Sixth Edition

Words and Phrases Legally Defined

Volume 1
A-J

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Volume 2
K-Z

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under the belief that the contract is completed, but, knowing or believing that the contract was not completed, declining to go on and complete it.' *Anderson v Fort William Commercial Chambers Ltd* (1915) 34 OLR 567 at 570, CA, per cur

Of distress

'Inasmuch as the goods were taken away without any intention whatever to abandon the distress, but with the knowledge that they would certainly be brought back again, when they were restored by the voluntary act of the person who took them away, they continued subject to the distress.' *Kerby v Harding* (1851) 6 Exch 234 at 241, per Parke B

'The quitting possession of goods, by the landlord, after he has distrained them, is not necessarily an abandonment of the distress.' *Bannister v Hyde* (1860) 2 E & E 627 at 631, per Wightman J

[The common law right to distrain for arrears of rent was abolished as from 6 April 2014: see the Tribunals, Courts and Enforcement Act 2007, s 71; Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014, SI 2017/768. See 62 Halsbury's Laws of England (5th Edn) (2022) para 305.]

Of goods

Property, both in lands and moveables, being … originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it: for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seise it to his own use. But if he hides it privately in the earth, or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove. (2 Bl Com 9)

Abandonment of goods takes place when possession of them is quitted voluntarily without any intention of transferring them to another. (80 Halsbury's Laws of England (5th Edn) (2020) para 848)

As to treasure trove, see now the Coroners and Justice Act 2009, s 26.

Canada '159 The question that the trial judge should have addressed, then, is whether KWG abandoned her property interest in the diary. I believe that she did not, and I would apply this Court's recent unanimous decision in *R v Law* [2002] 1 SCR 227, 2002 SCC 10, to resolve this matter. *Law, supra*, clearly provides that where an individual abandons or relinquishes her property, she effectively abandons her privacy interest in it. The logical corollary to this proposition must be that where an individual retains a privacy interest in her property, she cannot be deemed to have abandoned it. While a person can conceivably relinquish her privacy interests in the contents of her property—for example, by reciting every entry in one's diary to the general public—without also giving up the physical good, the law does not seem to allow for the reverse.

'160 In addition, the onus of proving "abandonment" rests with the party alleging it and is a relatively significant burden, which is met only when there is "a giving up, a total desertion, and absolute relinquishment' of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property"; R. A. Brown, *The Law of Personal Property* (2nd ed 1955), at p 9. According to *Black's Law Dictionary* (6th ed 1990), "abandonment" is the equivalent of "a virtual, intentional throwing away of property". Reference to these principles indicates that KWG did not abandon the diary …'. *R v Shearing* [2002] 3 SCR 33 at 94, per L'Heureux-Dubé J

Of ship

'… whatever strictness of construction may have been applied to notices of abandonment in former times, it never could have been absolutely necessary to use the technical word "abandon"; any equivalent expressions which informed the Underwriters that it was the intention of the assured to give up to them the property insured upon the ground of its having been totally lost, must always have been sufficient.' *Currie & Co v Bombay Native Insurance Co* (1869) LR 3 PC 72 at 77–79, per cur

'The word "abandon" is one in ordinary and common use, and in its natural sense well understood; but there is not a word in the English language used in a more highly artificial and technical sense than the word "abandon"; in reference to constructive total loss, it is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it including the freight then being earned.' *Rankin v Potter* (1873) LR 6 HL 83 at 144, per Martin B

'There is no set form or sacrosanct ritual to constitute abandonment. … The question in each case must be whether the facts warrant the inference in law that the vessel was abandoned. For this purpose it must be steadily borne in mind also that abandonment here connotes the leaving of the vessel *sine spe revertendi*, made in good faith and to save life on the order of the master or person in charge.' *The Albionic* [1941] P 99 at 112–113, per Langton J; affd [1942] P 81, CA

'The word "abandon" … has in the English legal use several different meanings. It is used in three different senses in the very group of sections [of the Marine Insurance Act 1906] which deal with constructive total loss. Indeed, it is used in two different senses in s 60(1). When the ship is spoken of as abandoned because of "its actual … loss appearing unavoidable," the word is used in nearly the same sense as when, according to the law of salvage, the ship is left by master and crew in such a way as to make it derelict, which condition confers on salvors a certain, but not complete, exclusiveness of possession, and a higher measure of compensation for salvage services. But to constitute the ship a derelict, it must have been left (a) with that intention (*animo derelinquendi*): See *The John and Jane*[(1802) 4 Ch Rob 216]; (b) with no intention of returning to her; and (c) with no hope of recovering her. Obviously that sense of the word is frequently inappropriate to the second case to which sub-s (1) applies, viz because it could not be preserved from total loss (i.e. an economic test) "without an expenditure greater than her value when the expenditure had been incurred".' *Court Line Ltd v R, The Lavington Court* [1945] 2 All ER 357 at 362–363, CA, per Scott LJ

ABATEMENT

Of legacy

'The rule is that in the case of a deficiency, all the annuities and legacies abate rateably, for since they cannot all be paid in full, they shall all abate rateably on the principle of the maxim "equality is equity" or "equity delighteth in equality". This rule is indeed subject to exceptions, for there are cases in which some annuities or legacies are to be paid in priority to others; but it is settled that the onus lies on the party seeking priority to make out that such priority was intended by the testator, and that the proof of this must be clear and conclusive.… The onus is upon those who contend for a priority to show that the testator meant to give a preference to a particular legatee.' *Miller v Huddlestone* (1851) 3 Mac & G 513 at 523–524, per Lord Truro LC

See, generally, 103 Halsbury's Laws of England (5th Edn) (2021) para 1090.

Of nuisance

Abatement means the summary removal or remedy of a nuisance by the party injured without having recourse to legal proceedings; it is not a remedy which the law favours and is not usually advisable. It is not appropriate in situations involving difficult questions of fact or law, or in cases in which exercise of the right would have an effect on the other party out of all proportion to the harm suffered by the claimant. It is appropriate only in simple cases which would not justify the expense of legal proceedings, and urgent cases which require an immediate remedy. Its exercise destroys any cause of action in respect of the nuisance except for damages in respect of harm sustained before the abatement.… . (78 Halsbury's Laws of England (5th Edn) (2025) para 151)

ABDUCTION

South Africa 'The common law crime of abduction consists in the taking away of any female under the age of twenty-one years from the custody of her parents, guardians or those having charge of her, against her will. The object of the taking away need not necessarily

'A place of business is a "place of abode".' *Mason v Bibby* (1864) 2 H & C 881 at 888, DC, per Pollock CB

'A man may have two places of abode, one where he abides at night, and another where he abides by day.' *Mason v Bibby* (1864) 2 H & C 881 at 888, DC, per Martin B

'In ordinary language I do not think one would speak of a place of business as a man's place of abode or residence—phrases which, I think, ordinarily mean the same thing; but when the words are used in a statute one must consider the purpose of the statute and the object to be effected by requiring the place of abode or residence to be described or visited,' *R v Braithwaite* [1918] 2 KB 319 at 330, CA, per Scrutton LJ

'The argument on behalf of the tenant is largely based on the provision of s 23 of the Landlord and Tenant Act 1927, and in particular on the words "last known place of abode in England and Wales". It is contended that "place of abode" in that phrase means the place where the tenant dwelt—his residence in the sense of the place where he slept at night, if nothing more. However, a large number of authorities show that, at any rate for certain purposes, "residence" or "place of abode" may include a place where the person in question works and has his business. The reason why those results have been reached in those cases really depends on the purposes for which the statutory provisions are intended, and if they are intended to make sure that proceedings or notice of proceedings and the like shall come to the knowledge of a certain person (as has been pointed out in these cases) it often may be far more likely that a person will receive due notice of the matters in question if the notice is sent to him at his usual place of business rather than the place where he happens to go home and sleep at night.' *Price v West London Investment Building Society* [1964] 2 All ER 318 at 321, CA, per Danckwerts J

[The Theft Act 1968, s 25(1) makes it an offence for a person, when not at his 'place of abode', to have with him any article for use in the course of or in connection with any burglary or theft. The appellant had been living rough in a car which was found to contain such articles.] 'We must construe the phrase in the context in which it appears in s 25(1) of the Theft Act 1968. In that context it is manifest that no offence is committed if a burglar keeps the implements of his criminal trade in his "place of abode". He only commits an offence when he takes them from his "place of abode". The phrase "place of abode", in our judgment, connotes, first of all, a site. That is the ordinary meaning of the word "place". It is a site at which the occupier intends to abide. So, there are two elements in the phrase "place of abode", the element of site and the element of intention. When the appellant took the motor car to a site with the intention of abiding there, then his motor car on that site could be said to be his "place of abode", but when he took it from that site to move it to another site where he intended to abide, the motor car could not be said to be his "place of abode" during transit.' *R v Bundy* [1977] 2 All ER 382 at 384, CA, per cur

New Zealand 'The provisions of sub-ss (3), (4) and (5) of s 37 [of the Electoral Act 1956] show a legislative intention to equate "place of residence" with "usual place of abode". A place of abode is, we think, a place where a person for the time being, other than for a very brief stay, sleeps and eats and which in general he uses as a base for his daily activities. That a place of abode can be temporary only is clear from sub-s (4). "Usual" in this context we think connotes a degree of regularity and frequency not necessarily continuous in the sense of being uninterrupted, but at least continual in the sense of being repetitive.' *Re Wairarapa Election Petition* [1988] 2 NZLR 74 at 81, per cur

ABOLISH

'I cannot conceive myself but that the word "abolished" there [in a repealed Education Act] involves dissolution; it means that the school boards and school attendance committees shall be abolished, and it really is not denied that the effect of that section is that from the happening of "the appointed day" the school board and the committee would be incapable of doing anything.' *Oldham Corpn v Bank of England* [1904] 2 Ch 716 at 723, per Vaughan Williams LJ

Australia [As to whether Parliament's intention to 'abolish' an offence included an intention to decree there was no criminal liability for the offence whenever committed; or rather abolish any new criminal liability from accruing after the date of enactment.] 'In my opinion, arguments which rely upon dictionary definitions of the word "abolished" are not decisive. ... [I]t would be against common sense and the presumption against retrospective operation to suppose that Parliament intended to abolish the offence in relation to people already tried, convicted and sentenced, or even those who have served their sentences. Nor, in my opinion, does the abolition of the offence extend to the cancellation of an offender's prior criminal record. For this reason, it is clear that more is involved than conceptual reasoning based on dictionary definitions. The question cannot be determined in absolutes, but rather is to be determined by locating Parliamentary intention on a continuum of possibilities.' *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63 at 67, 70, per Doyle CJ

ABORIGINAL

Australia [Letters Patent issued by the Governor-General authorised the inquiry into certain deaths of 'Aboriginals'.] 'The ordinary meaning of the word "Aboriginal", as used in the community, is a broad one. Ordinary usage would not apply the term to a person believed to have no Aboriginal ancestry, however closely associated with Aboriginals. It would be inconsistent with ordinary usage to describe such a person as an "Aboriginal"; but on the other hand it is not the case that proof of any degree of such ancestry, however slight, would be enough in itself to justify the use of the term. To return to examples given above, which after two centuries of European occupation are by no means fanciful, the discovery that a person had a small trace of Aboriginal descent would not, without more, ordinarily cause those who knew him to describe him as an "Aboriginal"... . The weight of authority is against the adoption of a merely genetic notion of the meaning of the word "Aboriginal" and favours the following of ordinary usage. Treating the word "Aboriginal" as including "people of proven 'Aboriginal' descent" was [an] error if [it was meant] to treat as irrelevant social factors such as self-recognition as Aboriginal and recognition by the Aboriginal community.' *State of Queensland v Wyvill* (1989) 90 ALR 611 at 616–617, per Pincus J

[See also *Commonwealth of Australia v Tasmania* (1983) 1 CLR 158 at 274, per Deane J.]

Australia 'In my opinion, in order for someone to be described as an "Aboriginal person" within the meaning of that term in the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth), some degree of Aboriginal descent is essential, although by itself a small degree of such descent is not sufficient. A substantial degree of Aboriginal descent may, by itself, be enough to require a person to be regarded as an "Aboriginal person" ...

'It is I think where a person is either wholly of Aboriginal descent or where the degree of Aboriginal descent is so substantial that the person possesses what would be regarded by the generality of the Australian community as clear physical characteristics associated with Aboriginals that the person would be described in ordinary speech as "Aboriginal". It is racial origin not external physical appearance that governs whether a person is "Aboriginal" for the purposes of the Act ...

'The less the degree of Aboriginal descent, the more important cultural circumstances become in determining whether a person is "Aboriginal". A person with a small degree of Aboriginal descent who genuinely identifies as an Aboriginal and who has Aboriginal communal recognition as such would I think be described in current ordinary usage as an "Aboriginal person" and would be so regarded for the purposes of the Act. But where a person has only a small degree of Aboriginal descent, either genuine self-identification as Aboriginal alone or Aboriginal communal recognition as such by itself may suffice, according to the circumstances.' *Gibbs v Capewell* (1995) 128 ALR 577 at 584–585, per Drummond J

ABORIGINAL TRADITION

Australia '[13] ... The Acts Interpretation Act 1954 (Qld) defines ... "Aboriginal tradition" as "the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.

...

'[47] The definition of "Aboriginal tradition" in the Acts Interpretation Act 1954 (Qld) does not require the establishment of a native title under the common law as described in *Mabo v The State of Queensland [No 2]* (1992) 175 CLR 1 F.C. 92/014 but refers to "the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people". The

ordinary meaning, consistent with the dictionary definition of "tradition", is "the handing down of statements, beliefs, legends, customs, etc, from generation to generation, especially by word of mouth or by practice". In *Chapman v Luminis Pty Ltd (No 4)* [2001] FCA 1106, von Doussa J accepted that the word "tradition" in such a context required a degree of antiquity, perhaps more so than the words "observances, customs or beliefs" but that those words nevertheless carry with them the notion that there has been a handing down from generation to generation in accordance with the understanding of Aboriginal lore and practice.' *Stevenson v Yasso* [2006] QCA 40 at [13], [47]; BC200600746, per McMurdo P

ABORIGINE

Australia '[13] ... The Acts Interpretation Act 1954 (Qld) defines "Aborigine" as "a person of the Aboriginal race of Australia"...

...

'[38] ... That word should be given its ordinary meaning subject to the assistance given in the Acts Interpretation Act 1954 (Qld) and relevant judicial interpretation. It does not require an ethnological inquiry of a scientific, historical or scholarly character: see *Muramats v Commonwealth Electoral Officer (WA)* (1923) 32 CLR 500, Higgins J, 506–507); *Ofu-Koloi v R* (1956) 96 CLR 172, Dixon CJ, Fullaghar and Taylor JJ, 175. Pertinent considerations are whether the person said to be an Aborigine is of Aboriginal descent, identifies himself or herself as an Aborigine and is recognized in the Aboriginal community as being an Aborigine; see the discussion of this issue by Drummond J in *Gibbs v Capewell* (1995) 54 FCR 503, 507–508 and Merkel J in *Shaw v Wolf* (1998) 83 FCR 113, 118–122, 137.' *Stevenson v Yasso* [2006] QCA 40 at [13], [38]; BC200600746, per McMurdo P

ABOUT

Australia 'The relevant *Macquarie Dictionary* definitions of "about" suggest that to ask a question about a subject is to ask a question concerning it, or in regard to it, or connected with it, or concerned with it. The relevant definitions in the *Oxford English Dictionary* (2nd ed) of "about" suggest that to ask a question about a subject is to ask a question touching it, concerning it, in the matter of it, in reference to it, or in regard to it. The word "about" is the "regular proposition employed to define the subject-matter of verbal activity ..."' *R v Le* [2002] NSWCCA 186 at [59]; BC200202750, per Heyden JA

Place

'The words "about a factory" [in the Workmen's Compensation Act 1897, s 7(1) (repealed)] ... were evidently intended to meet the case of something being done in direct connection with the factory, though not exactly within it, as, for example, loading goods at a gate, or doing work in an annexe, though possibly separated from the principal yard by a street. It appears to me to be plain that this was the intention in inserting the word "about", and that it is not a word suitable to indicate that wherever a workman be sent to do work for his master, he, as it were, carries the factory to that place, or establishes a factory for his employers at that place, so that he is doing work "about" the factory.' *Barclay, Curle & Co v M'Kinnon* (1901) 3 F 436 at 438, per the Lord Justice-Clerk

New Zealand 'The word "about" ... is a geographical expression involving the idea of a certain physical contiguity, "but it also involves the idea of an employment connected with the business carried on at the place indicated": *Owens v Campbell Ltd* [[1904] 2 KB 60 at 64, CA, per Collins MR].' *Public Trustee v Gill* [1934] NZLR 832 at 837, per Reed J; also reported [1934] GLR 693 at 695

Quantity

'The question depends on the construction of the charterparty. By it, the defendant undertook to load a "full and complete cargo of iron ore, say about 1,100 tons". ... The reasonable meaning seems to be that the shipowner undertakes, if the ship is of much greater capacity than 1,100 tons, to accept a cargo of about 1,100 tons as equivalent to a full cargo and thus effect is given to the words "say about", etc, as words of contract.... What, then, is the meaning of the word "about"? This is partly matter of fact and partly matter of law. I think the direction to the jury has always been that the deviation must not be very large. The difference must be such as people would ordinarily consider as included in the word "about". There can be no exact rule of law as to the percentage of difference allowed, but I have known juries often allow in practice 3 per cent.' *Morris v Levison* (1876) 1 CPD 155 at 156–158, per Brett J

ABOUT TO SAIL

'What do the words "now sailed or about to sail" represent to the charterers? To say that a ship "has sailed" is obviously to represent that she has done so. To say that she is "about to sail" is to represent either that she is loaded and just about to sail, or that, if she is not already loaded, she will be loaded in a day or two, and will then sail. Taken in connection with the first words "now sailed", it seems to me that the words "or about to sail" amount to a representation that the ship is just ready to sail.' *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 278, CA, per Lord Esher MR

ABOVE

See also **OVER**

[The appellants had erected a girder across a river. The question was whether this contravened a local Act regulating erections 'above' the river.] 'I think ... that the words "above the bed or waterway" mean, or at any rate include, "over" the bed or waterway.' *Burnley Co-operative Society v Pickles* (1898) 77 LT 803 at 807–808, per Wright J

[The Building (Safety, Health and Welfare) Regulations 1948, reg 31(3) (revoked; see now the Construction (Design and Management) Regulations 2007, SI 2007/320), laid down that suitable and sufficient ladders, etc, should be provided in cases where workmen, working on or near fragile roofs, had to pass over or work 'above' such roofs.] 'What does the word "above" mean? Does it mean above in the vertical plane of the fragile roof, or does it mean above merely in the sense of at a greater height? I think it means the former.' *Harris v Brights' Asphalt Contractors Ltd* [1953] 1 All ER 395 at 398, per Slade J; also reported in [1953] 1 QB 617 at 628

ABROAD

The expression 'abroad' means outside Great Britain and Ireland. (Children and Young Persons Act 1933, s 30)

Testamentary condition

'When the testator talks of the children being maintained in England, with regard to that I think there is no reasonable doubt. Then he says "and do not reside abroad except for a period not exceeding six weeks in each year". What does that mean? Is "abroad" contrasted with England, or has the word "abroad" the ordinary meaning in the English language? Mr Hart says that "abroad" means anywhere out of England.... I do not think that contention can be sound.... The word "abroad" can never be used by anybody in talking of a person who has gone to Scotland, nor I think of a person who has gone to Ireland *rebus sic stantibus*. There is, therefore, some little difficulty in deciding whether "abroad" means out of England, or means, as it ordinarily means, outside the British Islands. I think myself it must mean outside the British Islands.' *Re Boulter, Capital & Counties Bank v Boulter* [1922] 1 Ch 75 at 82–83, per Sargant J

ABSENCE

Australia [Section 10(1) of the Extradition Act 1998 (Cth) provides: 'Where a person has been convicted in the person's absence of an offence against the law of an extradition country ... then, for the purposes of this Act, the person is deemed not to have been convicted of that offence but is deemed to be accused of that offence'.] 'Unassisted by reference to the history or context of the relevant provisions or their purpose, one would construe the reference to a conviction in a person's absence in s 10(1) as a reference to a conviction obtained when the person was not present at trial or conviction. Absence simply means not present. On this approach no question would arise as to the reason for the person's non-attendance.

'Such a construction reflects the ordinary use of the language.

'The *New Shorter Oxford English Dictionary* (1993) gives the primary meaning of "absence" as "the state of being away from a place or person". The *Macquarie Dictionary* (1995, 2nd ed) also gives the primary meaning of "absence" as "a state of being away".

'The same meaning was given to s 64 of the Crimes Act 1958 (Vic), which provided a defence to a charge of bigamy where, inter alia, the husband or wife had been "continually absent" for seven years. Hudson J in *R v Darnton* [1960] VR 191 held that the defence was available if the accused had been absent, whether such absence was a result of desertion on his part or not.

'And, in *Gapes v Commercial Bank of Australia Ltd* (1979) 27 ALR 72, Northrop J held that an employee who was physically present at work was not "absent from duty" even though the employee was not performing his duties. His Honour said that "absent from duty" should be "given its ordinary meaning as referring to physical bodily absence from duties".

'In *Ryan v Heiler* (unreported, Supreme Court of New South Wales, Young J, 26 February 1990), Young J was concerned with provisions of the Local Government Act 1990 (NSW) which stipulated that certain absences from council meetings could result in the loss of office by an alderman. "Absence" was construed to mean "not at" rather than "a voluntary or deliberate failure to be present". The assistance of this case is limited because the construction depended on the particular statutory context. His Honour noted that the opposite meaning had been applied in cases dealing with articles of association of companies: *Mack's Claim* [1900] WN (Eng) 114; *McConnell's Claim* [1901] 1 Ch 728; and *Willsmore v Willsmore-Tibbenham Ltd* (1965) 109 Sol Jo 699.' [North J then proceeds to examine *Wiest v DPP* (1988) 23 FCR 472 (which concerns the predecessor of s 10(1), namely, s 4(3) of the Extradition (Foreign States) Act 1966 (Cth)), the common law position, and the history of s 4(3) (at [24]–[82]). He concludes that 'the better construction of s 10(1) is that a conviction in absence means a conviction obtained when the accused was not present for whatever reason'.] *Hellenic Republic v Tzatzimakis* [2002] FCA 340 at [17]–[22], [83]; BC200201161, per North J

Canada 'The expression "absence or inability to act" [of judge of Court of Sessions of Peace] should of course be given a construction at once reasonable and in harmony with the purpose of the statute. "Inability to act" may or may not involve "absence". It is usually accompanied by physical absence; and absence may be due to physical inability to be present. But, as used in the statute, "absence" clearly means something different from "inability to act". It connotes physical non-presence from whatever cause. The question is non-presence in what place or within what area? We are not concerned with the cause of absence.

"Absence", as used in this statute, must, I think, be taken to mean absence from the bench, or, at the utmost, absence from the court-room in which the trial takes place. That is a fact of which the replacing judge can be personally cognisant when the trial is beginning. Beyond that his actual knowledge ordinarily cannot extend.' *Brunet v R* (1918) 57 SCR 83 at 91–92, SCC, per Anglin J

Canada [Under the Municipal Act, RSO 1937, c 266, s 213(2) (repealed), a majority of a municipal council could themselves call a meeting in the 'absence' of the mayor.] '[Counsel] urges … that "absence" … should be construed in its widest sense; that it requires no particular degree or amount of absence, viz. from the city or the Province, and that the applicants, going as they did, to the respondent's office in the City Hall and remaining from 9.30 to 11 am and finding the mayor not present, absence is established within the meaning of the section.… I cannot conclude that there was an absence here to warrant the applicants taking the steps they did. The respondent was in the city; he had been in his office the evening before; he would be in later in the day, and it was no doubt known that in the forenoon when the applicants called, he was on duty with the regiment to which he belonged.' *Cooper v Croll* [1940] 1 DLR 610 at 615–616, Ont SC, per Gillanders J

Absence of a temporary nature

Australia [Land Tax Act 1958 (Vic) s 13.] '… Like the Tribunal I do not see reason to construe the expression "absence of a temporary nature" in s 13C otherwise than according to the plain, ordinary and natural meaning of the words of the expression and, as the Tribunal said, the ordinary meaning of something which is "temporary" is something that lasts for a time only or which is made to supply a passing need, as opposed to being "permanent". Hence, if one can say of an absence that it is for a time only or to satisfy a passing need, as opposed to being permanent, it is accurate and in my view appropriate to describe the absence as being of a temporary nature; whether short or not.

'That view of the matter finds support in the terms of subsection 13C(3). The express limitation to absences of not greater than two years (or such longer period as the Commissioner may allow) implies that, but for the express limitation, an absence could qualify as a temporary absence though longer than two years.

'No doubt there are limited periods of absence which would be so long that they would not be temporary for the purposes of the section. For example, if an owner absented himself or herself from a principal place of residence with the intention of returning to it in 50 years time, the absence would be for a limited time only but it could not reasonably be regarded as temporary for the purposes of the section. Once, however, one moves away from extreme cases of that kind it is not impossible to suppose that significant periods of absence could be conceived of as "temporary" for the purposes of the section. If an absence of up to two years is within the contemplation of the section, as it plainly is, may not there be cases in which an absence of three years qualifies as "temporary"? Other things being equal, what is the essential difference between two years and three years in the context of this section? And if a period of three years is within the contemplation of the section, what is to say that the section may not reach to an absence of six years, at least in some cases? After all, a period of that order is no more than the duration of many courses of study and business and professional postings and "short term work assignments or other commitments" were offered in the Second Reading Speech as exemplars of temporary absences to which the exemption was intended to apply.' *Comr of State Revenue v Anderson* [2004] VSC 152 at [11]; BC200402772, per Nettle J

ABSENCE OF REASONABLE AND PROBABLE CAUSE

Australia [In the context of malicious prosecution.] 'There are several questions bound up in the proposition that absence of reasonable and probable cause requires an examination of what the prosecution "made" or "should have made" of the material available to the prosecutor when he or she decided to prosecute, or to maintain an existing prosecution. As has already been noted, two kinds of inquiry are postulated: one subjective (what the prosecutor made of the available material) and the other objective (what the prosecutor should have made of that material). Does proof of the absence of reasonable and probable cause require proof of the absence of a state of persuasion (a "belief") in the mind of the prosecutor? What is the subject-matter of the state of persuasion that is to be considered? Is it a persuasion about the likelihood of a particular outcome of the prosecution (the conviction of the person prosecuted)? Is it a persuasion about what the material considered by the prosecutor reveals ("guilt" or "probable guilt" of the person prosecuted)? Or is it a persuasion about that material's sufficiency to warrant setting the processes of the criminal law in motion? What, if any, weight may be given by the prosecutor to the existence of various checks and balances, like the interposition of committal proceedings and the assignment of particular functions to the Director of Public Prosecutions, that form an integral part of the system of criminal justice?

'Those questions should be answered as follows. If the plaintiff alleges that the defendant prosecutor did not have the requisite subjective state of mind when instituting or maintaining the prosecution, that is an allegation about the defendant prosecutor's state of persuasion. The subject-matter of the relevant state of persuasion in the mind of the prosecutor is the sufficiency of the material then before the prosecutor to warrant setting the processes of the criminal law in motion. If the facts of the particular case are such that the prosecutor may be supposed to know where the truth lies (as was certainly the case in *Sharp v Biggs*) the relevant state of persuasion will necessarily entail a conclusion (a belief of the prosecutor) about guilt. If, however, the plaintiff alleges that the prosecutor knew or believed some fact that was inconsistent with guilt (as the plaintiff alleged in *Mitchell v John Heine*) the absence of reasonable and probable cause could also be described (in that kind of case) as the absence of a belief in the guilt of the plaintiff.

'But what of a case like *Martin v Watson* where the prosecutor knows only of the fact that a complaint has been made? What of *Glinski v McIver*, a case arising out of the prosecution of the appellant, Mr Glinski, for offences of conspiracy to defraud and obtaining goods by false pretences? The prosecution had been instituted by the respondent, a Detective Sergeant of police. The appellant alleged that the prosecution had been brought to punish him for giving evidence, in another case, which the police believed to be perjured.

'In a case where a police officer prosecutes a person on the basis of statements by third parties, there are evident difficulties in applying a test of reasonable and probable cause which would be satisfied by demonstrating only that the subjective state of mind of the prosecutor fell short of positive persuasion of guilt. A test of that kind would presuppose the need for a police officer to have some degree of personal commitment to a case. That would, or at least would often, not be consistent with what should

desirably be the objective assessment and analysis of material provided by others.

'The appellant in *Glinski v McIver* argued that a prosecutor did not have reasonable and probable cause for a prosecution without "an overall belief in the guilt of the accused, a personal opinion as to the facts and their effect in law and a belief in the facts on which the prosecution is founded." The respondent contended that belief in guilt is not an ingredient in reasonable and probable cause and that the role of the subjective element of belief "is confined to the belief in the existence and reliability of facts known to the prosecution and does not extend to mere abstract belief in guilt in the sense of the prosecutor's personal opinion".

'As Lord Devlin pointed out, "in the reported cases the question put to the jury has almost universally been whether the defendant believed in the plaintiff's guilt or in the truth of the charge". But as Lord Devlin also pointed out, "guilt" has the ambiguity identified earlier in these reasons. Does "guilt" refer to the strength of the case revealed by the material then available, or does it refer to some objective state of guilt which, presumably, should find reflection in the ultimate outcome of the prosecution? There is evident difficulty in using the word in this context with the second of these meanings if only because a fundamental hypothesis for the institution of an action for malicious prosecution is that the prosecution failed.

'The absence of reasonable and probable cause will not in every case be shown by demonstrating that the prosecutor had no positive belief that the accused person was, or was probably, guilty. In particular, references to belief in guilt, or more properly, the absence of belief in guilt, will very likely prove distracting in any case where the prosecutor may not be supposed to know where the truth lies. A case where the prosecutor acts on the statements of others is one example of such a case.

'There are three critical points. First, it is the negative proposition that must be established: more probably than not the defendant prosecutor acted without reasonable and probable cause. Secondly, that proposition may be established in either or both of two ways: the defendant prosecutor did not "honestly believe" the case that was instituted or maintained, or the defendant prosecutor had no sufficient basis for such an honest belief. The third point is that the critical question presented by this element of the tort is: what does the plaintiff demonstrate about what the defendant prosecutor made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution? That is, when the plaintiff asserts that the defendant acted without reasonable and probable cause, what exactly is the content of that assertion?

'As noted earlier in these reasons, the jury questions formulated by Cave J in *Abrath v North Eastern Railway Co* asked whether the prosecutor "honestly believe[d] the case ... laid before the magistrates". But the content of the question—"did the prosecutor believe the case which [he or she] laid before the magistrates?"—is not altered if the word "honestly" is added before "believe". The word "honestly" may therefore be thought to have no substantive function to perform. Nonetheless, the qualitative element of the contention that the defendant prosecutor acted without reasonable and probable cause may often be captured best by the word "honesty". In most cases, honesty, or more accurately, the allegation of lack of honesty, will require consideration of what the prosecutor knew, believed, or concluded, about some aspect of the material. If the prosecutor's knowledge or belief must be considered, honesty will add nothing to the inquiry. But it will not always be necessary or appropriate to look only at what the prosecutor knew or believed. Not least will that be so where the prosecutor's knowledge or belief is confined to knowledge or belief of what others have said or done.

'In *Mitchell v John Heine*, did the prosecutor know, or believe, that the accused person had been given the property which the accused was or was to be charged with stealing? If "yes", the prosecutor would not have acted honestly in launching the prosecution. And it would also be right to describe the prosecutor as not believing the case. The prosecution would have been instituted without reasonable and probable cause. In *Sharp v Biggs*, did the prosecutor know, or believe, that the evidence which the accused had given about the prosecutor's actions was right? Again, if "yes", the prosecutor did not act honestly, the prosecutor did not believe the case, and there was no reasonable and probable cause to institute a prosecution for perjury. In both cases the plaintiff would show, in the words of the jury question, that the prosecutor did not "honestly believe" the case that was to be laid before a magistrate. If, however, the answer is "no", it may or may not be apt to describe the prosecutor as believing

the accused to be guilty. The aptness of the description would turn on the nature of the material at issue.

'In cases where the prosecutor acted on material provided by third parties, a relevant question in an action for malicious prosecution will be whether the prosecutor is shown not to have honestly concluded that the material was such as to warrant setting the processes of the criminal law in motion. (There may also be a real and lively question about the objective sufficiency of the material, but that may be left to one side for the moment.) In deciding the subjective question, the various checks and balances for which the processes of the criminal law provide are important. In particular, if the prosecutor was shown to be of the view that the charge would likely fail at committal, or would likely be abandoned by the Director of Public Prosecutions, if or when that officer became involved in the prosecution, absence of reasonable and probable cause would be demonstrated. But unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for prosecution, or to have formed that view on an insufficient basis, the element of absence of reasonable and probable cause is not established.

'The expression "proper case for prosecution" is not susceptible of exhaustive definition without obscuring the importance of the burden of proving the absence of reasonable and probable cause, and the variety of factual and forensic circumstances in which the questions may arise. For the reasons given earlier, it will require examination of the prosecutor's state of persuasion about the material considered by the prosecutor. That should not be done by treating the five conditions stated by Jordan CJ in *Mitchell v John Heine* as a complete and exhaustive catalogue of what will constitute reasonable and probable cause. First, to focus upon what is reasonable and probable cause distracts attention from what it is that the plaintiff must establish—the absence of reasonable and probable cause. And secondly, because those conditions are framed in terms of belief about probable guilt, they are conditions that, for the reasons already given, do not sufficiently encompass cases where the prosecutor acts upon information provided by others.

...

'As Dixon J said in *Brain*, if there is no dispute that a prosecutor "believed in the truth of the charge, or considered its truth so likely that a prosecution ought to take place" and no question arises as to the materials upon which the opinion was founded, there remains the question, for the Court to decide, "whether the grounds which actuated [the prosecutor] suffice to constitute reasonable and probable cause."

'Reference is sometimes made in this context to the statement of Hawkins J in *Hicks v Faulkner* defining reasonable and probable cause:

> to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

'The objective element of the absence of reasonable and probable cause is thus sometimes couched in terms of the "ordinarily prudent and cautious man, placed in the position of the accuser" or explained by reference to "evidence that persons of reasonably sound judgment would regard as sufficient for launching a prosecution". Or, as Griffith CJ put it in *Crowley v Glissan*, the question can be said to be "whether a reasonable man might draw the inference, from the facts known to him, that the accused person was guilty".

'None of these propositions (nor any other equivalent proposition which might be formulated to describe the objective aspect of absence of reasonable and probable cause) readily admits of further definition. It is plain that the appeal is to an objective standard of sufficiency. The references to "reasonable" and "reasonably", to "ordinarily prudent and cautious", make that clear.

'Because the question in any particular case is ultimately one of fact, little useful guidance is to be had from decisions in other cases about other facts. Rather, the resolution of the question will most often depend upon identifying what it is that the plaintiff asserts to be deficient about the material upon which the defendant acted in instituting or maintaining the prosecution. That is an assertion which may, we do not say must, depend upon evidence demonstrating that further inquiry should have been made.

'It is, nonetheless, important to recognise what, standing alone, may not suffice to show a want of objective sufficiency. It is clear that absence of reasonable and probable cause is not demonstrated by showing only that there were

further inquiries that could have been made before a charge was laid. When a prosecutor acts on information given by others it will very often be the case that some further inquiry could be made. *Lister v Perryman*, where a charge was preferred on account of what had been reported to the prosecutor, is a good example of such a case. And as Lord Atkin rightly said in *Herniman v Smith*:

> It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is a reasonable and probable cause for a prosecution.

'For like reasons it cannot be stated, as a general and inflexible rule, that a prosecutor acts without reasonable and probable cause in prosecuting a crime on the basis of only the uncorroborated statements of the person alleged to be the victim of the accused's conduct. Even if at trial of the offence it would be expected that some form of corroboration warning would be given to the jury, the question of absence of reasonable and probable cause is not to be decided according to such a rule. The objective sufficiency of the material considered by the prosecutor must be assessed in light of all of the facts of the particular case.' *A v New South Wales* [2006] HCA 10 at [70]; BC200701675, per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ

ABSENT

'In the construction of an article like clause 97 of the articles of this bank it has been held that the expression "absents himself" means something more than the expression "is absent"…. He [a director] could not be taken to have absented himself within the meaning of that article until there was a meeting which he ought to have attended…. I do not think that the period of absence began to run until then.' *Re London & Northern Bank, McConnell's Claim* [1901] 1 Ch 728 at 731–732, per Wright J

New Zealand 'The rule of the New Zealand Code … which has come under discussion is r 53…. The material part of it is as follows:—"—In actions founded on any contract made or entered into or wholly or in part to be performed within the colony, on proof that any defendant is absent from the colony at the time of the issuing of the writ, and that he is likely to continue absent … the Court may give leave to the plaintiff to issue a writ and proceed thereon without service"…. The … contention related to the word "absent"…. The appellant seeks to confine it to persons who at some previous time have been domiciled or resident in New Zealand. It is not easy to appreciate the reasons why such an artificial sense should be put upon the word; and during the argument their Lordships expressed agreement with the judges of the Court of Appeal, who held that the word is used in its ordinary sense, and describes persons who are not in New Zealand.' *Ashbury v Ellis* [1893] AC 339 at 341, 345, PC, per cur

South Africa 'Not present in a given place at a given time.' *Jurlicke and Holdcroft v Currie* 27 NLR 154

Without leave

In this Act 'absent without leave' means absent from any hospital or other place and liable to be taken into custody and returned under this section, and related expressions shall be construed accordingly. (Mental Health Act 1983, s 18(6))

ABSOLUTE

See also **FEE SIMPLE; TERM OF YEARS**

[It was held that the obligation imposed by the Mines and Quarries Act 1954, s 81(1) (to maintain machinery, etc) was 'absolute'.] 'The word "absolute" in this connexion has become part of the dictionary of the law. Sometimes the word "continuing" is substituted for it. Either word means that, in effect, the employer warrants that the machine or other equipment which he is obliged to maintain will never be out of order.' *Hamilton v National Coal Board* [1960] 1 All ER 76 at 78, HL, per Viscount Simonds; also reported in [1960] AC 633 at 639

Canada 'In my opinion the word "absolute" even when used in a technical sense in connection with the vesting of property may signify at least two different legal concepts. In one sense it may be used to denote the lack of limitation of the extent or duration of an interest in personal property while in another it may mean the freedom of the interest from dependence on other things or persons.' *Halley v Minister of National Revenue* [1963] Ex CR 372 at 375, Ex Ct, per Thurlow J; affd, without written reasons, 63 DTC 1359, SCC

ABSOLUTE AND INDEFEASIBLE

'Absolute and indefeasible means absolute and indefeasible against the whole world. Unless the enjoyment gives a title against all persons having any interest in the *locus in quo* it gives no title at all.' *Wheaton v Maple & Co* [1893] 3 Ch 48 at 68, CA, per Lopes LJ

ABSOLUTE ASSIGNMENT

See **ASSIGNMENT**

ABSOLUTE INTEREST

For the purposes of [the Income Tax (Trading and Other Income) Act 2005 Pt 5 Ch 6 (ss 649–682A) or the Corporation Tax Act 2009 Pt 10 Ch 3 (ss 934–967) (Beneficiaries' income from estates in administration)] a person has an absolute interest in the whole or part of the residue of an estate if the capital of the residue or that part is properly payable to the person, or it would be so payable, if the residue had been ascertained. (Income Tax (Trading and Other Income) Act 2005, s 650(1); Corporation Tax Act 2009, s 935(1))

ABSOLUTELY

'What is the meaning of the word "absolutely"? If an independent meaning can be given to it, it must be "unconditionally".' *Re Pickworth, Snaith v Parkinson* [1899] 1 Ch 642 at 651, CA, per Rigby LJ

'I return to this simple will: "I give all my property to the person who, at the time of my death shall be or shall act as the abbess of the said convent absolutely"…. The real difficulty in this case is the use of the word "absolutely". "Absolutely" means free of some fetter in some form…. I think that the word not only means that the recipient will retain the full ownership, for the purposes indicated, of that which is given, but also that she is to be free from any fetter or trust which would bind her to keep the fund intact for the purposes of the community.' *Re Ray's Will Trusts, Re Ray's Estate, Public Trustee v Barry* [1936] Ch 520 at 525–526, per Clauson J

Australia 'Its [the word "absolutely"] ordinary meaning is "without condition or limitation". And in legal parlance it is commonly used with regard to vesting as meaning "indefeasibly".' *Re Thompson, Rhoden v Wicking* [1947] VLR 60 at 67, per Herring CJ

ABSTRACT OF TITLE

An abstract of title is a summary of all the documents comprised in the title. The preparation of an abstract in traditional form has largely been superseded by the practice of supplying an epitome of the title supported by photocopies of all the documents referred to. An epitome of title is a schedule of the documents comprising the title. The documents should be numbered and listed in chronological order, starting with the earliest in time. Each document should be identified as to its date, type (for example, conveyance, assent etc), the names of the parties to it, whether a copy of the document is supplied with the epitome, and whether or not the original of the document will be handed to the buyer on completion. (23 Halsbury's Laws of England (5th Edn) (2023) para 113)

'Now, I apprehend that an abstract is delivered whenever a number of sheets of paper, call it what you will, whenever a document is delivered to the purchaser, which contains, with sufficient clearness and sufficient fullness, the effect of every instrument which constitutes part of the title of the vendor, and that that is a delivery of the abstract, even though it takes place, as it must, I apprehend, in all cases take place, before the actual comparison of the abstract with the deeds themselves, which they purport to abstract.' *Oakden v Pike* (1865) 34 LJ Ch 620 at 622, per Kindersley V-C

ABSTRACTION

'Abstraction', in relation to water contained in any source of supply, means the doing of anything whereby any of that water is removed from that source of supply, whether temporarily or permanently, including anything whereby the water is so removed for the purpose of being transferred to another source of supply; and 'abstract' shall be construed accordingly. (Water Resources Act 1991, s 221(1))

ABSURDITY

Canada '[27] If a statute is susceptible of two interpretations, the interpretation that avoids absurdity is to be preferred (*Datacalc Re-*

search Corp v The Queen [2002] TCJ No 99 (QL) (Tax Ct of Canada) [reported [2002] 2 CTC 2548], at para 54).

'[28] According to F. Bennion, *Statutory Interpretation*, 4th ed. (London: Butterworths, 2002), the concept of "absurdity" actually encompasses several components. The presumption against an "absurd" interpretation means the avoidance of (1) an unworkable or impractical result, (2) an inconvenient result, (3) an anomalous or illogical result, (4) a futile or pointless result, (5) an artificial result or (6) a disproportionate counter-mischief.' *Wicken (Litigation Guardian of) v Harssar* [2004] OJ No 1935, 240 DLR (4th) 520 (Div Ct), per the Court

ABUSE

'The information contains a charge of assaulting and abusing a certain woman; therefore, on the face of it, there is a complaint of something more than a mere assault. The expression "abusing" appears to me to import "assaulting" and something more.... I am not aware that the word "abuse" applied to a woman is ever used except with reference to sexual intercourse. Certainly, in more than one Act of Parliament the word "abuse" has had that meaning applied to it.' *Re Thompson* (1860) 6 H & N 193 at 200, per Pollock CB

'To my mind the word "abused" conveys no definite meaning: it is not a word of art; in popular language it means calling names—abusing by words. The only instance in which it is used as a term of art shows that it does not mean "ravish", because I find in the 9 Geo 4, c 31, s 18 [repealed by the Offences against the Person Act 1861], as to trials for the crimes of "rape and of carnally abusing girls" under the ages therein mentioned, the term "carnally abusing" is used as meaning something different from rape. The word "abusing" without the concomitant words "unlawfully and carnally" has no definite meaning. The expression "unlawfully assaulted and abused" alleges an assault, with a word which may mean that the prisoner did something else.' *Re Thompson* (1860) 6 H & N 193 at 202–203 per Bramwell B

ABUSE OF LAW

'[4] ... VAT is an EU tax imposed pursuant to successive Directives of the European Union, at the relevant time the Sixth Directive. The Directives are subject to the principle of abuse of law. By virtue of s 2(1) of the European Communities Act 1972 the same principle must apply to domestic legislation implementing the Directives.

'[5] Abuse of law is a concept derived from civil law jurisprudence, which is unknown to English common law but has been adopted by the law of the European Union. In its simplest form, it confines the exercise of legal rights to the purpose for which they exist, and precludes their use for a collateral purpose. For present purposes, the expression détournement de droit adopted by some French writers is probably a better description of its content. The application of the principle to tax avoidance schemes calls for a difficult balance to be drawn. It is traditional, at any rate in this jurisdiction, to distinguish between avoidance, which involves the lawful arrangement of a taxpayer's affairs so as to minimise his tax bill, and evasion, which is an unlawful failure to account for tax due, generally by suppressing or falsifying information. Sophisticated avoidance schemes do not so much undermine this distinction as challenge its usefulness. By artificially reclassifying transactions so as to produce a more favourable tax outcome than commercially comparable "normal" transactions, they frustrate the objective of the taxing provision without necessarily falling foul of its language. The result is arbitrarily to depress tax receipts, producing inequity between taxpayers and potentially distorting competition between firms who are otherwise similarly placed. This gives rise to social costs which are significant and increasingly controversial. On the other hand, legal certainty is an important principle of both English and EU law, particularly when it comes to justifying the financial demands of the state. Artificiality, if it is to be deployed as a workable legal concept, has to be tested against some standard of transactional normality, and the search for such a standard is far from straightforward. Taxpayers faced with a choice between alternative ways of achieving some commercial objective are in principle entitled to select the one with the more tax-efficient statutory outcome. In particular, they are entitled to choose between exempt and taxable transactions in their own financial interest. Like any other tax, VAT is due only in so far as its imposition is authorised by statute. It follows that although the courts may examine the commercial reality of transactions without being unduly hidebound by labels, they do not

as a general rule enlarge the scope of a taxing provision by reference to considerations which affect neither the construction of its language nor the characterisation of transactions to which it is said to apply. These dilemmas are particularly acute in the United Kingdom, where the drafting of tax legislation has traditionally depended not on the formulation of general principles but on the definition of taxable occasions with a high degree of specificity.

'[6] The main task of any court seeking to apply a principle of abuse of law is to reconcile these competing considerations. ...

...

'[10] Two main difficulties arise where the principle of abuse of law is applied to tax avoidance schemes.

'[11] The first arises from the assumption made by the Court of Justice in *Halifax* [*Halifax plc v Customs and Excise Comrs* (Case C-255/02) [2006] STC 919, [2006] ECR I-1609] that the principle will not apply to what it called "normal commercial operations" (para 69). Subsequent case law has established that this means those that are normal in the context of the relevant line of business, not necessarily normal for the particular taxpayer: *Revenue and Customs Comrs v Weald Leasing Ltd* (Case C-103/09) [2011] STC 596, [2010] ECR I-13589. I do not think that the court can have intended to set up a third distinct test, in addition to the two which are set out in paras 74–75 and repeated in its order. The "normality" of a transaction is relevant to the question posed in the court's first test, about the "purpose" of the relevant provision of the VAT Directives. "Normal commercial operations" will not as a general rule be regarded as contrary to the purpose of the Directives, since these must be assumed to have been designed to accommodate them. Thus in *Weald Leasing* the taxpayer's decision to take equipment on lease from an intermediate company rather than buy it outright was an ordinary commercial transaction. It was not abusive even though it was unusual for the taxpayer in question and was designed to obtain a tax advantage by spreading the liability to tax over a longer period. The choice between leasing and outright purchase was a choice accommodated by the scheme of the VAT legislation. The tax treatment of lease payments being a facility available under the legislation itself, resort to it could not be regarded as contrary to its purpose. For the same reason, a transaction is not abusive merely because it falls within an exception or derogation from ordinary principles of EU law governing the incidence of VAT, such as the right enshrined in the Sixth Directive to deduct input tax generated by transactions in another member state. It follows that the sourcing of goods or services from a country in which the VAT regime is more favourable is not in itself abusive, even though the object and effect is to allow the deduction of input tax without the payment of output tax (*Revenue and Customs Comrs v RBS Deutschland Holdings GmbH* (Case C-277/09) [2011] STC 345, [2010] ECR I-13805). The reason, as the court explained in that case at paras 51–52, is that this is a choice inherent in a scheme of taxation that is designed to be fiscally neutral as between different member states while allowing for some differences between their implementing laws. Likewise, the conduct of a genuine business activity through a subsidiary incorporated in another member state is not abusive, although the sole reason for the choice is that it has a lower rate of corporation tax: *Cadbury Schweppes plc v IRC* (Case C-196/04) [2007] All ER (EC) 153, [2006] ECR I-7995. Precisely the same considerations must apply to a decision to source goods or services from outside the European Union, an option which is inherent in the territorial limits of the EU VAT regime and the assignment of economic relations with third countries to other policies of the Union.

'[12] The second difficulty which arises from the application of the principle of abuse of law to tax avoidance is that of concurrent purposes. Tax avoidance schemes are rarely directed exclusively to tax avoidance. It is difficult to conceive of a scheme, other than a fraudulent one, which achieved absolutely nothing but a tax advantage. They are usually directed to achieving a commercial purpose, such as the provision of the call centres in *Halifax*, in a way which avoids a tax liability that would otherwise be associated with it. The potential for abuse consists in the method chosen to achieve the commercial purpose. In *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897, the consideration payable by the lessee under a leasing transaction was artificially split between two contracts, one with the lessor and the other with an associated company of the lessor. The latter contract was structured so as to qualify as an exempt financial contract under Italian law, so as to reduce the amount chargeable to VAT. The transactions

had a legitimate commercial purpose, namely the leasing of the cars, but the method of achieving that purpose was held to be open to challenge if "the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue" (para 45). This conclusion seems to me to do no more than make explicit something which is implicit in the *Halifax* tests. Identifying the "essential aim" in a case of concurrent fiscal and commercial purposes depends on an objective analysis of the method used to achieve the commercial purpose. As Advocate General Maduro observed in a passage from para 89 of his opinion which was in terms approved by the court (para 75), the taxpayer's choices must be "at least to some extent, accounted for by ordinary business aims". The question is therefore whether the commercial objective is enough to explain the particular features of the contractual arrangements which produce the tax advantage.

'[13] These considerations effectively answer a question which is likely to arise in most cases involving prearranged sequences of transactions. Is the relevant "aim" that of the scheme as a whole or of its component parts? The answer is that it may be either or both. Because the principle of abuse of law is, in this context, directed mainly to the method by which a commercial purpose is achieved, it is necessary to analyse each transaction by which it is achieved. Because the purpose of each step will generally be to contribute to the working of the whole scheme, the effect of the whole scheme has also to be considered. In *WHA Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 728, [2007] STC 1695 (at [22]), Lord Neuberger, delivering the leading judgment in the Court of Appeal, rejected the submission that the court was confined to considering the artificiality or purpose of each individual step, since these will commonly be individually unassailable but designed to produce the tax advantage in combination. I agree with this observation.' *Pendragon plc v Revenue and Customs Comrs* [2015] UKSC 37, [2015] 3 All ER 919 at [4]–[6], [10]–[13], per Lord Sumption

ABUSIVE

Australia '"Abusive" (like "insulting") is a large term. Its subject matter ranges from the trivial to the serious... . The *Macquarie Dictionary* gives as the primary meaning for "abusive"—"Using harsh words or ill treatment" and gives the example of "an abusive author". The second meaning is "characterised by or containing abuse", and the example given is "an abusive satire". The present context is of course the writing or printing of abusive words. There is no reason why it should not be given its ordinary or popular meaning in this context and there is equally no good reason why it should be confined to words towards the upper end of the scale. In common usage it is capable of encompassing fairly trivial and low level, albeit direct, expressions of disapproval.' *Coleman v P* [2001] QCA 539 at [67]; BC200107434, per Thomas JA

ABUT

See also **ADJACENT; ADJOIN**

'I think ... the language "with all the houses and grounds abutting on and upon the said road" ... synonymous with the expression "bounded by the said road".' *R v Strand Board of Works* (1863) 4 B & S 526 at 549, per Cockburn CJ

'With reference to land to "abut" means to actually touch'. *Barnett v Covell* (1903) 68 JP 93 at 94, per Lord Alverstone CJ

[The Leicester Corporation Act 1897, s 31 provided (inter alia) that every hoarding 'in, abutting on, or adjoining' any street should be securely erected.] 'It seems to me that when there is an advertisement hoarding put up which becomes for the time being de facto the boundary of the street, so that if it is not strong enough it may possibly come down either into the street, or on to the people who are standing on the land adjoining the street, then within the meaning of this statute the hoarding is "in, abutting on, or adjoining the street".' *Rockleys Ltd v Pritchard* (1909) 101 LT 575 at 577, DC, per Lord Alverstone CJ

'Prima facie, at any rate, you ought to be careful to use the word [abut] in its proper sense; and "abut" in its proper and etymological sense, and as frequently used, means actual touch.' *R (on prosecution of Lewisham Borough Council) v South Eastern Rly Co* (1910) 74 JP 137 at 139, CA, per Kennedy LJ

Canada [An abutting owner had the right to purchase a stopped-up portion of a highway under Municipal Act, RSO 1960, c 249, s 477 (repealed; see now RSO 1980, c 302, s 316(1))] '... an abutting owner within the meaning of s 477 means an owner, the front, rear or side of whose property is contiguous to *a side of* a highway which is stopped up, but does not mean or include an owner whose property is contiguous to either terminus of a highway.' *Catkey Construction (Toronto) Ltd v Bankes* (1970) 15 DLR (3d) 13 at 14, Ont CA, per Jessup JA

ACCELERATION

'The doctrine of acceleration is that all interests which fail or are undisposed of are captured by a residuary gift or go on an intestacy, but that a testator is presumed to have intended an acceleration of subsequent interests where a life interest fails in consequence of the donee being prevented by law from taking.' *Re Kebty-Fletcher's Will Trusts, Public Trustee v Swan* [1967] 3 All ER 1076 at 1080, per Stamp J

ACCEPTANCE

See also **AGREEMENT**

Of bill of exchange

'Acceptance' means an acceptance completed by delivery or notification. (Bills of Exchange Act 1882, s 2)

'That section [the Bills of Exchange Act 1882, s 19] provides "(1) An acceptance is either (a) general, or (b) qualified: (2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. In particular an acceptance is qualified which is ... (c) local, that is to say, an acceptance to pay only at a particular specified place. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere". The emphasis there is on the word "only", and it follows that, if an acceptor merely accepts a bill payable at a named place, it remains a general acceptance for the purpose of the section. It is only if he accepts expressly to pay at a specified place only and not elsewhere that it becomes a qualified acceptance.' *Banku Polskiego v Mülder (K J) & Co* [1941] 2 KB 266 at 267–268, per Tucker J

New Zealand 'I am of opinion that the learned Magistrate has misconstrued the meaning of the acceptance of a bill on demand. The Bills of Exchange Act 1908, s 17, states: "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer". If the learned Magistrate's view is right, the words endorsed by the drawee here were meaningless. In my judgment, the words "will accept", when applied to a bill on demand, mean "will pay"; and this is the view taken by the late Mr Justice Byles, one of the greatest authorities on bills of exchange. In the case of *Smith v Vertue* [(1860) 30 LJCP 56] His Lordship said: "Any words which stipulate that the drawee means to pay is a sufficient acceptance; anything in writing to that effect and signed by the acceptor. The simple meaning of an acceptance is "I will pay".' *Humphreys v Taylor* [1921] NZLR 343 at 344, per Stout CJ; [1921] GLR 123

See, generally, 49 Halsbury's Laws of England (5th Edn) (2021) paras 199–212.

Of goods

The buyer is deemed to have accepted the goods ... when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them. (Sale of Goods Act 1979, s 35(1), (4))

[Section 34 of the Act provides that a buyer is not deemed to have accepted the goods until he has had a reasonable opportunity of examining them in order to ascertain whether they are in conformity with the contract.]

Of offer

An acceptance of an offer is an indication, express or implied, by the offeree made whilst the offer remains open and in the manner requested in that offer of the offeree's willingness to be bound unconditionally to a contract with the offeror on the terms stated in the offer. (22 Halsbury's Laws of England (5th Edn) (2019) para 51)

Of option

Canada '"Acceptance" of the option means the election of the plaintiff [the optionee] to buy the property on the terms specified, and ... "exercising the option" means the same thing.' *Lawrance v Pringle* (1912) 17 BCR 250 at 255, BCCA, per Macdonald CJA

ACCESS

Canada '[11] Section 173(1)(*a*) of the Code makes it an offence to wilfully perform an

can containing gasoline remained in the garage over night. If, despite the insured's settled practice as to the use of gasoline in the garage and despite his regular nightly inspection to see that the gasoline was removed, the can by some oversight escaped attention and remained all night in the garage, that single instance would not, in the circumstances, constitute "keeping" gasoline in the garage.' *Blue v Pearl Assurance Co Ltd* [1940] 3 WWR 13 at 19–20, Alta SC, per Ewing J

New Zealand 'Subsection 1 of s 37 [of the Licensing Amendment Act 1910 (repealed; see now the Sale of Liquor Act 1962, s 264)] makes it illegal to keep or use any building, room, or other premises in any no-licence district as a place of resort for the consumption thereon of intoxicating liquor. A room in the defendant's hotel is, with his knowledge and consent, habitually used by a number of persons as a place of resort for the consumption of intoxicating liquor therein, or, in the language of the section, "thereon". The defendant supplies these persons with glasses.... They can also be supplied with soda-water or other beverage (non-intoxicating, of course).... Obviously but for the facilities thus afforded for the consumption of intoxicating liquor these persons would not resort to this room and bar. A person keeps or uses a room for the purpose or purposes for which he knows it is resorted to. It is immaterial, on the question of keeping or using, that he may also keep it for the sale of non-intoxicating beverages.' *Bingham v Coleman* (1914) 33 NZLR 989 at 991–992, per Denniston J; also reported 16 GLR 652 at 653

New Zealand [The Crimes Act 1961, s 147(1)(a) makes it an offence to 'keep' a brothel.] 'The word "keep" in ordinary parlance has many differing connotations, including to retain, to maintain, and also in a global sense to keep business premises and to conduct the business accommodated therein, as in the "keeping of a boarding-house", or a store, or a common gaming house, etc. In my view, it is in this sense that the word is used in para (a) of s 147(1).' *R v Mickle* [1978] 1 NZLR 720 at 723, SC, per Bain J

New Zealand 'In short, control or a share of control over the brothel is essential to constitute a person a keeper. Similarly a person does not "manage" the brothel unless he or she takes part in its control. The shade of difference between keeping and managing is that the former term is more apt for the owner of the business and the latter for a delegate conducting it for him.' *R v Barrie* [1978] 2 NZLR 78 at 81, CA, per Cooke J

Ordinarily keep

Australia 'To take the word "ordinarily" first, that word connotes in this context [Dog Act 1966–1986 (NSW), s 4(2) (see now s 6(2)(a)(ii))] some degree of continuity. I now turn to the word "kept". The words "kept" or "keep" can bear a very wide variety of meanings according to the subject matter of that which is alleged to be kept. When used in the context of a person ordinarily keeping a dog on any land or premises, and in relation to the occupier of that land or those premises who is entitled to occupy that land or those premises in one of the capacities mentioned in sub-s (4) of s 4 of the Act, I think that the phrase "ordinarily kept" can include the meaning of the act of so treating the dog with some degree of continuity that the animal becomes attached to that land or those premises for the time being.' *Porter v Cook* [1971] 1 NSWR 318 at 319, CA, per cur

KEEP IN REPAIR

See **REPAIR**

KEEP OPEN

Canada [A deed reserved a right of way at the rear of property as long as the owners of the property adjoining 'kept open' an equal width of land for a similar purpose.] 'I think that the words "shall *keep open*" in the condition in question, imply that the transferor regarded the way as either already open or that he had reason to believe that its opening was imminent. I think further that the same words involve a continuing act, which imply a question of time.' *Re Winters and McLaren* [1960] OR 479 at 485, Ont SC, per Thompson J; reversed on other grounds [1962] OR 402, Ont CA

KEEP UP

'To keep up a policy is to pay the premiums thereon as they fall due, and the person who pays the premiums is the person who keeps up the policy.' *Barclays Bank Ltd v A-G* [1944] AC 372 at 377, HL, per Lord Macmillan

KEEPER

See also **KEEP**

Of animal

A person is a keeper of an animal if—

(a) he owns the animal or has it in his possession; or

(b) he is the head of a household of which a member under the age of sixteen owns the animal or has it in his possession;

and if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this subsection continues to be a keeper of the animal until another person becomes a keeper thereof by virtue of those provisions. (Animals Act 1971, s 6(3))

[But a person is not a keeper where he has only taken and kept an animal in possession to prevent it causing damage or in order to restore it to its owner (Animals Act 1971, s 6(4)).]

Of disorderly house

'I do not assent at all to Mr O'Connor's argument [for the defendants] that nobody can ever be dealt with as keeper of a disorderly house [under the Sunday Observance Act 1780] unless he is found on the premises when the acts complained of are being committed. Such a doctrine would be most pernicious, as it seems to me, and I see no foundation for it whatever. It is difficult to find any stronger evidence, as I think, that a man is appearing, acting, and behaving himself as a person having the management of a place than that he permits his name to appear on all advertisements as that of the person having the management of the place, and is in fact cognisant of what is going on.' *Green v Berliner* [1936] 2 KB 477 at 489, per du Parcq J

KEPT

Australia 'There is no reason, in my view, to attribute ... a restrictive meaning to the word "kept". In its ordinary meaning it includes the narrow meaning given to it by Perry J [in *Residues Treatment and Trading Co Ltd v Southern Resources Ltd* (1989) 52 SASR 54 at 77; 15 ACLR 416 at 420] but it includes the well understood wider meanings of "keep" of which "kept" is the past participle, namely "to have in stock", "to have charge or custody of": *The Macquarie Dictionary*, 2nd rev; or "to guard, defend, protect, preserve, save", "to take care of, to look after": *Shorter English Oxford Dictionary*.' *Duke Group Ltd (in liq) v Pilmer* (1994) 15 ACSR 255 at 272, per Mullighan J

Australia [Subsection 1305(1) of the Corporations Act 2001 (Cth) states that '[a] book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.' Subsection 1305(2) states that '[a] document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subs (1)'. Section 1305 of the Corporations Law (the predecessor of the Corporations Act) was essentially in the same terms.] 'In a number of cases concerning evidentiary provisions as to records kept by companies, the word "kept" has been given a narrow interpretation. In *Residues Treatment and Trading Co Ltd v Southern Resources Ltd* (1989) 52 SASR 54, Perry J was concerned with the Companies (South Australia) Code, s 550 ... It was argued that a company's annual report, which it had a statutory obligation to create, was a "book kept by a corporation pursuant to a requirement of this Code". His Honour said, at 77:

> "In my opinion, given its context, the word 'kept' in s 550(1) does not simply mean a document which is retained by a corporation. It seems to me that it is an essential part of the quality of a document which is said to come within the scope of s 550, that it should be in the nature of a document or record which is in some way maintained by the corporation in a systematic or periodic fashion.
>
> "It is true, as Mr Bathurst QC put in the course of his argument, that a company would normally keep a copy of its Annual Report and make it available, from time to time, for inspection by people who had a legitimate reason to see it.
>
> "But that consideration is not sufficient to lead me to the view that the Annual Report should be regarded as within the scope of the relevant words of s 550, as it

> does not seem to me to answer to description of a book 'kept' by the corporation in the relevant sense of that word."

'The first of the paragraphs I have just quoted was cited with approval by Drummond J in *The Tubby Trout Pty Ltd v Sailbay Pty Ltd* (1993) 42 FCR 595 at 600. His Honour had to rule as to the admissibility of a letter received by a corporate respondent in that case from the credit manager of a company that was providing supplies to a restaurant, confirming that it was opening a separate account for the restaurant, and that that respondent would be responsible for that account until a separate licence was granted for the restaurant by a licensing authority. It was argued that the company was obliged by the Corporations Law to keep that letter as a written financial record that correctly recorded and explained its transactions and financial position. Drummond J did not reject the submission that the relevant company was obliged to retain the letter pursuant to a provision of the Corporations Law, but held that the letter did not fall within the scope of s 1305 because it was not a document or record that the corporation was required to maintain in a systematic or periodic fashion.

'A similar approach was taken by Olsson J, with whom Mohr and Nyland JJ agreed, in *Sheahan v Northern Australian Land and Agency Co Ltd* (unreported, Supreme Court of South Australia, Full Court, 6 May 1994). At first instance, Perry J had refused to allow two purported contracts of sale to be tendered pursuant to s 1305. After setting out s 1305 and the definition of "books", Olsson J said, at para 50:

> "What is manifestly in contemplation is that class of document which is brought into existence, by or on behalf of a company, and maintained in its custody by virtue of an express obligation to do so imposed by the Corporations Law itself."

'However it is not clear from the judgment whether the appellants in that case identified any statutory provision as the source of an obligation to retain the purported contracts, or argued that "kept" included "retained". His Honour's comments, insofar as they related to the scope of the word "kept", may well have been obiter.

'It seems that a wide interpretation of the word "kept" was adopted for the first time in *Duke Group Ltd v Pilmer* (1994) 63 SASR 364. In that case, Mullighan J declined to follow *Residues Treatment and Trading Co Ltd v Southern Resources Ltd* (supra), and held that the annual report of a company constituted a book "kept" by the company under a requirement of the Companies Code. He did so on the basis that the Code, s 274(1), obliged the company to furnish a member of the company, in specified circumstances, with copies of the last of its annual accounts, directors' reports, and auditor's reports. He reasoned that, since a company could not provide such documents without retaining them, there was an implied requirement to keep them, and that that requirement fell within the scope of s 1305. It seems no such argument was advanced in *Residues Treatment*. As to the reasoning for not following *Residues Treatment*, his Honour said the following at 273:

> "With respect, I disagree. There is no reason, in my view, to attribute such a restrictive meaning to the word 'kept'. In its ordinary meaning it includes the narrow meaning given to it by Perry J but it includes the well understood wider meanings of 'keep' of which 'kept' is the past participle, namely 'to have in stock', 'to have the charge or custody of': *Macquarie Dictionary* 2nd rev; or 'to guard, defend, protect, preserve, save', 'to take care of, to look after': *Shorter English Oxford Dictionary*."

'In *R v Connell* (1996) 14 ACLC 32 at 35, White J (of the Supreme Court of Western Australia) followed Perry J in *Residues Treatment* and Drummond J in *Tubby Trout*, rejecting the interpretation favoured by Mullighan J in *Duke Group*. His comments were obiter, since he concluded that the documents in question were kept by the relevant company on either construction of the word "kept". He had held that s 1305(2) not only deemed a document to which it applied to be a book and to have been kept by a body corporate, but also deemed its keeping to have been under a requirement of the Corporations Law or a previous law corresponding to a provision of the Corporations Law. He said that the narrow construction of "kept" went "a long way towards overcoming any difficulty which might otherwise be thought to exist as a result of the construction of s 1305(2) which I prefer and to avoiding what Mr Connell has called an 'absurd result'." Mr Connell had argued that a wide interpretation of s 1305(2) would lead to the "absurd result that any piece of paper in the possession of a body corporate, whatever its nature, would

... be prima facie evidence of its truth". His Honour had rejected that submission, on the basis that s 1305(2) dealt only with a document that purported to be a book kept by a body corporate. Having reached that conclusion, it is difficult to understand what difficulty a wide interpretation of "kept" could create.

'A very compelling reason for adopting a wide interpretation was advanced by Finkelstein J in *Valoutin v Furst* (1998) 154 ALR 119. After referring to the competing views expressed in *Residues Treatment* and *Duke Group*, his Honour said (at 128–9):

> "In deciding which of these decisions is to be preferred it must be remembered that since the last century the narrow traditional common law view of the admissibility of business records has been the subject of statutory modification to facilitate the admission of those records in almost every common law jurisdiction. This is because the common law rules were recognised as an inhibition to the proper administration of justice in both the civil and criminal courts. Thus there is no warrant for giving a provision such as s 1305 a narrow construction especially when the admissibility of a document under the section is only on a prima facie basis and will often give way to other conflicting evidence. In my view there is no reason why the word 'kept' should be given the restrictive meaning preferred by Perry J. I agree with Mullighan J that the word should be given its ordinary meaning which includes 'to maintain' and 'to retain'."

'In *Caratti v R* (2000) 22 WAR 527 at 546, Malcolm CJ, with whom Kennedy and Anderson JJ agreed, cited those comments with approval. However what Malcolm CJ said was obiter, since he concluded that the relevant documents were admissible on either construction of the word "kept".

'The fact that s 1305 and its predecessors involve a departure from the common law is one factor weighing in favour of a narrow interpretation of "kept". It could also be argued that Parliament intended "kept" in s 1305 to be understood in the same way as "keep" in s 286(1), which imposes the obligation to keep written financial records that correctly record and explain a company's transactions, financial position, and financial performance, and would enable true and fair financial statements to be prepared and audited. However I think that those factors are outweighed by the requirement of the Acts Interpretation Act 1901 (Cth), s 15AA, to prefer a construction that would promote the purpose or object underlying the Act to one that would not. Like Malcolm CJ, I agree with the views expressed by Finkelstein J in *Valoutin*. Further, the wide approach gives the word "kept" its ordinary meaning, as Mullighan J pointed out in *Duke Group*. For these reasons, I consider that s 1305 applies to all books retained in the custody of a corporation under a requirement of the Corporations Act 2001 (Cth) or the Corporations Law and not just to books that are the subject of a requirement that they be maintained in a systematic fashion.' *R v Turner (No 17)* [2002] TASSC 18 at [8]–[16]; BC200201966, per Blow J

KIDNAP

'A composite word made up of two colloquial expressions which together denote child-snatching ... but in common parlance it is used to describe the carrying away of anybody, child or adult.' *People (AG) v Edge* [1943] IR 115 at 146, per Black J

'"Kidnapping" may include any case of a child being taken out of this country by some person against the wishes of the parents, or by one parent against the wishes of the other parent, at any rate where some element of force or deception or secrecy is involved.' *Re P (G E) (an infant)* [1964] 3 All ER 977 at 984, CA, per Pearson LJ; also reported [1965] Ch 568

'Kidnapping is much in the air at the moment; one sees stories about it in the newspapers every day and it is sometimes carried out with dreadful results. But in this court "kidnapping" has a rather different meaning; there has been a series of at least four cases of what is called the kidnapping variety, which really consist of this: that when a child, or children, have a settled home in one jurisdiction—anyhow any foreign jurisdiction —and one of the parents, by fraud or stealth, removes them from this jurisdiction and makes them wards of court, the court will not countenance that procedure and will, if it is satisfied that no harm will come to the children if they are returned to the jurisdiction where they belong, send them back there without further investigating the matter.' *Re A (Infants)* [1970] 3 All ER 184 at 186, CA, per Harman LJ

'It is convenient to take first the question of whether some secreting or concealment of the victim is necessary to constitute the offence of kidnapping. Counsel for the appellant referred to Archbold [37th edn, p 889] which under the

heading "kidnapping" has the sentence: "The stealing and carrying away, a secreting of any person of any age or either sex against the will of such person … is an offence at common law …" It is, however, quite clear that the word "a" in that sentence is a misprint for "or". That this is so is evident because the authority cited is Russell on Crime, where the wording is exactly the same except that the word "or" and not "a" is used. Russell cites East, where the statement is: "The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offence at common law …" We can find no reason in authority or in principle why the crime should not be complete when the person is seized and carried away, or why kidnapping should be regarded, as was urged by counsel, as a continuing offence involving the concealment of the person seized.' *R v Reid* [1972] 2 All ER 1350 at 1351–1352, CA, per cur

'There are many old cases in which consenting minors have been removed from their homes and parents, in the context of subsequent forced or fraudulent marriages, or unlawful sexual intercourse, but these cases all appear to have been dealt with as offences of conspiracy against public morals or, in the case of females, of abduction or conspiracies to abduct. The present case has none of these features. There are also older authorities which deal with offences of "kidnapping", either as a common law misdemeanour or as crimes against old statutes, no longer in force. These appear to present an element of removing a person from this country. That is why they are "kidnapping" cases, and "kidnapping" is used in these cases in the sense in which Robert Louis Stevenson used the word in the title to his book. It is worthy of note that in Blackstone's *Commentaries*, under the rubric "Kidnapping", the only cases which are dealt with are cases of taking young people out of the country. Similarly, the offence of "kidnapping" is mentioned in East's *Pleas of the Crown* where the cases are cases of taking people out of the country. The kidnapping cases to which I have referred also present elements of force or fraud and, as far as I have been able to discover, in the absence of one or other of those elements the case of a consenting victim does not seem to have been adjudicated on by the English courts. The vital point in the present case is that [the] count does not allege that the named girl was taken or secreted by force or fraud or against her will. The only modern authority which seems to bear on the question I had to decide is a decision of the Supreme Court of Ireland, *People (A-G) v Edge* [supra], in which that court by a majority of four to one held that the offence of kidnapping a 141/2-year-old boy by—I quote—"unlawfully carrying him away and secreting him against the will of his guardian" was not an offence at common law.' *R v Hale* [1974] 1 All ER 1107 at 1108–1109, per Lawson J

'There is surprisingly little authority in the books about the crime of kidnapping. The authority which has been referred to in the fairly recent past comes from the definition of kidnapping which is set out in East's *Pleas of the Crown* [1803 edn, pp 429–430]. There the learned author said: "The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offence at common law punishable by fine, imprisonment and pillory." … In our judgment … all that has to be proved is the false imprisonment, the deprivation of liberty coupled with a carrying away from the place where the victim wants to be. It may be that in some circumstances the movement would not be sufficient in the estimation of the jury to amount to carrying away. Every case has to be considered on its own facts.' *R v Wellard* [1978] 3 All ER 161 at 162–163, CA, per cur

'From [a] wide body of authority six matters relating to the offence of kidnapping clearly emerge. First, the nature of the offence is an attack on, and infringement of, the personal liberty of an individual. Second, the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another, (2) by force or by fraud, (3) without the consent of the person so taken or carried away and (4) without lawful excuse. Third, until the comparatively recent abolition by statute of the division of criminal offences into the two categories of felonies and misdemeanours (see s 1 of the Criminal Law Act 1967), the offence of kidnapping was categorised by the common law as a misdemeanour only. Fourth, despite that, kidnapping was always regarded, by reason of its nature, as a grave and (to use the language of an earlier age) heinous offence. Fifth, in earlier days the offence contained a further ingredient, namely that the taking or carrying away should be from a place within the jurisdiction to another place outside it; this further ingredient has, however, long been obsolete and forms no necessary part of the offence today. Sixth, the offence was in former days described not merely as taking or carrying away a person but further or alternatively as secreting him; this element of secretion has, however, also become obsolete, so that, although it may be present in a particular case, it adds nothing to the basic ingredient of taking or carrying away.' *R v D* [1984] 2 All ER 449 at 453, HL, per Lord Brandon of Oakbrook

Canada 'The Criminal Code gives no definition of the word "kidnap". The Dictionary of English Law—Earl Jowitt, defines it thus: "Kidnapping (Dut *kind*, a child, *nap*, to steal), the forceable abduction or stealing away of a person, whether man, woman, or child, from his own country, and sending him into another." … It has been held in Canada that kidnapping does not necessarily mean sending or taking the person stolen out of the country: *Cornwall v The Queen* [(1872) 33 UCQB 106 at 117]. The actus reus [of the offence of kidnapping] includes "intent to cause him (or her) to be secretly confined within Canada against his (or her) will".' *R v Leech* (1972) 10 CCC (2d) 149 at 154–155, Alta, per MacDonald J

KIN

See **NEXT OF KIN**

KIND

'To identify the "kind" to which a particular article belongs, you must ascertain first what is the common characteristic which turns a collection of individual articles into a "kind".' *Customs & Excise Comrs v Mechanical Services (Trailer Engineers) Ltd* [1979] 1 All ER 501 at 511, CA, per Megaw LJ

Of that kind

Australia [Whether the goods and services referred to in the Trade Practices Act 1974 (Cth) s 65A(1)(a)(vi) as 'goods or services of that kind' mean goods or services of the kind the subject of the publication referred to in s 65A(1)(a)(i) and (ii), or whether they mean only goods or services of the same kind as the 'relevant goods or services' mentioned in s 65A(1)(a)(v). Section 65(A1) provides that nothing in section 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than:

(a) a publication of matter in connection with:

(i) the supply or possible supply of goods or services;

(ii) the sale or grant, or possible sale or grant, of interests in land;

(iii) the promotion by any means of the supply or use of goods or services; or

(iv) the promotion by any means of the sale or grant of interests in land;

where:

(v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or

(vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:

(A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or

(B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or

(b) a publication of an advertisement.]

'[1] Section 52(1) of the Trade Practices Act 1974 (Cth) (the TPA) provides:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Actions brought under the section alleging misleading or deceptive news media stories in the late 1970s and early 1980s led to the creation, in 1984, of a statutory exemption for "prescribed information providers". The exemption was created by the enactment of s 65A. An identical provision limiting the scope of the prohibition on misleading or deceptive conduct in relation to financial services is to be found in the Australian Securities and Investments Commission Act 2001 (Cth). Similar provisions appear in the Fair Trading Acts of the various states and territories.

'[2] The present appeal concerns an exception to the exemption. The exception relates to the publication of matter pursuant to a contract, arrangement or understanding between the party publishing the matter and a supplier of goods or services. The proceedings which have led to this appeal arise out of two episodes of the *Today*

Tonight program broadcast by the respondents in October 2003 and January 2004. Each respondent is a licensed broadcaster, a member of the Channel Seven network, and a subsidiary of Seven Network Ltd.

...

'[9] For the reasons that follow, the appeal should be allowed. The exemption conferred by s 65A does not apply to situations in which a media outlet, pursuant to an arrangement with a supplier of goods or services, publishes and, by adoption or otherwise, makes representations of a misleading or deceptive character in relation to goods or services of that kind. That is the present case.

...

'[28] The next two questions are the primary constructional questions upon which this appeal turns:

(iv) Do the goods or services referred to in s 65A(1)(a)(vi) as "goods or services of that kind" mean goods or services of the kind the subject of the publication referred to in s 65A(1)(a)(i) and (iii)? or

(v) Do they mean only goods or services of the same kind as the "relevant goods or services" mentioned in s 65A(1)(a)(v)?

The first construction, proposed in question (iv), yields a wider exception to the exemption than the second, proposed in question (v). The first was that adopted by the primary judge. The second was that adopted by the Full Court.

'[29] If the first construction be correct, then a prescribed information provider is not protected by s 65A when publishing matter in connection with the supply of goods or services of any kind where the publication is made on behalf of, or pursuant to a contract, arrangement or understanding with, a person who supplies goods or services of that kind.

'[30] If the second construction be correct, the prescribed information provider will be protected in such a case unless the goods or services are "relevant goods or services", that is to say goods or services of a kind supplied by that prescribed information provider or a related body corporate.

...

'[77] Section 65A(1) begins by providing that nothing in certain specified sections of the Act "applies to a prescribed publication of matter by a prescribed information provider, other than" the several kinds of publication identified in paras (a) and (b) of the subsection. The immediate question in the case was whether the publication in issue was one of those excepted kinds of publication. In particular, was there "a publication of matter in connection with ... the supply or possible supply ... [or] the promotion ... of the supply ... of ... services" where "the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with ... a person who supplies ... services of that kind"?

'[78] When the question for consideration is identified in that way, there is no ambiguity in the applicable provisions of s 65A(1). The contract arrangement or understanding must be with a person who supplies services of the kind that are the subject of the publication. The expression "services of that kind" points back to the services which are the subject of the publication.

'[79] Section 65A(1) is drafted as a single sentence of nearly 200 words. But that sentence is divided and subdivided into paragraphs and subparagraphs which, for the most part, are to operate disjunctively. When account is taken of those disjunctions, s 65A(1) can have more than a dozen distinct operations, even if no distinction is drawn between the supply or possible supply of goods and the supply or possible supply of services.

'[80] When construing s 65A(1) account must be taken of these disjunctive operations of the provision. Ordinarily, the attribution intended by the demonstrative adjective "that" is determined by proximity. But where, as here, there are distinct operations of the provision, the relevant proximity is identified by consideration of so much of the subsection as is relevant to the case at hand. It is not identified by treating the sub-section as a single sentence in which "goods or services of that kind" always refers back to the goods or services which were identified in the immediately preceding paragraph of the subsection

'[81] In this case, the words "of that kind", where they appear in s 65A(1)(a)(vi)(A) (a person who supplies goods or services *of that kind*) fell to be applied in a case in which it was alleged that there was a publication of matter in connection with "the supply or possible supply [or the promotion of the supply] of goods or services". Read in that way there is no ambiguity or difficulty in understanding the "goods or services of that kind" as referring back to the goods or services in connection with the supply, possible supply, or promotion of which there was a publication of matter.' *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* [2009] HCA 19, (2009) 255 ALR 1 at [1]–[2], [9], [28]–[30], per French CJ and Kiefel J, and at [77]–[81], per Hayne J

KINDRED

[By the Marriage Act 1949, s 1 (as now amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, s 1(4), (8), Sch 1, para 2, the Civil Partnership Act 2004, s 261(1), Sch 27, para 13, the Gender Recognition Act 2004, s 11, Sch 4, Pt 1, paras 1, 2, and the Marriage Act 1949 (Remedial) Order 2007, SI 2007/438, art 2), marriages between certain degrees of kindred and affinity are prohibited. The prohibited degrees of relationship are set out in Sch 1 to that Act (as substituted by the Civil Partnership Act 2004, s 261(1), Sch 27, para 17 and amended by the Marriage Act 1949 (Remedial) Order 2007, SI 2007/438, art 3.]

KING'S ENEMIES

See **ADHERENT**

KNACKER

The expression 'knacker' means a person whose trade or business it is to kill any cattle not killed for the purpose of the flesh being used as butcher's meat, and the expression 'knacker's yard' means any building or place used for the purpose, or partly for the purpose, of such trade or business, and the expression 'cattle' includes any horse, ass, mule, bull, sheep, goat, or pig. (Protection of Animals Act 1911, s 15(e))

KNACKER'S YARD

In this Part of this Act [Part II: Slaughter of Animals] ... 'knacker's yard' means any building, premises or place used in connection with the business of killing animals whose flesh is not intended for sale for human consumption. (Slaughterhouses Act 1974, s 45)

'Knacker's yard' means any premises used in connection with the business of slaughtering, flaying or cutting up animals the flesh of which is not intended for human consumption. (Food Safety Act 1990, s 53(1))

KNEW

[The Second Council Directive (EEC) 84/5 on compulsory motor insurance, art 1(4) makes provision regarding unidentified and uninsured vehicles, but exempts the Motor Insurers Bureau from liability in respect of an injured passenger who voluntarily entered the vehicle which caused the damage or injury, if it can be proved that he knew it was uninsured. '[12] ... Thus, member states may exclude compensation for damage or injury caused by the driver of an uninsured vehicle if the person who suffered damage or injury "voluntarily" entered the vehicle and "knew" it was uninsured. It should be noted that, unlike the corresponding exception in the MIB agreement ("knew or ought to have known"), the exception permitted by the directive uses the word "knew" without any adornment. It is this difference in language which gives rise to the issues arising on this appeal.

'[13] What is meant by "knew" in the context of the directive? The interpretation of the directive is a matter governed by community law. If the meaning of "knew" in art 1 is doubtful, and it is necessary to resolve the doubt in order to decide this appeal, then a reference to the Court of Justice of the European Communities must be made. Rightly so, because it is important that the provisions of this directive are applied uniformly throughout the community. So I turn to consider what "knew" means in the directive and whether there is any relevant ambiguity.

'[14] The context is an exception to a general rule. The Court of Justice has stressed repeatedly that exceptions are to be construed strictly. Here, a strict and narrow interpretation of what constitutes knowledge for the purpose of art 1 is reinforced by the subject matter. The subject matter is compensation for damage to property or personal injuries caused by vehicles. The general rule is that victims of accidents should have the benefit of protection up to specified minimum amounts, whether or not the vehicle which caused the damage was insured. The exception, therefore, permits a member state, contrary to the general rule, to make no provision for compensation for a person who has suffered personal injury or damage to property. Proportionality requires that a high degree of personal fault must exist before it would be right for an injured passenger to be deprived of compensation. A narrow approach is further supported by the other prescribed limitation on the permissible ambit of any exclusion: the person claiming compensation must have entered the vehicle voluntarily. The need for the passenger to have entered the vehicle voluntarily serves to confirm that the exception is

aimed at persons who were consciously colluding in the use of an uninsured vehicle. And it can be noted that the directive emphasises the exceptional nature of the exclusion of compensation by placing the burden of proving knowledge on the party who seeks to invoke the exception, namely, the institution responsible for paying compensation.

'[15] This, then, is the context in which "knew" is used in this directive. In this context, knowledge by a passenger that a driver is uninsured means primarily possession of information by the passenger from which the passenger drew the conclusion that the driver was uninsured. Most obviously and simply, this occurs where the driver told the passenger that he had no insurance cover. Clearly, information from which a passenger drew the conclusion that the driver was uninsured may be obtained in many other ways. Another instance would be when the passenger was aware, from his family or other connections with the driver, that the driver had not passed his driving test ("if he'd taken the test, I would have known"). Knowledge of this character is often labelled actual knowledge, thereby distinguishing other types of case where a person, although lacking actual knowledge, is nevertheless treated by the law as having knowledge of the relevant information.

'[16] There is one category of case which is so close to actual knowledge that the law generally treats a person as having knowledge. It is the type of case where, as applied to the present context, a passenger had information from which he drew the conclusion that the driver might well not be insured but deliberately refrained from asking questions lest his suspicions should be confirmed. He wanted not to know ("I will not ask, because I would rather not know"). The law generally treats this state of mind as having the like consequences as would follow if the person, in my example the passenger, had acted honestly rather than disingenuously. He is treated as though he had received the information which he deliberately sought to avoid. In the context of the directive that makes good sense. Such a passenger as much colludes in the use of an uninsured vehicle as a passenger who actually knows that the vehicle is uninsured. The principle of equal treatment requires that these two persons shall be treated alike. The directive is to be construed accordingly.

'[17] Thus far I see no difficulty. I consider that it is acte clair that these two categories of case fall within the scope of the exception permitted by the directive. Conversely, I am in no doubt that "knew" in the directive does not include what can be described broadly as carelessness or "negligence". Typically this would cover the case where a passenger gave no thought to the question of insurance, even though an ordinary prudent passenger, in his position and with his knowledge, would have made inquiries. He "ought" to have made inquiries, judged by the standard of the ordinary prudent passenger. A passenger who was careless in this way cannot be treated as though he knew of the absence of insurance. As Lord Denning MR said in *Cia Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthene* [1976] 3 All ER 243 at 251, [1977] QB 49 at 68, negligence in not knowing the truth is not equivalent to knowledge of it. A passenger who was careless in not knowing did not collude in the use of an uninsured vehicle, and he is not to be treated as though he did. To decide otherwise would be to give a wide, rather than a narrow, interpretation to the exception permitted by the directive. This also seems to me to be acte clair.' *White v White* [2001] UKHL 9 at [12]–[17], [2001] 2 All ER 43 at 47–49, HL, per Lord Nicholls of Birkenhead

Knew or had reason to believe

[The liability of insurers to satisfy judgments against uninsured drivers is excluded under the Road Traffic Act 1988, s 151(4) in the case of a person who 'knew or had reason to believe that the vehicle had been stolen or unlawfully taken'.] '[9] Section 151 of the Road Traffic Act 1988 requires insurers to satisfy judgments obtained against drivers arising out of their use of a motor vehicle where the judgment relates to a liability which is required to be covered by a policy of insurance under s 145 of the 1988 Act. Section 145 of the 1988 Act requires the driver of a motor vehicle to be covered by a policy of insurance for any liability which may be incurred by the driver in respect of the death of, or bodily injury to, any person, or any damage to property, caused by, or arising out of, the use of the vehicle on a road or other public place. It follows that Iain's liability for Andrew's injuries was a liability which was required to be covered by a policy of insurance.

'[10] Subject to an important exception, s 151 applies when the vehicle is being driven by uninsured drivers as well as insured ones. Insured drivers are covered by s 151(2)(a), which requires insurers to satisfy judgments

where the liability is "a liability covered by the terms of the policy ... and the judgment is obtained against any person who is insured by the policy ..." And uninsured drivers are covered by s 151(2)(b), which requires insurers to satisfy judgments where the liability is "a liability, other than an excluded liability, which would be so covered if the policy insured all persons ... and the judgment is obtained against any person other than the one who is insured by the policy ..." It is common ground that Iain's liability to Andrew was not covered by the terms of the policy, and that Iain was not insured by the policy because he had not attained the age of 25, he did not hold a driving licence, and he had not been authorised by MEL to drive the van. So if the insurers are required to satisfy any judgment obtained by Andrew against Iain, it will have to be a judgment which satisfies the conditions of s 151(2)(b). It is common ground that Iain's liability to Andrew would have been a liability to which s 151(2)(b) related if that liability had not been "an excluded liability". That is the important exception to the generality of s 151. The critical question is whether Iain's liability to Andrew was an excluded liability.

'[11] The manifest purpose of the exception is to relieve insurers from their duty to satisfy judgments obtained against uninsured drivers by their passengers if the passenger knew or had reason to believe that the vehicle had been stolen or unlawfully taken. Thus, s 151(4) provides, so far as is material, as follows:

> "In subsection (2)(b) above 'excluded liability' means a liability in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who–(a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and (b) could not reasonably have been expected to have alighted from the vehicle."

It is accepted, of course, that Andrew was allowing himself to be carried in the van at the relevant time. And it is not suggested that he only became aware of the facts relating to Iain's lack of authority to drive the van after the journey to the garage had started. So the critical question is whether Andrew "knew or had reason to believe that the [van] had been stolen or unlawfully taken". The insurers accept that the burden of proof on that issue rests with them. It is therefore for them to prove, on the balance of probabilities, that Andrew knew or had reason to believe that that was the case.

...

'[16] In my judgment, the word "knew" in s 151(4) does not mean something other than actual knowledge or such knowledge as the law regards as equivalent to it. But there is an alternative to proof that the injured passenger *knew* that the vehicle had been stolen or unlawfully taken. Insurers will avoid liability if they prove that the injured passenger had *reason to believe* that the vehicle had been stolen or unlawfully taken. Whereas the words "knew or ought to have known" in the MIB agreement were intended to be co-extensive with the word "knew" in the directive [Second Motor Insurance Directive (Council Directive (EEC) 84/5 (on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles) (OJ 1984 L8 p 17)], s 151 does not fall to be construed in the light of the directive, so that the words "knew or had reason to believe" in s 151(4) need not be co-extensive with the word "knew" in the directive. To be fair, Mr Braslavsky did not contend for that.

'[17] So if the words "had reason to believe" in s 151(4) have to be construed independently of the word "knew", what do they mean? Mr Braslavsky accepted–in my opinion, rightly–that insurers do not have to prove that the injured passenger actually believed that the vehicle had been stolen or unlawfully taken. What has to be proved is that the injured passenger had the information–or what Mr Adrian Palmer QC for the insurers called "the building blocks"–which would have afforded him good reasons for believing that the vehicle had been stolen or unlawfully taken had he applied his mind to the topic. Shutting one's eyes to the obvious is therefore enough, provided that it would indeed have been obvious to the injured passenger if he had thought about it.' *McMinn v McMinn* [2006] EWHC 827 (QB), [2006] 3 All ER 87 at [9]–[11], [16]–[17], per Keith J

Knew or ought to have known

[Clause 6(1)(e)(ii) of (Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement) 21 December 1998 absolves

the MIB from liability where an injured passenger 'knew or ought to have known' that the vehicle was uninsured, as permitted by the Second Council Directive (EEC) 84/5 on compulsory motor insurance, art 1(4).] '**[20]** Against this background I turn to the interpretation of the phrase "knew or ought to have known" in cl 6(1)(e) of the 1988 MIB agreement. This question of interpretation is governed by English law. "Ought" imports a standard by reference to which conduct is measured. Such is the prevalence of negligence in English law that the phrase immediately prompts the thought that the standard imported by "ought" is the standard of the reasonable person. In cases of professional negligence the standard is that of the reasonably competent and careful professional in the relevant discipline. But this is not necessarily the standard. The meaning of the phrase depends upon its context. Here the context is the directive. The MIB agreement was entered into with the specific intention of giving effect to the directive.

'**[21]** Had the MIB agreement been embodied in legislation, whether primary or secondary, the English court would have been under an obligation to interpret its provisions, as far as possible, in a way which gives effect to the directive (see *Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1990] ECR I-4135). As Lord Oliver of Aylmerton observed in *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] 1 All ER 1134 at 1140, [1990] 1 AC 546 at 559, a purposive construction will be applied to legislation even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use.

'**[22]** The present case does not involve legislation. Despite the contrary argument submitted to your Lordships, I do not see how the *Marleasing* principle, as such, can apply to the interpretation of the MIB agreement. Article 5 of the EC Treaty obliges member states to take all appropriate measures to ensure fulfilment of their obligations arising out of the treaty. The rationale of the *Marleasing* case is that the duty of member states under art 5 is binding on all the authorities of member states, including the courts. The courts must apply national law accordingly, whenever the law was enacted or made. But it is one matter to apply this principle to national law. Whatever form it may take, law is made by authorities of the state. It is quite another matter to apply this principle to contracts made between citizens. The *Marleasing* principle cannot be stretched to the length of requiring contracts to be interpreted in a manner that would impose on one or other of the parties obligations which, the *Marleasing* case apart, the contract did not impose. This is so even in the case of a contract where one of the parties is an emanation of government, here, the Secretary of State. The citizen's obligations are those to which he agreed, as construed in accordance with normal principles of interpretation.

'**[23]** So the *Marleasing* principle must be put on one side. Even so, I consider that the application of conventional principles of interpretation of documents arrives at the same result. The purpose for which the MIB agreement was made furnishes a compelling context. The exception spelled out in cl 6(1)(e)(ii) of the MIB agreement was intended by the parties to carry through the provisions of the directive. The phrase "knew or ought to have known" in the MIB agreement was intended to be co-extensive with the exception permitted by art 1 of the directive. It was intended to bear the same meaning as "knew" in the directive. It should be construed accordingly. It is to be interpreted restrictively. "Ought to have known" is apt to include knowledge which an honest person who enters the vehicle voluntarily would have. It includes the case of a passenger who deliberately refrains from asking questions. It is not apt to include mere carelessness or negligence. A mere failure to act with reasonable prudence is not enough. Hence it does not embrace the present case. Brian White's claim is not excepted from the MIB agreement. On this I respectfully differ from the view of the Court of Appeal (sub nom *Mighell v Reading, Evans v Motor Insurers' Bureau, White v White* [1999] 1 CMLR 1251).' *White v White* [2001] UKHL9 at [20]–[23], [2001] 2 All ER 43 at 49–50, HL, per Lord Nicholls of Birkenhead

KNIFE

Folding pocketknife

[Under the Carrying of Knives etc (Scotland) Act 1993, s 1 it is an offence to carry any article which has a blade or is sharply pointed. A folding pocketknife with a cutting edge which does not exceed 3 inches is exempted.] 'In our opinion a knife which has a blade which can be fixed in the open position by a locking device is not a folding pocketknife within the meaning of section 1(3)... . It is not enough that the knife can be placed in the pocket, or that the blade can be folded to enable it to be placed there. It must be a folding pocketknife. It cannot be described as a knife of that kind if it has a device which is designed, until it has been overcome, to prevent the blade from being folded... . The description which it would be natural to give to a knife of that kind is that it is a lock knife or a locking knife, to distinguish it from a knife whose blade is always and immediately foldable.' *Stewart v Friel* 1995 SCCR 492 at 495, per the Lord Justice-General (Hope)

KNIGHT

Knighthood is a personal dignity conferred for life. It is not of a particular kingdom, like a peerage or a baronetcy, but is a dignity recognised in every part of the Queen's dominions.

An individual of the male sex is now legally entitled to use the prefix 'Sir' and to rank before untitled persons once the Sovereign's intention to confer the honour of knighthood has been officially published. The individual is formally created a knight when the Sovereign or an appointed lieutenant (usually a knight) directs the individual to kneel and strikes the individual's shoulder with a naked sword. A knight can also be created by letters patent. The oath of allegiance must be taken by all knights on their creation. (79 Halsbury's Laws of England (5th Edn) (2020) para 861)

Orders of knighthood

The age of chivalry engendered societies whose membership was restricted to knights. Of these the earliest in England was a society known as the Order of the Garter, founded by Edward III in or about 1348. It is limited to 24 knights in addition to the Sovereign (who is head of the order) and the Prince of Wales, but the Sovereign has the power to create additional royal knights and may appoint foreign Sovereigns as extra knights. Provision was made for the appointment of foreign knights in 1954. Historically the Garter was not normally bestowed on peers, particularly prior to the reign of Edward IV. Knights of the Garter take precedence in England before Privy Councillors and baronets.

Another society of knights in England, the precise origin of which is not clear, is the Order of the Bath. The order was originally civil in nature but was converted into a military order during the reign of George III as a consequence of the Napoleonic War. George III also divided the Order into different grades of companionship. Because of such changes the Order has lost the medieval character preserved by the Garter. The Order of the Bath is now divided into two branches, military and civil.

Other orders of knighthood are:

(1) Knights of St Andrew or the Thistle, founded or revived in Scotland by James II in 1687, and re-established on 31 December 1703;
(2) Knights of St Patrick, founded in Ireland by George III on 5 February 1783, and revived in 1833;
(3) Knights of the Order of the Star of India, founded in 1861, and used to reward service in connection with India;
(4) Knights of St Michael and St George, founded in 1818 to reward service in the Mediterranean, chiefly Maltese and Ionic, but now used to reward all colonial or diplomatic service;
(5) Knights of the Order of the Indian Empire, founded to commemorate the title of Emperor or Empress of India in 1878;
(6) Knights of the Royal Victorian Order, founded in 1896;
(7) Knights of the Order of the British Empire, founded in 1917.

Knights bachelor, or ordinary knights, are those who are merely created knights but belong to no particular Order. (79 Halsbury's Laws of England (5th Edn) (2020) paras 862–863)

KNOCK-FOR-KNOCK

The essence of a 'knock-for-knock' agreement is that, in the event of an accident involving more than one insured vehicle, each insurer carries the risk so far as concerns the damage to the car he has insured, whoever may be legally responsible for causing the damage. It is, however, an arrangement operative only between insurers, and there is no means of enforcing it against the individual insured. Therefore, if an insured, minded perhaps to avoid losing a 'no-claims bonus', pursues on his own a claim for damage to his car, it is no answer that he is entitled to receive or has already received indemnity for the damage from his own insurers. The fact that the claimant has insurance rights against his own insurers is irrelevant so far as the tortfeasor is concerned. Knock-for-knock agreements between insurers have fallen out of favour in recent years and are no longer used. (25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 726; not reproduced in 60 Halsbury's Laws of England (5th Edn) (2023))

'This appeal from a judgment of His Honour Judge Konstam raises an interesting point which, as far as I know, is a matter of first impression, at any rate so far as the Court of Appeal is concerned. The plaintiff, in a running-down action before the county court judge, had in respect of the damage to his own motor-car a claim for the sum of £33 2*s* 8*d*. He was insured on the terms that he himself was his own insurer for the first £5 of the risk, and was paid the balance, £28 2*s* 8*d*, by this insurance company. He then brought this action against the defendant, and no question arises but that the defendant was liable for this damage. The defendant was also insured, and we are informed, as the county court judge was informed, that there was between these two insurance companies what I am informed is known as a "knock-for-knock" agreement. We have not before us, nor had the county court judge before him, the terms of this agreement, but again we are informed that the purpose of this agreement is that each insurance company pays its own assured, without question, that which the assured is entitled to receive under the particular policy and that both of them do their utmost to discourage either of their own assureds from making claims against the other, or, putting it in another way, the insurance companies amongst themselves do not insist upon their assured bringing such action as they may be entitled to bring against the party insured by the other insurance company.' *Morley v Moore* [1936] 2 KB 359 at 361–362, CA, per Sir Boyd Merriman P

[For form of 'knock for knock' agreement and comments thereon, see *Hobbs v Marlow* [1977] 2 All ER 249 at 252 et seq, HL, per Lord Diplock]

KNOW

Australia [Where a person injured by an unidentified motor vehicle sues a nominal defendant under the Motor Car Act 1951, s 47(1) [see now Motor Car Act 1958–1986, s 49(1)(a)] (Vic) the burden of proof lies on him to show that he has complied with the proviso to that section, which stipulates that he must as soon as possible after he 'knew' that the identity of the vehicle could not be established give notice of his intention to make claim.] 'The word "know" is used in the provision in an ordinary sense, without any intention that it should be analysed or refined upon. But of course there are gradations of knowledge or belief upon such a matter. The gradations extend from a slight inclination of opinion to complete assurance. Here it seems to amount to an awareness or consciousness that no reasonable probability exists of ascertaining the identity of the car satisfactorily or with any certainty. Complete assurance is by no means necessary. When the plaintiff has come to think that the identity cannot be established that is enough. If the expression "think" must be refined upon, it may be said to mean that the steady preponderance of his opinion of belief is that it cannot be done.' *Vines v Djordjevitch* [1955] ALR 431 at 435, per cur

Australia 'A claimant "knows" a material fact, within the meaning of s 23A(2)(a)(i) of the Limitation of Actions Act (Vic) [see now s 23A(3)(e)] 1958–1986, when he receives information of the existence of that fact from a person, who, to the knowledge of the claimant, is in a position to have direct knowledge of the fact. Further, the claimant cannot prove ignorance of the material fact by proving his belief that the information is incorrect.' *Loveday v IND* [1980] VR 346 at 352, per Southwell J

Canada 'The verb "know" has a positive connotation requiring a bare awareness, the act of receiving information without more. The act of appreciating, on the other hand, is a second stage in a mental process requiring the analysis of knowledge or experience in one manner or another.' *R v Barnier* [1980] 1 SCR 1124 at 1136–1137, SCC, per Estey J

Canada 'To "know" the nature and quality of an act may mean merely to be aware of the physical act, while to "appreciate" may involve estimation and understanding of the consequences of that act.' *Cooper v R* [1980] 1 SCR 1149 at 1161, SCC, per Dickson J

KNOW-HOW

In [Part 5, Chapter 2: disposals of know-how] 'know-how' means any industrial information or techniques likely to assist in—

(a) manufacturing or processing goods or materials;

(b) working a source of mineral deposits (including searching for, discovering or testing mineral deposits or obtaining access to them); or

(c) carrying out any agricultural, forestry or fishing operations.

(Income Tax (Trading and Other Income) Act 2005, s 583(4))

KNOWING

New Zealand [Local Electoral Act 2001, s 134(1): offence of transmitting a return of electoral expenses, knowing it to be false in one or more material particulars.] '[37] Section 134(1) used the word "knowing". In order to have committed an offence under the section, it was necessary that, when the candidate transmitted the return of electoral expenses, he or she knew that it was false in a material particular.

'[38] In the criminal law generally, it is commonly accepted that there is more than one way in which a person can be said to "know" something.

'[39] First, knowledge can consist of actual knowledge or correct belief. ...

'[40] Secondly, knowledge can be attributed to a defendant where he or she is "wilfully blind". While a precise definition of wilful blindness remains elusive, it seems that in New Zealand, a defendant is wilfully blind if he or she deliberately chooses not to inquire whether something is true because he or she has no real doubt what the answer is going to be, or because he or she wants not to know. In such cases, the law can, in appropriate cases, presume knowledge on the part of the defendant.

...

'[44] Perhaps not surprisingly, there are no cases which have dealt with the meaning of the words "knowing [the return of electoral expenses] to be false" contained in s 134(1) of the Local Electoral Act.

'[45] Mr Jones submitted that the state of knowledge required by s 134(1) is actual knowledge. He referred to s 134(2) of the Act. As I have already noted, it provided that every candidate committed an offence who transmitted a return of electoral expenses that was false in any material particular, unless the candidate proved that he or she had no intention to misstate or conceal the facts, and that he or she took all reasonable steps to ensure that the information was accurate. Mr Jones argued that this provision created an offence of strict liability, because no element of knowledge was required. He contrasted this provision with subs (1), which required knowledge of the falsity. He argued that it followed that actual knowledge of falsity was required under subs (1). He also relied on a judgment of Heath J in *Mortimer v Commissioner of Inland Revenue* [(2002) 20 NZTC 17-797].

'[46] I do not accept Mr Jones' submission ...

...

'[47] Underpinning the doctrine of wilful blindness is the principle that a defendant should not be able to shield himself or herself from criminal liability by deliberately remaining in ignorance. As Cooke P, for himself and for Richardson J, put it in *Millar v Ministry of Transport* [[1986] 1 NZLR 660, CA, at 669] the doctrine of wilful blindness carefully applied, should be "a major safeguard against spurious claims of lack of knowledge".

'[48] In my judgment, the knowledge required by use of the phrase "knowing [the return of electoral expenses] to be false" in s 134(1) of the Act embraced not only actual knowledge, but also wilful blindness in the sense I have discussed. It follows that the Crown had to prove beyond reasonable doubt either that Mr Banks actually knew or correctly believed the return of electoral expenses to be false, or that, having formed the view that the return was likely to be false, he deliberately refrained from making further inquiries because he knew what the answer was going to be, or because he wanted not to know.' *R v Banks [Reasons for verdict]* [2014] NZHC 1244, [2014] 3 NZLR 256 at [37]–[40], [44]–[48], per Wylie J

KNOWINGLY

'"Knowingly" must mean with a design.' *R v Bannen* (1844) 1 Car & Kir 295 at 299, CCR, per Tindal CJ

'Section 5 [of the Companies Act 1900 (repealed; see now the Companies Act 2006, s 579)] ... says this: "An allotment made by a company to an applicant in contravention of the foregoing provisions of this Act shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up".... Under that section not only is the applicant entitled to void his contract, but if he suffers any loss in consequence of it he is entitled to bring his action against the directors or any director of the company who knowingly contravenes or permits or authorises the contravention of any of the foregoing provisions of the Act with respect to allotment.... I think that "knowingly" means with knowledge of the facts upon which the contravention depends. I think it is immaterial

whether the director had knowledge of the law or not. I think he is bound to know what the law is, and the only question is, did he know the facts which made the act complained of a contravention of the statute?' *Burton v Bevan* [1908] 2 Ch 240 at 246–247, per Neville J

[The Children Act 1908, s 17(2) (repealed; *cf* now Sexual Offences Act 1956, s 28 (repealed)) provided that any person having the custody of a girl under the age of sixteen should be guilty of an offence if he 'knowingly' allowed her to consort with a prostitute or person of known immoral character.] 'There is a wide difference between allowing and "knowingly allowing" within the meaning of this enactment. There are many cases upon the meaning of "allowing", "permitting", or "suffering" in other statutes, but they do not give much assistance in this case, because it is clear that the "knowingly allowing" which is contemplated in s 17, sub-s 2 of the Act of 1908, must be such a permission as can be deemed to be causing or encouraging.' *R v Chainey* [1914] 1 KB 137 at 142, per cur

'When one finds put up as a danger signal or a signpost ... the words "If any person knowingly" does certain things, it seems to me that discussions about mens rea are of something less than academic interest. The knowledge on the part of the alleged offender is described prominently as an essential ingredient of the offence.' *Gaumont British Distributors Ltd v Henry* [1939] 2 KB 711 at 716, per Lord Hewart CJ

'The point that is raised is purely a matter of construction of s 4(1) of the Explosive Substances Act 1883, which is in these terms: "Any person who ... knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he ... does not have it in his possession or under his control for a lawful object, shall unless he can shew that he ... had it in his possession or under his control for a lawful object, be guilty of felony...." The question is whether the word "knowingly" means that he must know not only that he has a parcel or a substance in his possession but also that it is an explosive. The words, I repeat, are "knowingly has in his possession any explosive substance". Having given the best consideration that we can to this case, we think that the words must mean that he must know that it is an explosive substance.' *R v Hallam* [1957] 1 All ER 665 at 665, CCA, per cur (Also reported in [1957] 1 QB 569 at 571–572)

[The defendant was stopped at Heathrow Airport on arrival from Amsterdam. He was in possession of two video cassettes which bore the labels of two ordinary films on general release, but which actually contained material whose importation was prohibited, namely indecent photographs of boys under 16. In his defence, he claimed that he had not known that the cassettes had contained indecent photographs of children, and had instead believed them to contain two other films which he thought were prohibited, but were not in fact prohibited. Such a belief, if accepted by the jury as a reasonable possibility, would have required the defendant's acquittal, and the judge directed the jury accordingly. He was convicted and appealed.] '[53] In the present case it is not in dispute that the goods carried by the appellant were prohibited goods. Once the jury had rejected (as they did) the "*Taaffe* defence" [*R v Taaffe* [1984] 1 All ER 747, HL] advanced on behalf of the appellant that he believed he was carrying two prohibited video films but that, in reality, those films were not prohibited, the only issue for the jury to decide was whether the defendant knew that the goods which he was carrying were subject to a prohibition. The judge on a number of occasions correctly directed the jury that this was the issue which they had to decide. He also correctly told the jury that the prosecution had to satisfy them that the defendant "by his behaviour, and the situation which you will find as a matter of fact, that he knew he was bringing in prohibited photographs".

...

'[56] ... The offence created by s 170(2)(b) of the 1979 Act is the offence of being "knowingly concerned in any fraudulent evasion ... of any prohibition ... with respect to the goods". The essence of the offence is being knowingly concerned in the evasion of a prohibition. The jury were fully entitled to find that the behaviour of the appellant satisfied them that he was knowingly concerned in the evasion of a prohibition. His behaviour in buying genuine video films of "Spartacus" and "The Godfather Part 2" in the airport shop at Amsterdam Airport and obtaining receipts for them, leaving the genuine video films in the lavatory at Heathrow, and then producing the receipts which appeared to relate to the two video films containing indecent material, pointed quite clearly to the conclusion that he knew that he was involved in the evasion of a prohibition against importation.

'[57] In many cases a person who, at the request of another and, it may be, in return for a payment, brings into the United Kingdom an article, knowing that he is taking part in the fraudulent evasion of a prohibition against importation, will not know the precise nature of the article which he is carrying. In such a case the task for the prosecution in proving an offence would be virtually impossible if, in addition to having to prove that the article was a prohibited one and that the defendant knew that he was involved in the evasion of a prohibition, it also had to prove that he knew the precise nature of the article. In my opinion the application of the principle stated in *R v Hussain* [[1969] 2 All ER 1117, CA] gives rise to no injustice in a case such as the present one, as it is open to the defendant to seek to rely on the "*Taaffe* defence" if his case is that he believed that he was carrying an article which in reality and contrary to his belief was not prohibited.' *R v Forbes* [2001] UKHL 40, [2001] 4 All ER 97 at [53], [56], [57], per Lord Hutton

Canada [The Insurance Act, RSO 1937, c 256, s 191 (see now Insurance Act, RSO 1980, c 218, s 206) provided that where an applicant for insurance 'knowingly' misrepresented, any claim should be invalid.] 'I do not think that a person making a proposal for insurance can avoid the effect of the section when the proposal is untrue, by saying that while he signed, he was not aware of the contents of the application. I think "knowingly" in the statute is used in the sense that the applicant is in possession of information that what is in fact stated in the application is untrue or does not disclose the truth.' *Sleigh v Stevenson* [1943] 4 DLR 433 at 441, Ont CA, per Kellock JA

Canada [The accused was charged with knowingly selling obscene material without lawful justification or excuse, where the materials had film board approval.] 'It is a general rule of statutory construction that when the term "knowingly" is used in a criminal statute, it applies to all elements of the *actus reus*.' *R v Jorgensen* [1995] 4 SCR 55 at 93, SCC, per Sopinka J

New Zealand 'Due effect must ... be given to the word "knowingly" in s 170 of the Companies Act 1908 [(NZ) (repealed; see now Companies Act 1955 (NZ), s 364(1))], where the proceeding is under the section; but, in my opinion, all that it means is that, before an order can be made, it has to be shown that the member of the company sought to be mulcted knew that the particular debts were being incurred and also had a knowledge generally of the company's affairs, so that, as a reasonable person, he should have known that, at the time when the particular debts were contracted, the company should not have had any reasonable or probable expectation of being able to pay the same as well as all its other debts. That construction places the member in the same position as if he were conducting the company's business as his own private business and had become bankrupt, and that, I think, is what the Legislature intended.' *Re J & E Hurdley & Son Ltd* [1941] NZLR 686 at 734, CA, per Myers CJ; also reported [1941] GLR 260 at 285

KNOWINGLY AND VOLUNTARILY

Australia [In the context of disclosure of documents under Evidence Act 1995 (NSW) s 122(2).] 'The meaning of the words "knowingly and voluntarily" was touched upon by Rolfe J in *Ampolex v Perpetual Trustee Co (Canberra) Pty Ltd* (1996) 40 NSWLR 12 at 22, where his Honour said:

> I assume that the word "voluntarily" is intended to mean something other than "under compulsion of law" which appears in paragraph (c). I think the distinction is that the disclosure was made voluntarily, in the sense that it was not made by way of mistake, it being possible that a disclosure may be made "knowingly" yet by way of mistake, and accordingly, perhaps not voluntarily.'

Australian Securities and Investments Commission v Rich [2004] NSWSC 934 at [3]; BC200406700, per Austin J

KNOWLEDGE

See also **COMMON KNOWLEDGE**

[The Road Traffic Act 1930, s 112(3) (repealed; see now the Road Traffic Act 1988, s 175(2) (as prospectively substituted by the Transport Act 1982, s 24(1) (as amended by the Road Traffic (Consequential Provisions) Act 1988, s 3, Sch 2, para 13)) enacted that any person who issued a certificate of insurance or security, which was 'to his knowledge' false in any material particular committed an offence.]