form contains any maxim for the profession at large, it must be that speed is to be the watchword in having a plaintiff's action heard if further litigation is likely to result from the same occurrence, for it is only by defeating the other party in the race to litigate that the plaintiff can ensure the trial of his own action unmolested by any previous suits.[50]

J. W. PARKER, Case Editor—Third Year Student.

WHEN IS A MOTOR-CAR NOT A MOTOR-CAR?

NEWBERRY v. *SIMMONDS*[1]

SMART v. *ALLAN*[2]

The average car owner in England must feel a little confused as to when he is required to have a licence for his car under the United Kingdom Vehicles (Excise) Act, 1949. S.15(1) of that Act provides:

> If any person uses on a public road any mechanically propelled vehicle for which a licence under this Act is not in force . . . he shall be liable to a penalty.

But just what constitutes a mechanically propelled vehicle? Charles Simmonds claimed his Ford did not fit this description during the time it was unlicensed since at that time its engine was missing, stolen by "persons unknown". This contention, although upheld by the justices at first instance, was nonetheless rejected by a Divisional Court of the Queen's Bench division whose members had no difficulty in deciding that a motor-car without an engine could in certain circumstances be a "mechanically propelled vehicle". On the other hand William Smart, who left an unlicensed Rover by the road-side, had his conviction quashed; Mr. Smart's Rover had been bought for scrap and another Divisional Court held that where, as here, there was no reasonable prospect of a motor-car ever being made mobile again, the stage had been reached when the car had ceased to be a "mechanically propelled vehicle".

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[50] It should be noted in passing that in *Isaacs* v. *The Ocean Accident & Guarantee Corporation Ltd. and Winslett* (1958 S.R. 63) it was held by Street, C.J. and Roper, C.J. in Eq. (Owen, J. dissenting) that where an action is brought by A against B and this action is settled by consent, the filed terms containing one clause to the effect that the consent verdict is to be given without admission of liability on the part of B, a later action brought by B against A is not estopped by reason of the earlier verdict in A's favour. It was also held that if B's case, when sued by A, is conducted by his authorised insurer and other requirements of s.18 of the Motor Vehicles (Third Party Insurance) Act, 1942-51 are met, s.18(3) would operate to prevent such a verdict against B from prejudicing him in any other claim or proceedings arising out of the same occurrence. Section 18 of this Act empowers the authorised insurer who issued a third party policy—

(a) to undertake the settlement of any claim against any person in respect of a liability against which he is insured under the third party policy;
(b) to take over the conduct, on behalf of the insured, of any proceedings taken to enforce any such claim or for the settlement of any question arising with reference thereto; and
(c) to defend or conduct such proceedings in the name and on behalf of the insured.

Subs. 3 of s.18 provides—

> Nothing said or done by or on behalf of the authorised insurer in connection with the settlement of any such claim or the defence or conduct of any such proceedings shall be regarded as an admission of liability in respect of or shall in any way prejudice any other claim, action or proceedings arising out of the same occurrence.

[1] (1961) 2 W.L.R. 675.
[2] (1962) 3 W.L.R. 1326.

In coming to the decisions in *Newberry* v. *Simmonds* and in *Smart's Case* the Court necessarily embarked on a discussion of the definition of the phrase "mechanically propelled vehicle". These cases were thus put into that heterogeneous group in which courts have had to consider whether a particular fact situation comes within a more general concept when it is clear that the particular fact situation falls close to the border line of what is usually described by that general concept. Thus, English courts have had to decide whether or not a camel is a "wild animal"[3] or whether a flying-boat falls within the description "ship".[4]

Professor Herbert Hart puts it like this:

> A legal rule forbids you to take a vehicle into a public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about aeroplanes? Are these . . . to be called "vehicles" for the purpose of the rule or not?[5]

Hart's point is that concepts such as "vehicle" have a central "core" of meaning and an area of fringe meaning, so that when it becomes necessary to classify an object as a vehicle or not a vehicle, if the object falls clearly within the central core of meaning or totally outside the whole concept, there is no difficulty. Trouble arises only when the particular object falls within the fringe area. In this situation the judge or "classifier must make a decision which is not dictated to him, for the facts and phenomena to which we fit our words and apply our rules are as it were *dumb*. The toy automobile cannot speak up and say, 'I am a vehicle for the purpose of this legal rule,'. . . . Fact situations do not await us neatly labelled, creased, and folded, nor is their legal classification written on them to be simply read off by the Judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision".[6]

In these circumstances the judge may do one of two things; he may exercise a "creative choice" between alternatives[7] in the light of social values or he may be blind or pretend to be blind to the fact that the general rule with which he is working is capable of many interpretations, and take "the meaning that the word most obviously suggests in its ordinary non-legal contexts to ordinary men, or one which the word has been given in some other legal contexts".[8]

If the judge adopts the second of these alternatives he commits the sin of what is often called "formalism"[9] although this is an unfortunate misnomer. In any event a choice so made is "blind" and, while the judge cannot be said to have failed to exercise his legislative function, he has clearly exercised it in an unseeing fashion. He should instead appreciate the problem with which he is involved and reach a decision in the light of social values. Hart is quick to point out, however, that very often a judge who appears to act "blindly" does consider and give effect to social values although he does so unconsciously.

Professor Fuller takes issue with Professor Hart upon his notion of the central "core" of meaning which a concept such as "vehicle" is supposed to

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[3] *McQuaker* v. *Goddard* (1940) 1 K.B. 687—held it was not.
[4] *Polpen Shipping Co. Ltd.* v. *Commercial Union Assurance Co. Ltd.* (1943) K.B. 161—held no.
[5] H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1957-8) 71 *Harvard L. R.* 593 at 607.
[6] *Ibid.*
[7] *Id.* at 612.
[8] *Id.* at 611.
[9] *Id.* at 610.

have.[10] According to Fuller there is no essential difference between a case which falls within the "fringe" or "penumbra" and a case within the central "core". For this distinction between "penumbra" and "core" depends upon the "assumption that problems of interpretation typically turn on the meaning of individual words. Even in the case of statutes we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text. Surely a paragraph does not have a 'standard instance' that remains constant whatever the context in which it appears. If a statute seems to have a kind of 'core meaning' that we can apply without a too precise enquiry into its exact purpose, this is because we can see that, however one might formulate the precise object of the statute, *this* case would still come within it".[11]

Fuller points out that even in a situation that depends upon the interpretation of a single word, the notion of a settled core of meaning might prove unreliable. To take the case posed by Hart of a rule forbidding vehicles in public parks, on Hart's analysis an automobile is always a "vehicle". Yet suppose local patriots take a Second World War truck (in perfect working order) into the park to mount it on a pedestal. Can they be said to have violated the rule? Would any court hold that they had?[12]

Again, suppose a law is passed forbidding persons "sleeping on railway stations". The weary traveller who dozes while waiting for a late train may well be discharged by a magistrate, while a tramp who arrives with his bedroll might be arrested before he ever falls asleep and still be convicted.[13]

Fuller then suggests that it is for the court in every case to determine the type of behaviour the rule has been created to regulate and then decide on the facts whether this rule has been breached. Thus the theory of words with a central core of meaning gives place to the theory of legal rules and even whole statutes brought into being to regulate, control or enforce some form of behaviour. It is in interpreting the particular facts before it and in deciding whether they fall within the class of behaviour at which a particular legal rule is aimed, that the court exercises its legal function in every case. In many cases this function may be almost automatic as where the behaviour in question is precisely that which the rule contemplates; in others, where the behaviour more or less resembles that at which the rule is aimed, the judge's legislative task is more difficult, but it is still in substance the same task.[14]

Whether Professor Hart's or Professor Fuller's view be adopted it is clear that, in the fact situations of both *Newberry* v. *Simmonds* and *Smart* v. *Allan*, to reach a satisfactory result or any result at all the presiding judges had to exercise some positive legislative function. A motor-car without an engine is not within the settled core of meaning of the phrase "mechanically propelled vehicle", to use Hart's terms; nor is it abundantly clear in Fuller's terms that this was the sort of thing the legislature had in mind when it enacted the statute. Whether a motor-car in the state of dilapidation of Mr. Smart's Rover is a "mechanically propelled vehicle" is also a question which on the surface may be equally well answered in the affirmative or the negative.

In both cases the members of the Divisional Courts were quick to see that derivation of a definition of the phrase "mechanically propelled vehicle" in a logical fashion was impossible. Thus in *Newberry* v. *Simmonds* it was pointed out that on one view a literal reading of the phrase means that it is to apply

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[10] Lon L. Fuller, "Positivism and Fidelity to Law. A Reply to Professor Hart" (1957-8) *Harvard L.R.* 630 at 661 *et seq.*
[11] *Id.* at 662-3.
[12] *Id.* at 663.
[13] *Id.* at 664.
[14] *Id.* at 665.

only to vehicles actually in motion, yet clearly, the court said, it must be taken to apply also to stationary vehicles.[15] Again, in *Smart* v. *Allan* the prosecution, elaborating on an argument put forward in *Simmonds' Case*, submitted that the expression "mechanically propelled vehicle" was a definition "by classification" so that once an object was registered as a mechanically propelled vehicle it remained one until it was physically destroyed.[16] Lord Parker, C.J. in *Smart's Case* agreed that, "provided one assumes" that the expression is one "denoting classification", it is logical to extend its meaning to vehicles which have become scrap but have not yet been physically destroyed. He was not prepared, however, to make this assumption.[17]

Thus the Courts dismissed two possible meanings of the phrase "mechanically propelled vehicle"; and the rejection of just one such meaning on a ground other than strict logic is sufficient to render pointless any attempt to deduce the content of the phrase in a strictly formal fashion.

Nevertheless the Divisional Court in *Simmonds' Case* was able to come to the conclusion that "a motor-car does not cease to be a mechanically propelled vehicle upon the mere removal of an engine if the evidence admits of the possibility that the engine may shortly be replaced and the motive power restored".[18]

This statement supports Professor Hart's theory in a striking fashion. The Court clearly took the view that a motor-car was ordinarily a "mechanically propelled vehicle" and then considered whether the removal of the engine was sufficient to take the object in question out of this category. And in reaching its decision the Court would be and obviously was exercising a legislative function.

Much of the judgment in *Simmonds' Case* is concerned with the fact that to the ordinary passer-by (or perhaps to the ordinary police constable) the object in question was "an ordinary motor-car".[19] Bearing in mind that the statute concerned was a licensing statute, it is easy to imagine the Court unconsciously taking the view that, as the aim of a licensing statute is to be as comprehensive as possible, this Act ought reasonably to be thought to include vehicles which are left upon the streets and seem to the casual observer no different from other motor-cars. Any other decision would leave it open for an other defendant to say in a future case: "But my car had no engine in it", and thus escape liability. The Court may well have been thinking: "The legislature cannot have intended that any Tom, Dick or Harry should be able to clutter up the streets with unlicensed vehicles and escape liability by merely removing the engine".

But this interpretation of the decision would also fall four-square within Fuller's approach; for here is a classic example of the Court saying to itself: "What has the legislature aimed at implementing by this rule?" The answer would seem to be: "To compel all owners of vehicles which use the road to have a licence". A motor-car parked at the road side, in all other respects normal but lacking, for the time being, an engine, would surely still be the sort of vehicle the legislature had in mind.

On the other hand when, as in *Smart's Case*, the vehicle is so clearly in such an unroadworthy condition that it can no longer be used as a motor vehicle, the Court, on Hart's view, in exercising its legislative function would be determining whether such a state of dilapidation is sufficient to take the motor-car out of the category of "mechanically propelled vehicle". And the Court in this case was able to conclude "as a matter of commonsense that some

[15] (1961) 2 W.L.R. 675 at 678. See also *Floyd* v. *Bush* (1953) 1 A.E.R. 265.
[16] (1962) 3 W.L.R. 1325 at 1330.
[17] *Ibid.*
[18] (1961) 2 W.L.R. 675 at 678.
[19] *Ibid.*

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

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

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

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

N. J. MOSES, B.A., Case Editor — Fourth Year Student.

STATEMENTS MADE OUT OF COURT ADMITTED AS EVIDENCE

NOMINAL DEFENDANT v. *CLEMENTS*

I. *Introduction*

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

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