121} Ibid 171–74 (Pilcher J).
\textsuperscript{122} [1955] 1 QB 158, 184 (Denning LJ).
\textsuperscript{123} Ibid 184–85 (Denning LJ).
\end{footnotes}
speeches of the House of Lords in the Elder Dempster case are so compressed on this point that we have a variety of reasons to choose from’.  

So for Denning LJ the protection of stevedores and others in similar situations was important enough to justify the principle that he proposed, even though there were evident problems in fitting his formulation within the existing architecture of the common law of contract.

Lord Justice Jenkins held that there was no evidence to support a claim that the company entered into the contract as an agent for the defendants and that, in any event, the contract did not stipulate for their protection. But, more importantly for the purposes of this paper, he did not share Denning LJ’s view of the law. After a lengthy analysis of Elder Dempster he concluded as follows.

The Elder Dempster case can well be explained by reference to its own facts without ascribing to their Lordships any intention to lay down any such general principle as the defendants here contend for, nor do I think that their Lordships’ language, carefully directed as it was to the particular facts of the case then before the House, can fairly be construed as doing so.

Lord Justice Jenkins held that the Court of Appeal decision in Cosgrove v Horsfall applied to the facts before him. This was a case involving a plaintiff with a free pass on a bus service, who was given a ticket with a clause exempting the bus service and its servants from liability for loss, injury or damage to ticket-holders. The plaintiff was injured while riding on the service. Despite the best endeavours of the defendants’ counsel Jenkins LJ did not think that Elder Dempster was inconsistent with Cosgrove and found for the plaintiff.

Lord Justice Morris felt similarly bound by Cosgrove and he, too, rejected the claim that this case was inconsistent with Elder Dempster. For Morris LJ Elder Dempster was a ‘special case’ and he understood it as follows.

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124 Ibid 182 (Denning LJ) (footnote omitted).
125 [1924] AC 522.
127 (1945) 62 TLR 140 (Cosgrove).
129 [1924] AC 522.
130 (1945) 62 TLR 140.
132 (1945) 62 TLR 140.
133 [1924] AC 522.
134 [1924] AC 522.

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I do not read the decision in the *Elder Dempster* case as laying it down that if A makes a contract with B by which he agrees not to hold B answerable for the tort of his servant C, that C is thereby automatically given immunity if he commits a tort against A.136

*Adler Dickson*137 is not an authority that supports the expansive formulation derived from *Elder Dempster*138 by Scrutton LJ in *Mersey Shipping*.139 Lord Justice Denning’s support for Scrutton LJ’s formulation, as shown above, included an admission that its doctrinal basis was uncertain,140 and the other two judges, Jenkins and Morris LJ, argued strongly that judges in *Elder Dempster*141 did not create or intend to create such an exception to the rules surrounding privity. Justice Fullagar was correct in identifying *Adler Dickson*142 as being consistent with his understanding of *Elder Dempster*.143

Once *Elder Dempster*144 and the cases that applied it are considered in detail it becomes apparent that Fullagar J’s judgment in *Wilson*145 conforms to Sir Owen Dixon’s strict and complete legalism. Justice Fullagar bases his judgment on the basal principle in contract law that only the parties to a contract can claim benefits under it and then considers the suggestion that the decision in *Elder Dempster*146 had created a general exception to this principle. His analysis of this and subsequent cases shows that there are very good reasons for rejecting this claim. Furthermore, Fullagar J openly disregarded instrumental claims based on the needs of commerce in carrying out his analysis, relying instead only on legal doctrine and legal reasoning. Given the strong instrumental reasoning adopted by the proponents of the supposed general exception to privity and the open acknowledgment by all judges that the doctrinal justification for such a principle was uncertain it would be difficult to find a better example of legalism in action than in the judgment of Fullagar J. Indeed, as will become apparent from the cases to be examined in the next section of this paper, later decisions of the highest courts only confirm the reasoning and conclusions of Fullagar J.

137 [1955] 1 QB 158.
139 (1925) 21 LJ L Rep 375.
140 See discussion associated with n 123.
141 [1924] AC 522.
142 [1955] 1 QB 158.
143 [1924] AC 522.
144 Ibid.
145 (1955–56) 95 CLR 43.
146 [1924] AC 522.
Later cases

In *Scrutons Ltd v Midland Silicones Ltd*[^147] a similar fact situation to that in *Wilson*[^148] was presented to the House of Lords. In response to an argument that *Elder Dempster*[^149] had endorsed the general exception to the requirement for privity as formulated by Scrutton LJ in *Mersey Shipping*[^150] and accepted by Denning LJ in *Adler Dickson*,[^151] the House of Lords (Viscount Simonds, Lords Reid, Keith and Morris, Lord Denning dissenting on this point) rejected this contention. The majority judges emphasised that the traditional rule dealing with privity was fundamental to the common law of contract, that Scrutton LJ’s formulation was not based on principle and, however one interpreted the judgments in *Elder Dempster*,[^152] there was no indication that the Law Lords there intended to create an exception to the requirement for privity.[^153] In effect, *Midland Silicones*[^154] represented an affirmation by the House of Lords of Fullagar J’s reasoning in *Wilson*.[^155]

*Midland Silicones*[^156] represented a dead end for the attempt crafted by Scrutton LJ and supported by Denning LJ and the judges in the New South Wales Supreme Court to derive from *Elder Dempster*[^157] a general exception to the requirement for privity in contracts. However, the instrumental concern to protect stevedores and others in like situations which had motivated this failed endeavour had not come to an end and *Midland Silicones*[^158] was to see the birth of another, and ultimately successful, strategy to protect stevedores. In responding to the unsuccessful claim of the stevedores to the protection of the exemption clause in the bill of lading entered into by the carrier Lord Reid had the following to say about a claim based on agency.

I can see a possibility of success of the agency argument if, (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as

[^147]: [AC 446 (‘Midland Silicones’).]
[^149]: (1955–56) 95 CLR 43.
[^150]: [1924] AC 522.
[^151]: (1925) 21 Ll LRep 375.
[^152]: [1955] 1 QB 158.
[^154]: [1962] AC 446, 467–72 (Viscount Simonds), 477–79 (Lord Reid), 480–1 (Lord Keith), 494 (Lord Morris).
[^156]: (1955–56) 95 CLR 43.
[^158]: [1924] AC 522.
agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.\textsuperscript{159}

None of the other Law Lords endorsed this formulation. Neither was it necessary for Lord Reid’s resolution of the problem before him. Rather it reads as an advice to counsel — which is, indeed, what it became. It seems clear Lord Reid was animated by the instrumentalist desire to aid stevedores in much the same way as Scrutton LJ and the judges who supported him were driven to distort legal principles in aid of making the law commercially expedient and useful. However, on the facts before him Lord Reid accepted that his agency argument could not work. It would not take long before another court found that this argument could work.

In \textit{New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd}\textsuperscript{160} the Privy Council was faced with yet another stevedore claiming the protection of provisions contained in a bill of lading — in this case a time limitation clause. The plaintiff consignee, Satterthwaite, was the buyer of an expensive drill shipped from England on the ship \textit{Eurymedon} which was damaged when unloaded by the defendant stevedores, the New Zealand Shipping Co. The bill of lading was issued by agents of the carrier, which was a wholly owned subsidiary of the stevedores. New Zealand Shipping Co had carried out all the stevedoring work for the carrier at the port of Wellington where the drill was damaged during unloading.

The Privy Council (Lord Wilberforce and Lords Hodson and Salmon, Viscount Dilhorne and Lord Simon dissenting) found for the stevedores. The case was argued on the assumption that Lord Reid’s four-part test in \textit{Midland Silicones}\textsuperscript{161} was the applicable legal principle to satisfy and, in particular, the argument in the case concentrated on whether the requirement for consideration to be shown in the contract between consignor and stevedore had been made out. In none of the judgments was the persuasiveness either in reasoning or as a matter of legal authority of Lord Reid’s formulation questioned. Yet this obiter statement of one judge in a bench of five was somehow accorded the status of binding legal authority.

\textsuperscript{159} [1962] AC 446, 474 (Lord Reid).
\textsuperscript{160} [1975] AC 154.
\textsuperscript{161} [1962] AC 446.
Lord Wilberforce commenced his judgment with an affirmation of the proposition that a third party to a contract cannot sue on that contract although it is expressed to be for her or his benefit, and that both *Midland Silicones*\textsuperscript{162} and *Wilson*\textsuperscript{163} were correctly decided.\textsuperscript{164} But he then quickly moved on to Lord Reid’s four-part test\textsuperscript{165} and, in particular, whether consideration could be shown here for the suggested contract created by the carrier as agent for the stevedore.

If the choice, and the antithesis, is between a gratuitous promise, and a promise for consideration, as it must be in the absence of a tertium quid, there can be little doubt which, *in commercial reality*, this is. The whole contract is of a commercial character, involving service on one side, rates of payment of the other, and qualifying stipulations as to both. The relations of all parties to each other are commercial relations entered into for business reasons of ultimate profit. To describe one set of promises, in this context, as gratuitous, or nudum pactum, seems paradoxical and is prima facie implausible.\textsuperscript{166}

The instrumentalist urge to take into account the commercial reality, as Lord Wilberforce saw it, is clearly apparent from this extract. Just as clear is Lord Wilberforce’s determination to have the law reflect what he understood to be business needs.

It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life … English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.\textsuperscript{167}

In other words, the rules of contract law are to be interpreted to give effect to the realities of business and life more generally, rather than being seen as a coherent set of principles to which people and business must conform if they are to have legally binding relationships. Lord Wilberforce was nothing if not explicit on this point.

There is possibly more than one way of analysing this business transaction into the necessary components. … But whether one describes the shipper’s promise to exempt

\textsuperscript{162} Ibid.
\textsuperscript{163} (1955–56) 95 CLR 43.
\textsuperscript{164} [1975] AC 154, 166 (Lord Wilberforce).
\textsuperscript{165} Lord Reid had also suggested that in a bill of lading issued between a consignor and a stevedore the provisions of the Bills of Lading Act 1855 would have to be satisfied to affect the consignee. However, this aspect of Lord Reid’s formulation is normally considered apart from the four requirements spelt out in his formulation.
\textsuperscript{166} [1975] AC 154, 167 (Lord Wilberforce) (emphasis added).
\textsuperscript{167} Ibid.
as an offer to be accepted by performance or as a promise in exchange for an act seems in the present context to be a matter of semantics.168

It is difficult to imagine a franker acknowledgment of an instrumental attitude by a judge. As Lord Wilberforce makes abundantly clear, he was determined to find consideration and was quite open in admitting that if one way did not work he was willing to try another. For Lord Wilberforce the role of the law was to suit business needs, behaviour and expectations irrespective of whether or not existing contractual principles reflected commercial reality (as he saw it). Indeed, his desire to make the law suit the perceived needs of commerce is highlighted when it is noted that the bill of lading in this case was not drawn up with Lord Reid’s four-part test in mind. As both the counsel for the plaintiff consignee in The Eurymedon169 and Lord Simon (in dissent) highlighted, the bill of lading in question had been drafted before Lord Reid handed down his decision in Midland Silicones170 and could not, therefore, have been drafted to meet the four suggested requirements in Lord Reid’s formulation.171 However, Lord Wilberforce was determined to be what might be called commercially savvy and concluded with the following.

It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in rates of freight.172

While the particular doctrinal route adopted by Scrutton LJ and supported by Denning LJ was comprehensively rejected by the House of Lords in Midland Silicones173 the same desire to make the law suit the perceived needs of commerce which motivated Scrutton LJ and Denning LJ was manifest in Lord Reid’s obiter observation in Midland Silicones174 on how to frame a suitable claim in agency which would entitle a stevedore to claim the protection of exemption clauses normally found in bills of lading. So while Scrutton LJ’s formulation was rejected, Lord Reid followed Scrutton LJ’s desire to have the law reflect commercial needs and practice. This was to be given effect, notwithstanding the unpropitious bill of lading actually in

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169 Ibid 160.
170 [1962] AC 446.
172 Ibid 169 (Lord Wilberforce).
174 Ibid.
dispute in The Eurymedon,\textsuperscript{175} by the Privy Council both in that case and in Port Jackson v Salmond & Spraggon.\textsuperscript{176}

The artificiality of the reasoning adopted in these later cases illustrates clearly the transparent desires of many judges to change the law to suit a predetermined result, in this instance the perceived needs and expectations of business.

\textbf{Conclusion}

How does Fullagar J’s judgment in Wilson\textsuperscript{177} fit within Sir Owen Dixon’s strict legalism?

First, his judgment does not entail any form of mechanical jurisprudence. Given the confused and competing judgments in Elder Dempster\textsuperscript{178} one has to ask what form a mechanical response to the legal issue faced by Fullagar J would take.

Secondly, Fullagar J’s judgment is based on a genuine attempt to establish what the authorities had to say about the particular legal question presented in Wilson.\textsuperscript{179} But, as that case shows, these authorities did not provide an easy and clear answer.

Thirdly, Fullagar J’s judgment is indisputably creative but within bounds fixed by the common law. He was faced with conflicting lines of authority as well as poorly reasoned decisions. This demanded that Fullagar J deploy his mastery of the law to choose those authorities that best comported, in his opinion, with the common law of contract as well as drawing from the authorities principles which were consistent with these decisions yet which were formulated in more usable and convincing ways.

In Wilson\textsuperscript{180} Fullagar J delivered a careful judgment that explained that the House of Lords decision in Elder Dempster\textsuperscript{181} had to be understood on its own special facts and that, despite the difference of opinion displayed by the Law Lords, none had intended to challenge the orthodox position on third parties and contract and the fundamental requirement of privity for those claiming benefits under a contract.

\textsuperscript{175} [1975] AC 154.
\textsuperscript{176} (1980) 144 CLR 300.
\textsuperscript{177} (1955–56) 95 CLR 43.
\textsuperscript{178} [1924] AC 522.
\textsuperscript{179} (1955–56) 95 CLR 43.
\textsuperscript{180} Ibid.
\textsuperscript{181} [1924] AC 522.
Justice Fullagar explained very carefully how the judgments of Scrutton LJ and Denning LJ in cases subsequent to *Elder Dempster*\(^{182}\) had misread that case and why this meant that their formulation of rules designed to protect stevedores and similar parties was not good law. This analysis was expressly endorsed by the House of Lords in *Midland Silicones*.\(^{183}\)

By contrast the judgments of Scrutton LJ and Denning LJ were transparently instrumental. Both judges distorted legal principles and misread earlier authorities to achieve a predetermined result — the protection of stevedores and like persons.

The judgment of Fullagar J in *Wilson*\(^{184}\) is a wonderful illustration of a legalist judge in action and is a clear rebuke for those who would argue that Dixonian strict legalism is a fairytale.\(^{185}\)

\(^{182}\) Ibid.
\(^{183}\) [1962] AC 446.
\(^{184}\) (1955–56) 95 CLR 43.
\(^{185}\) See, for example, Frank Carrigan, ‘A Blast from the Past; the Resurgence of Legal Formalism’ (2003) 27 MULR 163; Allan Hutchinson, ‘*Heydon* Seek: Looking for Law in the Wrong Places’ (2003) 29 Monash ULR 85.
Chapter Six — *Hall v Busst*¹

On 15 July 1949 John Busst entered into a written agreement to sell to Harriet Hall the small island of Bedarra (approximately 86 acres or 35 hectares in size), including all fixed improvements and chattels, for £3,157.² In an indenture dated the same day but not executed until 25 July 1949 the parties made provision relating to the resale of the island. Clause 3 of the indenture prohibited Hall from transferring the land without the consent of Busst. Clause 4 imposed a minimum one month's notice requirement on Hall and gave Busst first option to re-purchase the property on the terms contained in clause 5. That clause was in the following terms.

The purchase price relating to such option shall be the sum of Three thousand one hundred and fifty-seven pounds four shillings (£3,157 4s. 0d.) to which shall be added the value of all additions and improvements to the said property since the date of the purchase by the Grantor (such value to be taken as at date of exercise of this option) and from which shall be subtracted the value of all deficiencies of chattel property and a reasonable sum to cover depreciation of all buildings and other property on the land.³

On 29 November 1957 Hall sold the land to Kevin and Cynthia Druitt for £8,500, to be paid partly on signing of the contract and partly by instalments. Hall did not obtain Busst's consent for this sale and neither did she give notice to him or give him the opportunity to re-purchase the land. Busst then commenced action in the Supreme Court of Queensland seeking damages for breach of the indenture. In answering a stated case Jeffries J found that under the indenture Hall was legally obliged: first, to obtain the consent of Busst for the sale to the Druitts; secondly, to give Busst notice of her intention to sell; and, thirdly, to give Busst the option of re-purchasing the island. He then ordered to the matter to go to trial on the issue of damages. An appeal by Hall to the Full Court was dismissed and she then appealed to the High Court.

¹ (1960) 104 CLR 206. ("Hall v Busst").
² All figures have been rounded off to the nearest pound except in direct quotes. Bedarra is now a privately owned resort and is located near Mission Beach, half way between Cairns and Townsville. It is part of the Family Islands group. A short history of the island can be found at [http://www.bedarra.com.au/the-resort/a-history-of-bedarra](http://www.bedarra.com.au/the-resort/a-history-of-bedarra) although no mention is made of the High Court dispute. If this history is correct, only part of the island was sold by Busst to Hall in 1949, with Busst maintaining a holding on the island until 1957.
³ (1960) 104 CLR 206, 212. For the purposes of the indenture Hall was the grantor and Busst the grantee.

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The High Court (Dixon CJ, Fullagar and Menzies JJ, Kitto and Windeyer JJ dissenting) found for the appellant Hall on two grounds. First, clause 3 was void as a restraint on alienation. This ground will not be considered further. The majority also found that the option to re-purchase was unenforceable because the price was too indefinite. The minority found that the contract was not uncertain or incomplete.

Both majority and minority judges based their decisions on their respective understandings of how the law responded to a contract where, to put it as neutrally as possible, central elements of any bargain such as price, quantity, delivery dates, etc, had not been specified in exact terms. Did this mean that there was no agreement as held by the majority? Or did it mean that the parties had agreed and that the courts should be willing and capable instruments in distilling the meaning of that agreement, as held by the minority? An examination of the legal analysis undertaken by the judges will highlight their fidelity, or otherwise, to the legal materials. In particular, it will also consider the possibility that the legal materials support both positions.

Chief Justice Dixon's judgment

After examining the clauses in the indenture Dixon CJ concluded that the effect of clauses 3, 4 and 5 was to allow Busst to re-purchase the property for the original price but with an allowance made for Hall's work and expenditure carried out on the property since her purchase. It was the formulation of the latter which was uncertain for Dixon CJ.

"the value of all additions and improvements" is not, in my opinion, sufficiently certain to give rise to an enforceable contract. There could be no external standard of value of additions and improvements to the island: no standard yielding a figure reasonably fixed or ascertainable. Still less would it be possible to find an external standard for the reasonable sum to cover depreciation even if one knew what 'other property' is referred to. And indeed the value of deficiencies is another uncertain element in the ascertainment of the price. It is said that 'value' or 'fair value' is to be found objectively by a jury. But here we are dealing with substantive rights, not the procedure by which they are enforced. Can it be supposed that men contract to pay a price if and when fixed by a jury in a law suit?*

In response to authority that held that an express or implied term that the price be the fair value would be enough Dixon CJ said the following.

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But that could only be when a recognised value or standard of value measuring the price existed. It would be, so it seems to me, as absurd to apply this to an island off the coast of Queensland as it would be to apply it to a great modern city building. In any case it is not a price consisting of the fair value of land that we are dealing with.\(^5\)

For these reasons Dixon CJ held that the price contained in clause 5 was ‘unascertained’ and ‘too uncertain’ to be the basis of an enforceable contract.\(^6\)

In contrast to the other judges Dixon CJ did not consider the vexed question of whether or not a contract for the sale of land for a fair price was valid. Since he did not characterise the contract before him in this light he was merely following his normal caution in not deciding legal issues that were not central to the legal dispute before the court.

Both Fullagar and Menzies JJ were in broad agreement with Dixon CJ but both responded in detail to the appellant’s argument that the course of legal decisions was to find contracts to be valid where a reasonable price could be applied by the courts in situations where an exact price had not been included in a contract.\(^7\) The judgment of Menzies J will be examined as also being representative of Fullagar J’s position in this case.

**Justice Menzies’ judgment**

Menzies J held that the sums which the option specified were to be added to the fixed contract price (which was the original contract price) by calculating depreciation and the value of additions and improvements could not be arrived at other than by further agreement.

The task of valuing additions at the date of the exercise of the option and of valuing deficiencies at some unspecified time without some further agreement would, I am disposed to think, be impracticable, but however that may be, the ascertainment of ‘a reasonable sum to cover depreciation of all buildings and other property on the land’, which presumably covers buildings and other property upon the land both on 15\(^{th}\) July 1949 and at the date of the exercise of the option, whether or not they had been improved, would seem to me quite impossible without further agreement.\(^8\)

Given the variety of means available to calculate depreciation, only the provision for an authoritative determination, which was not provided for in the agreement, or

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5 Ibid 216–17 (Dixon CJ).
6 Ibid 217 (Dixon CJ).
7 For Fullagar J see (1960) 104 CLR 206, 221–3.
8 Ibid 231 (Menzies J).
the further agreement of the parties, would enable this calculation to be made in a
certain manner. If further agreement was necessary, this would mean, of course, that
there was no contract to be enforced.

Could the court make this calculation by determining what was reasonable
between the parties by making use of the law dealing with the sale of goods where a
reasonable price would be implied where none had been stipulated by the parties?
Menzies J did not think so and explained his reasoning as follows.

First,

there can be no binding contract of sale without agreement as to price. ... Where,
however, property has been delivered or work accepted, a person who has taken
what he requested is bound to pay a reasonable price for what he has received, and
the various indebitatus counts lie for the recovery of such sums because the
consideration has been executed.10

Justice Menzies then analysed some of the leading cases in this area before and
after the passage of the Sale of Goods Act 1893. His examination of these cases led
him to conclude that, in the main, they applied to situations where goods had been
accepted and not where breach of an executory contract was alleged. He noted that in
Hoadly v M'Laine,11 which had been seen as extending to executory contracts the
rule that applied to cases where the consideration had been executed, an indebitatus
count for the work done could have been maintained.12 He concluded as follows:

This review of the authorities most favourable to the contention that where no price
is fixed the law implies that the price will be what the goods are reasonably worth,
does not justify the proposition that in all cases a promise to pay a reasonable price
or a reasonable sum is sufficiently certain to give an agreement for sale legal
efficacy: ... Where there is an established market for the commodity the subject of a
bargain, a promise to pay the fair value would probably be sufficiently certain: ... Where, however, the property is of a special character, different considerations may
apply ... 13

In the 1950s Bedarra Island seems to have been a mixture of artists' retreat,
conservation zone and budding tourist development. It would seem that the
calculation of improvements and depreciation in such circumstances would be for a

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9 Ibid.
10 Ibid 232 (Menzies J).
11 (1834) 10 Bing. 482; 131 ER 982.
12 (1960) 104 CLR 206, 233 (Menzies J).
property of special character. But for Menzies J a decision on this ground was unnecessary.

The rule, so far as it exists, that a contract for the sale of goods at a reasonable price is not so uncertain as to be unenforceable is not, however, applicable to the sale of a particular piece of land and on this point I desire to do no more than express my agreement with what has been written by the Chief Justice and Fullagar J.14

**Justice Windeyer's judgment**

Both Windeyer J and Kitto J disagreed with the majority judges on the question whether the contract was uncertain. The more detailed judgment of Windeyer J will be examined as being representative of both judges' positions.15 Justice Windeyer agreed with textbook writers who argued that an agreement to sell land at a fair valuation was a valid contract. In his eyes if the law accepted, as it did, that valuation of land and improvements could be made for purposes of compensation for compulsory acquisition or for trustees proposing to invest funds on a mortgage, why could it not accept an agreement for sale which stipulated a reasonable price?16 On the facts before him Windeyer J felt that the calculation of the value of improvements, of deterioration of chattels and of depreciation was a straightforward matter which should not be seen as rendering the contract uncertain. But he was concerned to base his decision on the broader ground that an agreement,

for the sale of any property at its fair value, or reasonable price, is to-day a valid contract. If it be conceded that the fair value, in terms of money, of any property is an ascertainable objective fact, it seems to me to follow that the price in a contract of sale may be so expressed.17

His reasoning in justifying this claim proceeded through a series of arguments. First, he noted the importance given at common law to giving effect to contracts where the parties' positions had changed pursuant to the contract, all other things being satisfied.

Here the parties intended to make a binding bargain. They clothed their agreement in a deed. The defendant got possession of and a title to the land pursuant to the contemporaneous agreement for sale. ... In these circumstances it seems to me that the court should be slow to allow the defendant to escape from his covenant.18

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14 Ibid 235 (Menzies J).
15 Ibid 225–8 (Kitto J).
17 Ibid 238 (Windeyer J).
18 Ibid 239 (Windeyer J).
Secondly, Windeyer J considered the notion of a reasonable price. In doing so he claimed that the concepts of a reasonable price for goods sold, of reasonable remuneration for services rendered, of reasonable time and notice and the right to a reasonable compensation for the use and occupation of land were all the products of similar developments. Yet in argument the respondents had argued that while there was in law a requirement to pay a reasonable price in a contract for the sale of goods where no price was fixed, there was no equivalent rule in the case of the sale of land. In response Windeyer J noted that, while the rule for goods was developed in the common law courts to ‘ensure that those who supplied consumable goods got payment’, civil law doctrines were much more influential in the Court of Chancery where so much of the law of vendor and purchaser was made. Roman law required a certain price and did not accept the idea of a reasonable price.19

But once admit, as English law does but the Civil law does not, that there is such a things as a reasonable price then it seems to me that in our law the distinction between sales of lands and of chattels is not that an effective agreement can be made to sell a chattel for a reasonable price but an effective agreement to sell land cannot. It is, rather, that if persons would contract to sell land for a reasonable price they must do so expressly; whereas on a sale of chattels an obligation to pay a reasonable price is imposed by law when the parties are silent as to price. But surely the parties to a transaction concerning land can make an express agreement in the terms that in a sale of goods the law can infer that they made? And it is by such an inference or implication of what the parties intended should be the terms of their arrangement that the common law arrived at its rule in the case of chattels. The conclusion that seems to be warranted by logic is, I think, confirmed by history.20

But, as Windeyer J acknowledged, legal history also failed to show any example of an action involving a reasonable price for land sold. This he put down to the nature of conveyancing where conveyance and payment are normally con temporaneous so that actions at law to recover the price of land were rare.21

Thirdly, Windeyer J argued that the sale of goods cases that formed the basis of the rule in the Sale of Goods Act 1893, and which provided for a reasonable price when the parties failed to fix a price for a sale of goods, applied to executory as well as to executed sales.

The earlier cases show that an express promise to pay a reasonable price for all kinds of goods and all kinds of services would suffice to make a valid contract. The actions were, no doubt, all brought upon contracts that had been executed. But the

19 Ibid 240 (Windeyer J).
21 Ibid 242 (Windeyer J).
undertakings alleged were not made to support precedent debts. The promise preceded performance. It was alleged as a promise to pay a reasonable price when the contract was performed.\textsuperscript{22}

Finally, Windeyer J answered the concern of the majority that fixing a reasonable price was tantamount to asking the jury to fix the price in litigation.

When parties agree to sell for a reasonable price or at a fair valuation they do not leave an essential term of their bargain for further agreement, so that their agreement is incomplete. It is complete. They have fixed the price by a measure that the law knows. If they disagree as to what sum of money fills that measure, a court will determine it, at common law by a jury.\textsuperscript{23}

It is clear that there is a serious difference of opinion between the minority and majority on the law dealing with the issue before them. In essence the majority, exemplified in the judgment of Menzies J, sees the contract as uncertain and providing no objective standard by which to calculate the price. The claim that the rule in sales of goods (that a reasonable price will be inferred) should apply to sales of land, is rejected by the majority which sees the rule as anomalous and limited to contracts where goods have been accepted and not extending to sales of land. The minority’s position on the other hand, as displayed by Windeyer J, is that there were objective standards to apply to the calculation of depreciation, improvements and deterioration required by the contract, that the rule applying to sale of goods operates on executory and executed contracts and that, finally, logic and history suggest that the rule is not anomalous and is applicable to contracts involving not only goods, but services and land as well.

Both sets of judges rely on close analysis of the authorities in this area and are especially concerned to locate these authorities within what they see as the historical and principled development of the rules dealing (or not dealing) with the possibility of a reasonable price being implied in a contract involving land. It is beyond the scope of this study to make a comprehensive examination of all the authorities in this area of law to see if, in particular, Dixon CJ and the other majority judges dealt with these authorities as strict legalists. It is possible, however, to compare their reasoning with two prominent House of Lords decisions, \textit{May & Butcher, Ltd v R}\textsuperscript{24} and \textit{Hillas

\textsuperscript{22} Ibid 244 (Windeyer J).
\textsuperscript{23} Ibid 245 (Windeyer J).
\textsuperscript{24} [1929] All ER 679 (‘May & Butcher’).
& Co Ltd v Arcos, Ltd, in which this whole area of the law had been considered in some detail. Both cases were decided when House of Lords decisions were seen as binding on the High Court and both featured in the reasoning in Hall v Bussi. These cases can be used as a control, of sorts, to test whether the judges in Hall v Bussi were genuinely attempting to give effect to their understanding of the authorities or were using the authorities as a veneer to hide a desire to move the law in a direction in which they favoured.

May & Butcher

May & Butcher, Ltd had agreed with the Disposals and Liquidation Commission in January 1922 to purchase all the old tents and ancillary equipment (‘tentage’ in the terms of the agreement) that would become available up to 30 November 1923 at prices that were to be agreed on by the parties as the material became available. In August 1922 disputes arose between the parties over prices and the Commission indicated that it felt no longer bound by the agreement and proceeded to sell the tentage by open tender. May & Butcher, Ltd sought an injunction preventing sale of the material to any other than themselves. At trial the case went against them with the trial judge holding that a contract had not been made because essential terms such as price, date of payment and period of delivery had not been agreed to. The Court of Appeal, by majority, affirmed this decision and the plaintiffs appealed to the House of Lords. It should be noted that this was a case where the goods had not been transferred.

Lord Buckmaster found that there was no contract because a critical part of the agreement, the price, was left to be determined. In response to suggestions that the rule which applied to sales of goods should operate here, he noted that while the principles underlying this area of law applied irrespective of subject matter, nevertheless a contract ‘for the sale of land requires the consideration of a large number of special details that are wholly unnecessary in relation to a contract for the sale of goods’.

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25 [1932] All ER 494 (‘Hillas v Arcos’).
26 (1960) 104 CLR 206.
27 Ibid.
28 [1929] All ER 679, 682 (Lord Buckmaster).
29 Ibid 683 (Lord Buckmaster).
In other words, Lord Buckmaster here noted the special position of contracts for the sale of land and highlighted the dangers of too easily transferring doctrines dealing with sales of goods to sales of land.

Viscount Dunedin agreed that there was no contract here because essential items were left to the parties to agree to at a later date.\textsuperscript{30} On the argument that the \textit{Sale of Goods Act 1893} provided for a reasonable price he had the following to say.

\begin{quote}
No doubt in the matter of goods, the Sale of Goods Act, 1893 says that, if no price is mentioned and settled in the contract in any way, it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point, and here there is no silence, because there is the provision that the two parties are to agree.\textsuperscript{31}
\end{quote}

Lord Warrington, the third member of the bench, agreed that since an essential aspect of the agreement, the price, was left to be agreed to by the parties, no concluded contract was made.\textsuperscript{32} He did not think that a reasonable price could be inferred.

\begin{quote}
It is said that this case is to be treated on the same footing as if there had been no fixing of the price, as if the contract had been silent as to the price, and the law may then imply a reasonable price; but, in the present case, the facts preclude the application of any such principle. To do that would not be to imply something about which the parties have been silent, but it would be to insert in the contract a stipulation contrary to that for which they have bargained, to give them not the result of their own agreement, but possibly a verdict by a jury, or some other means of ascertaining the stipulated price. To do that would be to contradict the express terms of the document which they have signed.\textsuperscript{33}
\end{quote}

The judgments in \textit{May \& Butcher}\textsuperscript{34} provide some support for both views expressed in \textit{Hall v Busst}.\textsuperscript{35} The Law Lords emphasised the importance of agreement about essential terms and they limited the inferring of reasonable price to those situations where the parties were silent about the price. Both postures are consistent with the views adopted by the majority in \textit{Hall v Busst}.\textsuperscript{36} Nevertheless, the Law Lords were silent about whether or not the inferring of a reasonable price applied to situations where goods had been promised but not supplied and neither do their judgments deal with Windeyer J's later suggestion that express provision for a

\textsuperscript{30} Ibid 683–4 (Viscount Dunedin).
\textsuperscript{31} Ibid 684 (Viscount Dunedin).
\textsuperscript{32} Ibid 64 (Lord Warrington).
\textsuperscript{33} Ibid 684–5 per Lord Warrington.
\textsuperscript{34} [1929] All ER 679.
\textsuperscript{35} (1960) 104 CLR 206.
\textsuperscript{36} Ibid.
reasonable price in a contract for the sale of land should be viewed favourably by the law.

*Hillas v Arcos*\(^{37}\)

Hillas was a timber merchant who entered into an agreement with Arcos, the commercial agent for Soviet timber sales, on 21 May 1930 to purchase '22,000 standards of softwood goods of fair specification' over the season of 1930. The agreement contained a term giving Hillas the

option of entering into a contract with the sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and prices which show to them a reduction of 5 per cent on the f.o.b. value of the official price list at any time ruling during 1931.\(^{38}\)

On 22 December 1930 Hillas wrote to Arcos purporting to exercise the option but on 24 December 1930 Hillas wrote back to say that the agreement had been cancelled by mutual consent in July of that year. Hillas bought an action for breach of contract and, in the course of some messy litigation, Arcos then claimed that the part of the agreement of 21 May 1930 containing the option was an agreement to agree and therefore not binding. The trial judge found a binding contract but this decision was overturned on appeal to the Court of Appeal. Hillas then appealed to the House of Lords.

The House of Lords found that the agreement contained terms that could be objectively identified and that, therefore, it was not an agreement to agree. The reasoning of the various Law Lords contained interesting observations that are helpful in evaluating the competing positions adopted by the majority and minority judges in *Hall v Busst*.\(^{39}\) Lord Tomlin, with whom Lord Warrington and Lord Macmillan agreed, gave the leading judgment. He was at some pains to clarify the role of judges in commercial contractual disputes.

Commercial documents prepared by business men in connection with dealings in a trade with the workings of which the framers are familiar often by reasons of their inartificial forms confront the lawyer with delicate problems. The governing principles of construction recognised by the law are applicable to every document, and yet none would gainsay that the effect of their application is to some extent

\(^{37}\) [1932] All ER 494.

\(^{38}\) Ibid 496.

\(^{39}\) (1960) 104 CLR 206.
governed by the nature of the document. On the one hand the conveyance of real
estate presenting an artificial form grown up through the centuries and embodying
terms of art whose meanings and effect have long since been determined by the
courts, and, on the other hand, the formless document, the product of the minds of
men seeking to record a complex trade bargain intended to be carried out, both fall
to be construed by the same legal principles, and the problem for a court of
construction must always be so to balance matters that, without violation of essential
principle, the dealings of men may as far as possible be treated as effective, and that
the law may not incur the reproach of being the destroyer of bargains. 40

The general approach of Lord Tomlin is clear: give effect where possible to
commercial contracts and do not apply the same rigour in construction as is applied
to contracts for the sale of land. Lord Tomlin emphasised that the parties ‘were both
intimately acquainted with the course of business in the Russian softwood timber
trade’ 41 and that the meaning of the phrase ‘fair specification’ could be ‘ascertained
just as much as the fair value of the property’. 42 In finding the meaning of
‘conditions’ in the option he noted that it did not mean contractual conditions but
‘must connote some extrinsic condition of affairs, and the condition of affairs
referred to is, I think the conditions as to supply and demand which may prevail
during 1931’. 43

Lord Tomlin’s reasoning provides succour for both positions adopted in Hall v
Busst. 44 On the one hand, he speaks of the objective ascertainment of fair value for
property but, on the other hand, he emphasises that the determination to find meaning
is aimed primarily at commercial agreements with the ‘artificial’ agreements dealing
with land not needing such help from the courts. The reference to extrinsic matters
implies an objective standard which can be readily applied by the judges. This might
be possible in a commercial contract in an area of commerce in which both parties
were intimately involved. Can the same be said of the sale of an island off
Queensland where it was unclear whether a commercial or domestic use was
intended?

Lord Thankerton agreed, in the main, with Lord Tomlin but had difficulties with
the meaning of the words, ‘of fair specification’ contained in the main body of the
contract.

40 [1932] All ER 494, 499 (Lord Tomlin).
41 Ibid.
42 Ibid 500 (Lord Tomlin).
43 Ibid 500–501 (Lord Tomlin).
44 (1960) 104 CLR 206.
The question on which I have had doubt is whether the words ‘of fair specification,’ on their proper construction, will enable the subject to be identified by the court. In other words, do they provide a standard by which the court is enabled to ascertain the subject-matter of the contract, or do they involve an adjustment between the conflicting interests of the parties, which the parties have left unsettled and on which the court is not entitled to adjudicate. Does the phrase mean a specification which is fair as between the interests, on the one hand, of the seller in respect of the stock of wood, comprising various kinds of wood and various qualities and sizes, available for sale in the season of 1931, and, on the other hand, the interest of the buyer in respect of the requirements of his trade during that season? Or does the phrase mean a fair selection from the seller’s stock of wood available for sale in that season? 45

For Lord Thankerton the first interpretation would involve the court in an impermissible choice between the interests of the parties while the second would involve it in applying a standard given in the contract and would thus not involve the court in making a contract between the parties. The fact that this was a commercial contract was central to Lord Thankerton in construing the words as applying a contractual standard. 46

Lord Thankerton’s dilemma neatly encapsulates the problem facing the judges in *Hall v Busst*. 47 For the majority the minority’s position amounted to asking the judges to determine, for the parties, what was a fair price. For the minority, the majority’s position amounted to a denial of the application of objective standards outlined in the contract. However, the reliance placed by Lord Thankerton on the commercial nature of the transaction is not easily replicated in *Hall v Busst*. 48 As noted above it is difficult to avoid the conclusion that the transaction was at least partly domestic.

Lord Wright, too, accepted that business people often complete agreements in terms that would not satisfy a commercial lawyer but he, too, argued that such documents should be read broadly and that courts should not be ‘too astute or subtle in finding defects’. 49 Indeed, far from being too astute or subtle in finding defects, judges should, according to Lord Wright, recognise and apply ‘the legal implication in contracts of what is reasonable, which runs throughout the whole of modern English law in relation to business contracts’. 50

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45 [1932] All ER 494, 502 (Lord Thankerton).
46 Ibid 502 (Lord Thankerton).
47 (1960) 104 CLR 206.
48 Ibid.
49 [1932] All ER 494, 503 (Lord Wright).
50 Ibid 507 (Lord Wright).
On the one hand Lord Wright’s reasoning seems to support the position of the minority judges in *Hall v Buss*\(^1\) by strongly asserting that reasonableness and the appropriateness of judges applying contractual stipulations for a fair price are part of the common law of contract. On the other hand, as he makes clear, he is concerned with commercial contracts and once again it is not at all clear that the agreement in *Hall v Buss*\(^2\) was commercial in nature.

**Conclusion**

In *Hall v Buss*\(^3\) the High Court was presented with the intractable common law problem of deciding what amounts to certainty in the expression of transactions in the form of contracts. This is not an intractable problem in philosophical and perhaps even in logical terms. But, given the pedigree in terms of legal authority of the view taken by both the minority and majority judges, it is an intractable problem in the common law because the common law method, at least as encapsulated by Dixon’s strict legalism, makes it impossible to say that one group of judges got it right and the other group got it wrong. This chapter has not, of course, undertaken a comprehensive examination of the authorities on agreements to agree, uncertainty and incompleteness in contracts. But it seems relatively clear from the reasoning provided by the judges in *Hall v Buss*\(^4\) that what we have is a fundamental disagreement about what these authorities stand for, what trajectory of legal development is contained within them and what can legitimately be drawn from them. This is a disagreement, however, which does not allow for an easy resolution because both sides offer reasonable and persuasive arguments and references to authorities. To that extent the debate between the judges can be seen as exemplifying Dixon’s judicial method.

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\(^1\) (1960) 104 CLR 206.  
\(^2\) Ibid.  
\(^3\) Ibid.  
\(^4\) Ibid.