

**SYMPOSIUM TO MARK THE 50TH ANNIVERSARY OF THE
PUBLICATION OF *PROVINCE AND FUNCTION OF LAW* BY
PROFESSOR JULIUS STONE**

THE LEGACY OF JULIUS STONE

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I. JULIUS STONE: CITIZEN OF THE WORLD

I have to begin this published version of my tribute to Julius Stone with the same apology with which I began my earlier oral version. On both occasions I had hoped to end by invoking Stone's own favourite rabbinical quotation: "It is not for thee to finish the task; neither art thou free to desist from it."¹ But on both occasions it has turned out that what was to have come at the end by way of peroration must come at the beginning by way of apology. It was not for me to finish this paper; neither was I free to desist from it.

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1 Rabbi Tarphon, *Tractate Aboth* (c 100). See for example J Stone, *Legal Controls of International Conflict*, Maitland Publications (1954) p xi; J Stone, *Aggression and World Order*, Maitland Publications (1958) p 183.

Julius Stone was a citizen of the world. For over fifty years he maintained a stream of intellectually challenging and uncompromising contributions both to the scholarly superstructure of international law as an academic discipline, and to the seemingly endless subtleties and agonies of international politics - in which the academic discipline finds both its empirical material and its larger human purpose. Particularly in his great book *Legal Controls of International Conflict* in 1954,² in *Aggression and World Order* in 1958³, and in the essays collected in the anthology *Of Law and Nations* in 1974,⁴ he adopted a consistent posture of tough-minded sceptical guardedness against facile institutional or verbal solutions to intractable international problems, yet also a consistent posture of patient and optimistic commitment to the real, if slow, progress towards peace and justice of which he believed humanity is capable. In his ABC Boyer Lectures in 1960,⁵ amid the continuing tensions of the Cold War, he first suggested the installation of a hot line between Moscow and Washington - as a last opportunity for personal contact between the two leaders of the superpowers to avert an impending disaster; or, as Stone sombrely put it, as an opportunity for what might be "the last summit conference of all".⁶ The suggestion was implemented the following year; it was subsequently used on at least one occasion to avoid a potential crisis.

In the early years of intervention by American and Australian governments in the Vietnam conflict, Stone was a strong supporter of the policies which those governments hoped to pursue. But by late 1967 he had changed his mind - or, at least, had become convinced that the situation had worsened so catastrophically that the harm now being done by American intervention outweighed any countervailing benefit that could still be realistically hoped for. Characteristically, having reached that view, he immediately spelled it out in a personal letter to Lyndon Johnson. Within three months of that letter, Johnson announced that he would not seek re-election for a second term as President, but instead would devote all his remaining time in office to his efforts to end the Vietnam war.

Stone always believed that it was his letter that led Johnson to change his mind; and I like to think that he was right - because, if it was true that Stone was the one who changed Lyndon Johnson's assessment, I like to think that I was the one who changed Julius Stone's assessment, in our long discussions throughout 1967.

2 Note 1 *supra*.

3 *Id*, *Aggression and World Order*, Maitland Publications (1958).

4 *Id*, *Of Law and Nations*, Maitland Publications (1974).

5 *Law and Policy in the Quest for Survival* (November-December 1960), later published as *Quest for Survival: The Role of Law and Foreign Policy*, Harvard University Press (1961).

6 *Ibid* pp 102-03.

II. JULIUS STONE: SCHOLAR AND TEACHER

This, then, was a man who could change the history of the world. But always he was wise enough, and human enough, to know that his most important contributions lay elsewhere - above all with his beloved family, but also with those of us who were fortunate enough to work with him together as a kind of extended family, and beyond that - in a wider extended family again - with the generations of students whose view of the world was enriched by his vast learning and his deep human wisdom.

It is of Stone's influence on that wider family of students that I mainly wish to speak. But that influence was so vast - extending so widely across doctrinal and temporal and oceanic boundaries - that it is necessary to be selective.

Before he arrived at the University of Sydney in 1942, Stone had taught in the United States (at Harvard Law School) and in New Zealand (at the University of Auckland). His retirement from the University of Sydney at the end of 1972 - after thirty years as that University's Challis Professor of Jurisprudence and International Law - came early in the formative years of what was then the new School of Law at the University of New South Wales. Hal Wootten was the School's foundation Dean; I had joined the School in its first year of teaching, and Don Harding in its second year. All three of us had reason to look back with gratitude and affection on the deep intellectual and personal influence that Julius Stone had had on our lives. Together we proposed to the then Vice-Chancellor, Professor Rupert Myers, that the University should invite Professor Stone in his retirement to join the new Faculty as a Visiting Professor. It was typical of Rupert Myers that he came up with a better proposal than the one we had devised. Stone first took up the invitation in 1974, and thereafter year by year he continued to teach in the UNSW Law School until within three weeks of his death in 1985.

If that period at the University of New South Wales can be seen as the autumn of Stone's career, it was a singularly warm and fruitful autumn. His prodigious output of scholarly writing continued steadily throughout that time. (His last book, *Precedent and Law*, as ingenious and provocative as ever, was published posthumously in 1985.⁷) For a new generation of students in that final period of almost twelve years, and equally for his Faculty colleagues, mostly of a much younger generation than his own, Stone was like a much beloved intellectual father, whose depth of learning and experience and wise deliberative advice were always generously available. His years at the University of Sydney had sometimes been turbulent, marred by those jealousies and animosities with which, within or between so many academic departments, the idea of the University as a 'community of scholars' has so often had to contend. I like to think of his years at the University of New South Wales as an escape from that turbulence - as a time in which he was allowed to grow mellow, surrounded by the admiration and affection of his younger colleagues.

7 J Stone, *Precedent and Law*, Butterworths (1985).

Nevertheless, it is of his influence as a teacher in those earlier years at the University of Sydney that I mainly wish to speak. Moreover, while he taught in those years both in Public International Law (in the pre-final year of the LLB program), and in Jurisprudence (in the final year of the program), I want to focus on the second of these areas - on the impact of that final-year subject, Jurisprudence, as taught by Julius Stone.

Throughout those thirty years, Jurisprudence was a year-long compulsory subject in the Sydney LLB curriculum - which meant that, for every student who passed through Sydney Law School in those three decades, the lectures in 'Juliusprudence' were the finale, and for many the climax, of four or five years of study. Moreover, throughout those thirty years the University of Sydney Law School was the *only* University Law School in the State of New South Wales - so that every lawyer in the State who graduated from University throughout that period had been taught by Julius Stone.

I do not mean to suggest that all of those thousands of students, labouring as they then were under the double burden of a compulsory curriculum and articles of clerkship, were influenced to the same degree. In my own period of teaching with Stone at Sydney during the 1960s, I used to estimate that about a quarter of the class were fully receptive to his insights. But even that very modest estimate, when projected over a thirty-year period, suggests a remarkably far-reaching and pervasive influence on the legal profession of the State. In these latter days Victorian lawyers have sometimes said to me with rueful bemusement that as soon as they come north of the Murray they encounter Julius Stone.

For lawyers receptive to a sense of professional and social responsibility, Stone's teaching was both intellectually challenging and professionally and personally inspiring, with the power to shape for a lifetime one's conception both of the indeterminacies and antinomies which inescapably pervade legal arguments, and of the moral responsibility which must therefore be shouldered by those who advance such arguments, or who sit in judgment upon them. 'Jurisprudence' for Stone was neither (as it had been during the Austinian era) an arid analytical laboratory for the purification of juristic concepts, nor (as it has tended since to become) a mere self-reflexive intertextual project for the speculative exploration of theoretical hypotheses and parables, often bearing little functional relation to practical legal experience. As in all of Stone's work, he insisted on rigorous critical analysis, but also on a constant engagement with our detailed empirical human experience of law and legal institutions. It went without saying that analytical, philosophical and theoretical work were the very essence of 'Jurisprudence'. But always this work was to be understood not as an intellectual end in itself, but rather (like the law itself, as Stone always reminded us, quoting Rudolf von Ihering)⁸ only as a means to an end.

As Caesar divided Gaul into three parts,⁹ so Stone divided jurisprudence. His central message was that law must be understood from three different

8 See Rudolf von Ihering, *Der Zweck im Recht* (1877), vol 1, translated by I Husik as *Law as a Means to an End* in (1913) 5 *Modern Legal Philosophy Series* (reprinted 1968).

9 *De Bello Gallico* I.i.

perspectives, corresponding to three different characterisations of 'law' as an object of study. It must be approached from a critical analytical perspective, viewing 'law' as a notional edifice of logical and intellectual elaborations and interrelations of rules, principles, concepts, standards, and doctrines. It must also be approached from the perspective of traditional moral philosophy, viewing 'law' as the cultural medium or vehicle through which we evolve, transmit, defend, and seek to implement in practice, our ultimate human ideals and values - those which constitute our always-unfinished moral vision of how as human beings we ought to live together in a society, and of how the institutions of such a society ought ideally to serve our moral needs. And finally, it must be approached from the perspective of the contemporary social sciences, viewing 'law' as a complex empirical set of interpersonal and communal activities, organised around a distinctive cluster of social institutions and processes, through which both the formative values of the law, and its detailed doctrinal content, are perpetually mediated and modified. Thus the value-laden doctrinal content of law, and its mediating institutions and processes, are simultaneously the sources of continual influence *upon*, and the subjects of continual influence *by*, all else that happens in a human society. And this two-way influence is exerted not only by direct causal connection, but also more subtly by establishing the environmental and cultural settings that, separately or by a cumulative 'hanging together', are ultimately conducive to the emergence of one discernible trend or pattern of development rather than another. In short, the word 'law' embraces a rationally-ordered set of intellectual constructs; *and* an exploration and articulation of human ideals and values; *and* a complex set of social phenomena. What is meant by the word 'law' can never be adequately understood if any one of these three dimensions is neglected.

The vast breadth of this threefold vision was matched by the infinite encyclopaedic accumulation of detail with which Stone filled in its outlines. In part this mass of detail was itself a response - and for one so deeply versed in the common law a characteristic response - to those jurisprudential genres which focus rather on abstract theorisations of law. Like William Blake, Stone firmly believed that nothing can be achieved in art or science "but in minutely organised Particulars" ("and not", added Blake, "in generalising Demonstrations of the Rational Power").¹⁰ And if Stone's accumulation of detail at times seemed overwhelming (in the sense that it sometimes seemed too much for lesser minds to cope with), it was, in at least two crucial areas, overwhelming also in the more positive sense that, as example was piled upon example and illustrative case upon illustrative case, the underlying argument gathered cumulative and ultimately irrefutable force.

I have said that this happened in two crucial areas. Let me explain. The first area concerned Roscoe Pound's analysis of changes in legal doctrine as a

10 William Blake, *Jerusalem* (1804-1820) Plate 55; see generally lines 55-66 (reprinted in H Adams (ed), *William Blake: Jerusalem - Selected Poems and Prose* (1970) 305 at 413). And cf Blake's marginal annotations to Sir Joshua Reynolds's *Discourses* (reprinted in GE Bentley, *William Blake's Writings*, vol. 2 (1978) 1450 at 1458: "To Generalize [i]s to be an Idiot[.] To Particularize is the Alone Distinction of Merit. General Knowledges are those Knowledges that Idiots possess."

reflection of the individual and social interests involved. If, for many of us, most of our later intellectual experience has been one of lifelong engagement with the teachings of Julius Stone, it was equally true that, for Stone himself, a large part of his intellectual travail after his years at Harvard continued to revolve around his engagement with the teachings of Roscoe Pound. Pound had developed his theory of interests both as a pragmatic guide to the just resolution of conflicting needs and demands in a mass democratic society, and as an explanatory framework through which to understand the patterns and processes of legal change. Stone, as I have shown elsewhere in greater detail,¹¹ wrestled endlessly with the unresolved problems of Pound's theory, refining and reshaping its central elements, and in particular drawing a clear distinction (as Pound himself had not done) between the use of the scheme of interests as a deliberative guide to justice, and its use as an explanatory sociological tool. Never satisfied by the theory, he could never bring himself to abandon it either. When, during the 1960s, I in turn came to lecture on Pound's theory of interests, I was struck by how much more freely I was able to criticise the theory than Stone had been able to do. A decade later, when I had the opportunity to listen to one of my own former students from the 1960s now himself giving lectures on Pound's theory, I was struck by how much more freely he, in turn, was able to criticise the theory than I had been able to do. I thought it was a striking example not only of the intellectual inheritance that passes through successive generations of scholarship, but of how that inheritance must be constantly reinterpreted and reappraised in the eyes of each new generation.

But, whatever the shortcomings of Pound's scheme of interests as a decisional or analytical tool, Stone increasingly insisted as the years went by that it was at least, in its explanatory sociological version, an invaluable pedagogical tool; and it was through his pedagogical use of the theory as an explanatory sociological framework that much of his impact as a teacher was achieved. Initially in Chapters 21 and 22 of *The Province and Function of Law* in 1946,¹² and even more fully, twenty years later, in Chapters 5 and 6 of *Social Dimensions of Law and Justice* in 1966,¹³ Stone deployed his own more elaborate version of Pound's checklists of individual and social interests to demonstrate again and again, in one doctrinal area after another, how legal change had inexorably responded to social change. Sometimes the adjustment to changing configurations of interests had come about as a legislative response to the direct articulation of claims and demands through overtly political processes; sometimes it had come about more subtly through judicial recognition of the tensions and challenges to which settled legal doctrine (or the absence of it) was subjected by the insistent pressure of changing claims and demands. And often that pressure had been exerted through the process of litigation itself. Often the individual examples themselves were memorably charged with revelatory insight into the particular legal and social processes involved. In other cases the detailed demonstration

11 AR Blackshield, "The Pious Editor's Creed" in AR Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) 123 at 123-24.

12 J Stone, *Province and Function of Law*, Maitland Publications (1946).

13 *Id.*, *Social Dimensions of Law and Justice*, Maitland Publications (1966).

was more forgettable. In other cases again the analysis was debatable, though in those cases the uncertainties or irresolutions were themselves of great pedagogic value. But more than any particular example, it was the sheer cumulative weight of the mass of detailed examples that conveyed an irresistible picture of how the law responds - and in order to avoid pathological strain must inevitably respond - to the pressure of social and cultural change.

Moreover, the insight thus insistently driven home was twofold. Not only could the fluctuations and conflicts of individual and social interests be used as a medium through which to interpret and comprehend legal doctrine, but the legal materials in turn could be used as a mirror through which to gain a deeper understanding of their social and cultural context. At a deeper level still, the lesson thus hammered home was precisely that law *does* change - that the legal experience is one of endless adjustments and reversals, none of them necessarily dictated by the content of the pre-existing legal doctrine itself; and that this experience of perpetual motion, rather than the comfort of having mastered a stable body of settled doctrine whose content could be *known*, was what lawyers must understand and accept. As Holmes said, certainty generally is an illusion, and repose not the destiny of man.¹⁴ Or as Stone himself said, the function of studying jurisprudence was not to equip fledgling lawyers with a body of knowledge which they could *use* or *apply* as they moved into professional practice, but rather to equip them with the resources that would help them to cope with the realisation - after ten, twenty, thirty years of a professional career - that everything they had learnt at law school had changed.

This, then, was one way in which Stone's demonstration of his argument through a seemingly inexhaustible fund of examples drove home his underlying message. In the second area which I had in mind, the impact was even more telling; for this time the positivistic expectation of a clear, certain, knowable body of 'law', authoritatively given and objectively applied, was subverted by the rigorous analytical study of legal doctrine itself.

As early as 1908 Roscoe Pound had begun to expose the fallacy of "mechanical jurisprudence";¹⁵ and throughout Stone's years at Harvard the point was pursued with evangelical fervour - though not always with Pound's own approval - by the American Legal Realists. The tensions that emerged during those years between Pound and the Legal Realists¹⁶ were unfortunate and ironic; but this was not the only irony here. One of the claims made by Karl Llewellyn, as spokesman and pamphleteer for the Realists, was that here for the first time was "a goodly number of men" united by their determination:

to pick up ideas which have been expressed and dropped, used for an hour and dropped, played with from time to time and dropped - to pick up such ideas and set about *consistently, persistently, insistently to carry them through*. Grant that the idea or point of view is familiar - the results of steady, sustained, systematic work

14 OW Holmes Jr, "The Path of the Law" (1897) 10 *Harvard Law Review* 457 at 466.

15 R Pound, "Mechanical Jurisprudence" (1908) 8 *Columbia Law Review* 605.

16 See D Wigdor, *Roscoe Pound: Philosopher of Law*, Greenwood Press (1974) pp 260-66.

with it are not familiar. Not hit-or-miss stuff, not the insight which flashes and is forgotten, but sustained effort to force an old insight into its full bearing...

Yet, to the extent that the Realist movement failed to achieve its full promise, it was precisely because, for all its polemical attacks upon “childish thoughtways” (that is, upon the tendency to cling to belief in a framework of “pre-existing ‘rules’” which “must be so”, because of a naive “desire for stability, continuity and uniformity”),¹⁸ the critique remained too often at the level of “hit-or-miss stuff” and flashy insights. It was Stone, more than any of the Legal Realists - and more than any other writer this century - who “consistently, persistently, insisently” developed the intuitive idea of the indeterminacy of legal materials through “steady, sustained, systematic work”. He did so through his schematic development, elaborated for almost half a century,¹⁹ of “categories of illusory reference”.²⁰

As Stone saw it, a judge presented with a legal problem which requires resolution will refer it to the authoritative legal materials, expecting that this reference will yield an apodeictic answer to the question that must be resolved. The judge does this by assigning the facts or the issues to a relevant legal category. If the reference to that category yields the expected guidance, all is well; and in such a case the judicial decision can be treated merely as an application of the pre-existing legal materials. But if the chosen category provides no guidance, or incomplete or indeterminate guidance, then the reference has been illusory. And if this means that *no* determinate guidance can be given by the legal materials, then the judge - who must give *some* answer, since the pending litigation must be disposed of - cannot be said to derive that answer from the legal materials, but must derive it from somewhere else. Stone’s answer to where that “somewhere else” might be was supplied by his sociological jurisprudence and his theory of justice.

The inconclusiveness of the legal materials may come about in various ways. It may be necessary to choose between *categories of competing reference* - two or more legal categories, both appropriately tailored to the relevant facts and issues, but yielding opposite answers. In that event the ultimate solution will be determined by the choice between the competing categories. But that choice cannot itself be determined by the authoritative legal materials, since what those materials do is precisely to confront the judge with the necessity for choice. Or a similar dilemma might arise when a single legal category has *competing versions of reference*, as typically happens in the common law when the same intuitive idea has been expressed by different judges in different language. The differences may be minor and unintended; but sooner or later a case will arise

17 Karl Lewellyn, “Some Realism about Realism – Responding to Dean Pound” (1931) 44 *Harvard Law Review* 1222 at 1238 (italics in original).

18 Jerome Frank, *Law and the Modern Mind* (1930, 6th printing 1949) pp 72-73.

19 Stone himself liked to date the development from his article “*Res Gesta Reagitata*” (1939) 55 *Law Quarterly Review* 66 (his first clear exploration of “a single legal category with competing versions of reference”).

20 First systematically expounded in Chapter 7 of *The Province and Function of Law* note 12 *supra* and more fully developed in Chapter 7 of *Legal System and Lawyers’ Reasonings*, Maitland Publications (1964).

where one formulation points to a decision for the plaintiff, and another to a decision for the defendant. Again, the judge must choose. Or a similar necessity of choice may arise because the same legal category has been used to subsume an illogical congeries of differing conceptions, or differing configurations of fact, each with differing consequences. In such a case what appears to be a single legal category is a *category of concealed multiple reference*.²¹

In other cases again, the crucial words or ideas in the chosen legal category may embody an indeterminate evaluative standard which judges can only apply by attempting their own evaluative judgment. That element of evaluative judgment determines the eventual outcome - not because judges have somehow failed to apply the relevant law, but because that is precisely what the application of the law requires. The category is one of *indeterminate reference*. Obviously, such categories have been endemic in twentieth century law.

But perhaps the two forms of illusory category for which Stone reserved his greatest affection - because of his delight in exposing the logical fallacies involved - were what he called *categories of meaningless reference* and *categories of circular reference*. In the former, to which I shall return in considerably more detail below, one authoritative verbal formulation yields an outcome for the plaintiff, and another yields an outcome for the defendant - and the problem is not that the judge has to choose between these two formulations, but rather that there is no meaningful way of making such a choice, since in fact the two formulations have an identical semantic content. To resolve such a case by "choosing" one formulation rather than the other is therefore a meaningless choice. Alternatively, where the reference is "circular",²² the immediate practical question of whether the plaintiff should recover (Question 1) is initially translated into the relevant legal question: "Was there a quasi-contractual relationship?" "Was there a duty of care?" (Question 2). But it then turns out that the answer to Question 2 is determined - and can only be determined - by the answer to Question 1. The reformulation of the original question in terms of a legal category has led us back to the original question. Again, therefore, the answer finally given cannot be determined by the process of legal reasoning involved, but only by the judge's personal assessment of whether the plaintiff ought to recover.

The effectiveness of Stone's argument lay not in the intellectual elegance of the particular analytical models involved, nor in that of the overall scheme. At times, indeed, the analysis was not particularly elegant; and insofar as it did achieve elegance that may have been a trap. The analysis of "categories of illusory reference" was the intellectual apparatus by which Stone was able to demonstrate the fallacy of claims to self-evident objectivity in legal decisions

21 In teaching I have found it helpful to distinguish between these last two situations by thinking of the single category with competing versions of reference as "one thing with many names", and the category of concealed multiple reference as "many things with one name".

22 Stone came to prefer this nomenclature to his earlier use of the label "circuitous" on the ground that a circuitous journey does in the end lead somewhere, albeit by a roundabout route, whereas a "circular" journey leads its travellers precisely back where they started from.

and doctrines. But, precisely because the analysis was merely an intellectual apparatus, it could not itself lay claim to self-evident objectivity either.

I doubt if Stone himself ever fully appreciated this. In 1946, in *The Province and Function of Law*, he had analysed Lord Atkin's famous "neighbour" principle²³ as embodying a category of circular reference.²⁴ In 1964, while reworking the analysis for *Legal System and Lawyers' Reasonings*,²⁵ he debated anxiously whether a meaningless reference might not rather be involved. Was it in truth an example of circular reference? Or of meaningless reference?

The question recalls the fallacy of "either/or characterisation" in Australian federal constitutional law.²⁶ The better understanding is that Stone's analysis in terms of "circular reference" is *one* way of helping us to see the inconclusiveness of the legal categories of "foreseeability", "duty of care", and "the neighbour", and thus to appreciate the need for evaluative assessment by the judge; while Stone's analysis in terms of "meaningless reference" is *another* way of helping us to arrive at the same conclusions. Neither analysis is uniquely 'correct', and neither of them need exclude the viability of the other - any more than either of them is excluded by the central role, amongst any criteria of negligence liability, of evaluative judgments mandated by categories of indeterminate reference.

What was important, then, was not the analytical structure of Stone's critical apparatus, but its usefulness in demonstrating the pervasive indeterminacy of the authoritative legal materials - in case after case after case. Perhaps the lesson was borne in on me with particular force. My first academic assignment, as Stone's research assistant in the early 1960s, was to read through the accumulated volumes of the *Commonwealth Law Reports* for the preceding ten years, looking for categories of illusory reference. I found them on every page of every case. The hundreds of examples that Stone crammed into the footnotes of *Legal System and Lawyers' Reasonings*, and their overflow into supplementary "Project Notes", were devastating enough; yet even that massive accumulation of evidence failed to give a fully adequate picture of the multi-layered interweavings and overlappings of categories of illusory reference which pervade the entire fabric of the legal materials with which lawyers and judges must work.

This, then, was the central lesson which Stone's teaching conveyed to those generations of New South Wales lawyers through his thirty years at Sydney University. In the recent casebook which I edited with George Williams and Brian Fitzgerald, I summed it up as follows:

Stone's pedagogic method was to demonstrate that the orthodox legalistic use of authoritative legal materials depends on "categories of illusory reference", the effect of which is that the judge's resort to legal doctrine *cannot* provide predetermined solutions to the problems of evaluative choice by which litigious outcomes must be determined, since what the legal materials do is precisely to confront the judge with

23 *Donoghue v Stevenson* [1932] AC 562 at 580.

24 Note 12 *supra*, pp 182-83.

25 Note 20 *supra*, pp 258-260.

26 Still perpetuated by Barwick CJ in *Victoria v Commonwealth (the Payroll Tax Case)* (1971) 122 CLR 353 at 372-73, but decisively exploded by Stephen J in *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 190-94.

the inescapable need for choice. Through ambiguities, indeterminate terms, logical circularities and contradictions, and above all through the constant presentation of alternative starting points, the judge is *required* to make personal choices in order to apply "the law". The central point is that wherever a judge is driven to make a choice between two versions of "the law", that choice itself cannot be controlled or determined by "the law", but must ultimately depend on the judge's own sense of what "the law" ought to be.²⁷

I was there concerned to stress that among those Sydney graduates were several who had "carried these teachings with them onto the High Court bench". To the list I gave there - Sir Anthony Mason, Sir Kenneth Jacobs, Lionel Murphy and Sir William Deane - one can now, of course, add Michael Kirby. But, although I have chosen to focus here on Stone's impact on the generations of students who passed through Sydney Law School, it must not be thought that his influence was confined to those generations of students, nor indeed to Australia. In the radio tribute to Julius Stone which Gary Sturges and I prepared for the ABC program *The Law Report*, before his death, we were able to include an interview with Lord Denning, who spoke eloquently of the influence which *Province and Function of Law* had exerted in the postwar years throughout the common law world. And he added, with becoming modesty: "It even influenced me."²⁸

III. JULIUS STONE AND OWEN DIXON

Much of what I have said thus far is well known. What may be less widely recognised is that, in a series of judgments delivered in the High Court by Sir Owen Dixon from about 1952 onwards, there is evidence that he had recently been reading *Province and Function of Law*, and that in the course of writing his judgments he repeatedly sought to respond to its catalogue of the leeways for judicial choice that arise from illusory categories. His responses were varied - sometimes enthusiastically *accepting* the invitation to judicial choice which Stone's analysis offered; sometimes seeking to refute Stone's analysis by demonstrating that the impugned legal categories were in fact not only logically sound, but founded in substantial considerations of practical workability and justice; and at other times simply exploring the questions which Stone's analysis raised.

In view of the salience which it has assumed in quite recent exchanges within the High Court,²⁹ it may be worth mentioning that Sir Owen's judgment in *Burton v Honan*³⁰ is one of these instances. In that case Sir Owen in effect conceded that, whenever the High Court is called upon to determine whether an

27 T Blackshield, G Williams and B Fitzgerald (eds), *Australian Constitutional Law and Theory: Commentary and Materials*, Federation Press (1996) p 838.

28 April, 1985.

29 Initially through its invocation by Dawson J in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 87. See now *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 318-321, per Brennan J; at 357, per Dawson J; at 375-76, per Toohey J; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 352, per Toohey J; and *Leask v Commonwealth* (1996) 140 ALR 1 at 15, per Dawson J.

30 (1952) 86 CLR 169 at 179.

enactment falls within Commonwealth “incidental power”, the need to show “a reasonable connection” with the primary subject of power was a category of indeterminate reference involving “matters of degree”. He conceded further that this might “seem sometimes” to call for a consideration of “justice, fairness, morality and propriety”. But he nevertheless refused to accept such an inference, insisting that it only “appears to be so”.

It may be important, however, to bear in mind precisely what argument he was accepting in that case, and what argument he was rejecting. He *accepted* an argument that, as a matter of general principle, a provision for forfeiture of prohibited imports must be judicially accepted as a reasonable sanction (in contemporary language an appropriate and proportionate sanction) by which to enforce the prohibition. He *rejected* an argument that, once having reached that conclusion, the Court should be deterred from acting upon it by the fact that the forfeiture would operate harshly in an individual case.

In other cases, Dixon’s judgments revealed his recurrent fascination with a logical analysis offered by Stone as one example of meaningless reference. Generally, as I indicated briefly earlier, a legal category was “meaningless” for Stone if on closer analysis it depended upon “a distinction without a difference”: if the legal result was made to depend on a choice between two legal formulae, which were so identical in substance that there was no rational basis for the choice. It was not perhaps surprising that this analysis should have captured Dixon’s attention, since he himself had long been wont to complain of “distinctions without differences”, and of “metaphysical” judgments which “import unreal distinctions”.³¹ But, as always, the broader conclusion which Stone sought to draw was that if the orthodox legal analysis of authoritative legal materials is logically incapable of producing any result, then the actual result which the court arrives at must be derived from considerations other than those suggested by the authoritative legal materials.

The particular example to which both Dixon and Stone repeatedly returned was best illustrated for Stone by *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd*.³² In that case the steamship *Kingswood*, whilst at anchor in South Australia, was disabled by an explosion, the cause of which was never determined. An action against the shipowners by the charterers was dismissed by the House of Lords on the ground that the contract had been frustrated. The Court of Appeal had allowed the charterers’ claim on the basis that:

a party prima facie guilty of a failure to perform his contract cannot escape under the plea of frustration, unless he proves that the frustration occurred without his default. There is no frustration in the legal sense unless he proves affirmatively that the cause was not brought into operation by his default.³³

The House of Lords rejected that analysis.

Clearly the defendants in this case were relying on the settled principle that in cases where a contract is wholly frustrated, the loss lies where it falls: the

31 Notably in *Medical Board of Victoria v Meyer* (1937) 58 CLR 62 at 97.

32 [1942] AC 154.

33 *Imperial Smelting Corp Ltd v Joseph Constantine Steamship Line Ltd* [1940] 2 KB 430 at 433, per Scott LJ.

contractual obligation having been frustrated is no longer actionable. The plaintiffs were relying on the equally well settled principle that this consequence does *not* follow in cases of “self-induced” frustration: defendants cannot be allowed to escape from contractual liability by relying on a disabling event for which they themselves are responsible. The question as it emerged from their Lordships’ speeches was how exactly the relationship between these two settled principles was to be expressed.

It was common ground that what was at issue was a choice between two formulations of an implied term of the contract. Should we impute to the parties an intention that frustration of contract is to operate as a general ground of exemption from liability, with the case of “self-induced” frustration then carved out by way of *exception* to the general principle? Or should we formulate the general principle at the outset so that one of the *conditions* for its operation is that it should only ever apply to those instances of frustration which are not induced by the defendant? On the first approach we would formulate the implied term by saying something like: “In all cases of frustration the loss lies where it falls, except where the frustrating event is induced by the defendant”. On the second approach we should rather say something like: “In all cases of frustration not induced by the defendant, the loss lies where it falls”.

In the *Constantine Case* the choice between these two formulations was regarded as controlling the burden of proof. On the former view, a defendant proving frustration would do all that was needed to bring the case within a general rule providing a *prima facie* defence; if the plaintiff then wanted to bring the case within the exception to that general rule, by showing that the frustration was “self-induced”, the burden of proof on that issue would be borne by the plaintiff. By contrast, if the defence is only applicable to “cases of frustration not induced by the defendant”, then the party relying on that defence would have the burden of proving all the fact-elements on which the defence is conditioned: that is, the defendants would have to prove both that the contract was frustrated by a supervening event, and that that event was not attributable to any default of their own. In the *Constantine* case, where the cause of the explosion could not be ascertained, the version treating self-inducement as an *exception* to the general rule would leave the plaintiff unable to invoke the exception, so that the plaintiff would fail. But the version treating absence of self-inducement as a *condition* of the general rule would leave the defendants unable to establish the elements of the defence, so that the defendants would fail.

Stone’s argument was simply that since the two proffered formulations of the rule are logically identical in meaning, the supposed choice between the two formulations must be a meaningless choice. He did not, of course, deny that ultimately in a case like *Constantine* either the plaintiff or the defendant must win. Nor did he deny that in such a case, where the cause of the explosion could not be established, the ultimate result might have to depend on a judgment as to which party should bear the onus of proof. But in that event his argument was that the question which party *should* bear the onus of proof was precisely what the court had to determine, and that judges could not escape the responsibility for making their own substantive determination of what *should* be the outcome

by pretending that a choice between identical legal formulae was capable of assigning the burden of proof on the basis of a predetermined operation of law. The true solution to the *Constantine* case, he argued, was found not in the choice between verbal formulae, but in their Lordships' underlying "substantial agreement on...grounds of policy" - for instance, in Lord Wright's desire to avoid a "serious injustice", and to give the doctrine of frustration a "beneficial operation...with the object of doing what is reasonable and fair".³⁴ Building on these and other hints in their Lordships' speeches, Stone argued that in most frustration cases the frustration is *not* "self-induced".³⁵ On that assumption, a rule enabling *most* defendants to rely on the defence would in fact do justice to most defendants, while doing injustice to only a small number of plaintiffs - so that this, overall, was the fairer rule. He also relied on the common assumption that it is easier to prove an affirmative than a negative, so that a rule requiring defendants to prove an *absence* of fault would in fact impose a more onerous burden than the converse rule requiring a plaintiff to prove that the defendant was responsible. Notice that this second argument seeks a greater likelihood of reasonable evidentiary requirements in the individual case, whereas the more general argument seeks a greater likelihood of overall justice across the whole range of frustration cases coming before the courts.

All this can be generalised. For Stone, the general problem was one of:

a supposed distinction between, on the one hand, a rule defined so as to exclude a given situation, and on the other hand, a rule defined without reference to that situation which is then made subject to an exception for that situation. It is the distinction between a rule containing its qualification within itself, and a rule the qualification upon which proceeds from a proposition outside the rule.³⁶

To put it another way, our concern is with situations where a normative or descriptive proposition needs to be formulated in a way that stops short of universality, and where this can be achieved by either of two stylistic techniques. Assume that the proposition will normally apply to X, but not to Y, and that Y is a subset of X. Then one might originally formulate the rule as applying to the whole class of X, and then add on an exception for Y; or one might from the beginning express the rule as applying only to a more limited class: that X which is not Y. In Stone's simplest example, the first approach yields a proposition in the form: "All animals have four legs except gorillas". The second approach would say rather: "All non-gorilla animals have four legs".³⁷

Sir Owen Dixon's first exploration of a problem presented in this logical form was in *Alford v Magee*.³⁸ The plaintiff sued for the death of her husband, whose motorbike had been hit by the defendant's car. The defendant alleged contributory negligence; the plaintiff replied that even if that were shown, the defendant had the "last opportunity" to avoid the consequences. The plaintiff obtained a jury verdict, but successive appeal courts held that there must be a

34 Note 33 *supra* at 193; and see 183-186.

35 Initially in his article "Burden of Proof and the Judicial Process" (1944) 60 *Law Quarterly Review* 262.

36 *Ibid* at 279.

37 *Ibid* at 280, repeated in Stone note 12 *supra*, p 171.

38 (1952) 85 CLR 437.

new trial because the jury had been misdirected on the “last opportunity” doctrine.

The judgment of the Court was delivered by Sir Owen Dixon. In restating the “last opportunity” doctrine, he began by formulating the problem in terms which closely paralleled Stone’s analysis of *Constantine*. On that basis, he said, one approach is to “state a general rule that [contributory negligence] is a good defence followed by a qualification or exception” (to cover those cases where contributory negligence will *not* be a good defence); the other approach is to define “contributory negligence” from the outset so as to cover *only* “such negligence of the plaintiff as will disentitle him to succeed against a negligent defendant”. On that basis “we state a rule *simpliciter*”, incorporating as one of the stipulated conditions of its operation “what, from the other point of view, is an exception to a general rule”.³⁹ He then gave what he thought were “substantial reasons” - not merely formal reasons - for thinking that the former approach “seems preferable”.⁴⁰ Historically, he said, the common law had first established a “general rule” that neither party could recover if both of them were at fault; but this was “later modified by a second rule” for cases where the denial of recovery “worked hardship”. The model of a rule qualified by an exception therefore more accurately reflected the substantive considerations involved. Secondly, it seemed “more natural and appropriate” to consider *first* whether negligence of the plaintiff had operated as a causative factor, “and then to consider what circumstances will preclude such negligence from affording a good defence”. Thirdly, the model of “a general rule subject to a qualification” was easier to explain to juries, especially since in many cases it would be appropriate to state the rule without need to explore the exceptions at all. It is perhaps debatable whether Dixon was here *resisting* Stone’s analysis, by arguing that the choice between the two formulations was substantive and not illusory; or whether he was following Stone’s *Constantine* model by seeking to adduce “substantial reasons” for preferring one version to the other. In particular, his practical argument that in many cases the jury need only be given a simple *unqualified* version of the “contributory negligence” rule, seems to echo Stone’s preference in the *Constantine* case for that version which would be conducive to overall justice in the majority of cases.

Having thus decided that what was needed was a general rule subject to a qualification, his Honour then turned to considering what the appropriate qualification should be. The “great difficulty”, he said, was “inherent in the whole conception of contributory negligence”.⁴¹ He proceeded to analyse both that conception, and the various attempts to qualify it for the benefit of deserving plaintiffs, in a manner clearly recalling Stone’s analyses of legal categories of competing reference and concealed multiple reference. He noted that both the defence of “contributory negligence”, and the qualification or qualifications upon it, had resulted in “a multiplication of intricacies”: that successive versions

39 *Ibid* at 451-52.

40 *Ibid* at 452.

41 *Ibid* at 452-53.

of the rule had been “encumbered or superseded” by “refinements and new analyses, and expounded in varying metaphors”, all of which had resulted in a pervasive indeterminacy of the law.⁴² He noted in particular the negation that would follow from acceptance of Lord Penzance’s statement in *Radley v London & North Western Railway Co*:

The first proposition is a general one, to this effect, that the Plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the Plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the Defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the Plaintiff’s negligence will not excuse him.⁴³

Sir John Salmond had commented that this latter formulation:

is clearly elliptical and insufficient...Read literally, it is not merely a limitation of the general rule as to contributory negligence, but the complete negation of it. For *ex hypothesi* in all cases of contributory negligence the defendant has been guilty of negligence which caused the accident; therefore in all cases he could by the exercise of care have avoided the accident; and therefore (reading the above proposition literally) he is liable, notwithstanding the contributory negligence of the plaintiff.⁴⁴

By similar reductive reasoning Sir Charles Butt had argued in *The Vera Cruz*⁴⁵ that such a statement would “put an end to the doctrine of contributory negligence altogether”. Clearly, on this analysis, Lord Penzance’s statement was an example of the practice which Stone (quoting Felix Cohen) described as “setting two contradictory principles side by side with only a ‘but’ or ‘however’ between them for the sake of decency.”⁴⁶

Despite this potential contradiction, and “the difficulty of framing a qualification of the general rule as to contributory negligence which would not simply destroy that rule”,⁴⁷ Dixon’s final conclusion was that the formulation suggested by Lord Penzance, and the similar statement by Wightman J in *Tuff v Warman*,⁴⁸ were the best that could be arrived at. It was “unsafe”, “hardly possible”, and “probably undesirable” to attempt to be more precise. Indeed, the formula was a sound guide to judgment just because it was imprecise: the effect of the tension between the rule and the exception was to focus the judge’s mind on “the fundamental idea...that there are cases in which there is so substantial a difference” in the position of the parties at the material time, that “it would not be fair or reasonable to regard the plaintiff as in any real sense the author of his

42 *Ibid* at 457.

43 (1876) 1 App Cas 754 at 759.

44 *Salmond on Torts*, Sweet & Maxwell (6th ed, 1924) p 40.

45 (1884) 9 PD 88 at 93.

46 Note 12 *supra*, p 140; quoting Felix Cohen, “The Problems of Functional Jurisprudence” (1937) 1 *Modern Law Review* 5 at 11.

47 Note 38 *supra* at 458.

48 (1858)141 ER 231 at 236.

own harm".⁴⁹ Thus, in the end, Dixon's conclusion was precisely the same as Stone's: the effect of the apparent illogicalities in the legal materials was to lead the judge inexorably to decide on the basis of his or her own assessment of what was "fair or reasonable".

As if to reinforce this convergence of views, Dixon based his conclusion in part upon a detailed demonstration that the governing legal category - "the last opportunity rule" - was what Stone would call a category of concealed multiple reference.⁵⁰ It was sometimes used to refer to the precise rule formulated in *Salmond on Torts*, with "the implication that the rule *so stated* expresses *the whole* of the qualification" which it is necessary to impose on contributory negligence as a defence. It was sometimes used as "a summary description" of the broader proposition laid down by Wightman J and by Lord Penzance, playing off the defence of contributory negligence against the need for *some* exception in favour of meritorious plaintiffs, although *some* of the reasons why particular plaintiffs might be regarded as meritorious would arise out of factors in relation to which the use of the expression "last opportunity" would be wholly inappropriate. Thirdly, it was sometimes used to describe "one test which may be used in determining a question of fact": that is, *one* kind of factual question which might bring a case within Lord Penzance's broader qualification.⁵¹ Clearly, in this passage Dixon was not only conducting his own experiment in the analysis of illusory categories along the lines suggested by Stone, but was using that analysis exactly as Stone himself had used it - to demonstrate that in this area any attempt to regulate outcomes by predeterminate legal rules was, in Dixon's words, "not merely unsound but unintelligible".⁵²

When Sir Owen Dixon was again confronted, eight months later, with another doctrinal puzzle in the form of Stone's "gorilla" example, his response was somewhat more equivocal. In *Alford v Magee* he had insisted "that the choice between the two ways of putting the position does not affect the burden of proof".⁵³ But in *Dowling v Bowie*⁵⁴ he did see a similar choice between verbal formulae as reducing ultimately to a question about burden of proof. The issue as he saw it concerned:

49 Note 38 *supra* at 460-1. At 461 the judgment went on, perhaps in a further demonstration of "concealed multiple reference", to identify four distinct types of case in which such a judgment might be made: the defendant had "a real opportunity" to avoid the accident *and the plaintiff had not* (italics in original); the defendant's negligence was "substantially later in...time"; the defendant was "master of the situation" and chose to run a risk; or was "master of the situation" and "failed to take advantage of his superior position". But the judgment further emphasised that these examples were not exhaustive, and could not be reduced to formulae: they were "merely illustrations of the kind of circumstances" which might justify a judgment of fairness. *Quaere* whether the later uses of this passage (in Dixon's absence) were faithful to his emphasis on the "fundamental idea" of evaluative judgment on the merits, or reduced the four examples to just the kind of "formulae" which Dixon had sought to avoid. See *Wilson v Murray* (1962) 110 CLR 445 at 455-56; *Carruthers Bros Pty Ltd v Pennell* (1964) 110 CLR 459.

50 Note 12 *supra*, pp 174-76.

51 Note 38 *supra* at 459-60.

52 *Ibid* at 460.

53 *Ibid* at 463.

54 (1952) 86 CLR 136.

the common law doctrine that where a statute having defined the grounds of some liability...proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it...[whereas] where the definition of the grounds of liability contains within itself the statement of the exception or qualification...the law places upon the party asserting that the liability has been incurred the burden of negating the existence of facts bringing the case within the exception or qualification.⁵⁵

The use of such a distinction to determine whether the exempting factor must be *proved* by the defendant, or *disproved* by the prosecution, was a mode of reasoning which Dixon sought to defend - apparently specifically against Stone's thesis in terms of "categories of illusory reference". The distinction, he said:

has been criticized as unreal and illusory and as, at best, depending on nothing but the form in which legislation may be cast and not upon its substantial meaning or effect.⁵⁶

But as against such criticisms Dixon argued that, beneath the verbal formulae, what happens in such cases is that the burden of proof is determined:

upon considerations of substance and not of form. A qualification or exception to a general principle of liability may express an exculpation excuse or justification or ground of defeasance which assumes the existence of the facts upon which the general rule of liability is based and depends upon additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it.⁵⁷

The particular example before the Court arose under s 141 of the *Licensing Ordinance* 1939 (NT), prohibiting the sale of liquor to "a person who is a half-caste within the meaning...of the *Aboriginals Ordinance* 1918". The *Aboriginals Ordinance* 1918 (NT) gave an extended definition of "half-caste" by reference to several different kinds of personal circumstances; it also provided a mechanism by which, through notice in the *Gazette*, a named individual could be declared *not* to be "an aboriginal or a half-caste". At the time of the events in *Dowling* there were in Darwin about 500 persons for whom such declarations had been made.

Under the *Licensing Ordinance* Dowling was prosecuted for having sold wine to Shannon at a Darwin hotel. An essential element in the offence was that Shannon was a half-caste. Was it sufficient for the prosecution to show that Shannon fell within the extended definition of "half-caste", leaving Dowling in his defence to prove if he could that there was an extant declaration deeming Shannon *not* to be a half-caste? Or did the prosecution bear the onus of proof on all aspects of the *Aboriginals Ordinance*, including the need to prove that no declaration affecting Shannon had been made or was in force?

Now, Stone himself had always conceded that when the verbal formula relied upon is found in a statute, and thus in a precisely authoritative form of words, the use of the statutory formulation in assigning the burden of proof may *not* be "illusory" or "meaningless". For one thing, the parliamentary drafting office

55 *Ibid* at 139-40.

56 *Ibid* at 140.

57 *Ibid*.

may have chosen one mode of formulation rather than the other precisely in order to indicate where the burden of proof should lie. Stone's problem arises where the rule in question is a judge-made rule of common law, so that no particular verbal formulation is "authoritative".

Even if we accept that distinction, however, the complex relationship in *Dowling* between the *Licensing Ordinance* and the *Aboriginals Ordinance*, and between the inclusive and exclusive provisions made by the latter Ordinance in relation to the concept of "half-caste", was not really reducible to a single neat formula which could settle the issue either way. For what it was worth, it was clear that the point at issue - whether Shannon by an executive determination had been *excluded* from the definition of "half-caste" - had the function of determining whether special facts existed to *exclude* his case from the general class of cases to which the provision in the *Licensing Ordinance* would apply. Applying the orthodox distinction, therefore, one might have expected that the prosecution would bear the onus of proving that Shannon was within a class of persons who would normally be classified as "half-caste", while Dowling would bear the onus of proving by way of defence the special additional facts relied on to negate that classification. Dixon's formulation already quoted, that "additional facts of a special kind" must be proven by "the party relying on the qualification or exception", would seem to confirm that view.

In the result, however, Dixon applied the distinction the other way. For one thing, the facts relating to Shannon were not necessarily within the knowledge of Dowling: he could not normally be expected to know whether there had been a gazettal of a notice relating to Shannon, "nor would it be particularly easy for him to [prove or] disprove it". By contrast, the informant, in his official capacity, with "access to the file of *Gazettes* or an official list of exempt aboriginals and half-castes", would have no such difficulty. For another thing, "in the case of a criminal charge having grave consequences for the defendant", no presumption that Shannon was a half-caste (such as the trial judge had apparently been prepared to make on the basis of "judicial notice" or of Shannon's physical appearance) could be relied on as taking the place of precise evidentiary proof. Thus, in the end, it would appear that Sir Owen did decide the issue on substantive considerations of justice - despite his attempt to defend the doctrinal distinction as not merely illusory, and despite the fact that his substantive justification of its normal operation would have pointed to the opposite result.⁵⁸

The final case in this series was *Vines v Djordjevitch*.⁵⁹ The plaintiff had been injured by an unidentified vehicle and sought to sue the nominal defendant. But she had not given notice of her intention to do so until almost six months after the accident. The delay was attributable in part to the consequences of the accident, and in part to cultural factors. (The plaintiff was a woman of Polish birth who had limited English.) The provision for judgment to be given in such

58 *Ibid* at 140-1.

59 (1955) 91 CLR 512.

cases against the nominal defendant was contained in s 47(1) of the *Motor Car Act* 1951 (Vic), but a proviso to that subsection added:

Provided that no such judgment may be obtained unless such person as soon as possible after he knew that the identity of the motor car could not be established gave to the Minister notice of intention to make the claim...

Once again the crucial issue concerned the burden of proof. The plaintiff was entitled to judgment, but not if she had failed to give her notice “as soon as possible”. Was it up to her to prove that she *had* acted “as soon as possible”, as an essential condition of her right to judgment? Or was it up to the nominal defendant to prove that she had failed to act “as soon as possible”, thus taking her out of the normal class of compensable plaintiffs?

The initial precedent relied on in the joint judgment delivered by Sir Owen Dixon seemed rather to complicate the issue. In *Steel v Smith*,⁶⁰ in 1817, the *Workhouses Act* of 1815⁶¹ had prohibited any contract whereby a churchwarden or overseer might profit by the supply of goods to a parish workhouse; and a penalty of £100 was recoverable by any common informer. But a proviso stipulated that, in any case where such a contract was the only convenient way of supplying “any of the articles required for such workhouse”, the contract might be approved by a formal certificate given by two justices of the peace; and in any action for a penalty the supplier might then plead the certificate by way of a defence.

Clearly this was a case like *Dowling*, where a transaction normally caught by a statutory prohibition might be removed from the operation of the statute by a special certification. Clearly, too, it was the defendant in such a case who was specifically to plead the exemption by way of defence. But the exemption was formulated not as an *exception*, but as a *proviso*; and the rule of law applied was that an *exception* to such a statute must expressly be negated by the plaintiff, but that a *proviso* need not be.

This, of course, appears to cut right across the normal expectation discussed in cases like *Constantine* and *Dowling*, that facts stated by way of exception must be proved by the party seeking to rely on the exception, but that when the same facts are stated as part of the primary provision, the burden of proof is upon the party relying on that provision. Once again, this would seem to be a case where opposite versions of the rule produce opposite results.

In *Vines*, however, Sir Owen Dixon accepted the formula in *Steel v Smith* at face value, but added his own qualifications.⁶² First, he insisted as in *Dowling* that nowadays the distinction between exception and proviso “has perhaps come to be applied in a less technical manner, and now depends not so much upon form as upon substantial considerations”.⁶³ Second, he noted that when the problem relates to a statute, and therefore to a precise authoritative form of words, the ultimate issue is one of legislative intention, and the form adopted in

60 (1817) 1 B & Ald 94 at 99; 106 ER 35 at 37.

61 55 Geo 3 c 137, s 6.

62 Note 59 *supra* at 519.

63 *Ibid.*

legislative drafting may be an indication of that.⁶⁴ Thirdly, he said, regardless of form, the ultimate burden of proof must depend on “the intrinsic character of the provision that the proviso makes and its real effect”.⁶⁵ Regardless of form:

When an enactment is stating the grounds of some liability that it is imposing or the conditions giving rise to some right that it is creating...it may be sufficiently clear that the whole amounts to a statement of the complete factual situation which must be found to exist before anybody obtains a right or incurs a liability under the provision.⁶⁶

In such a case, the whole burden of proof must be upon the party invoking the primary provision. On the other hand, again regardless of form:

if [the statute] expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter.⁶⁷

In *Vines*, the *formal* argument, as Dixon understood it, was that because the disentitlement flowing from failure to give “notice as soon as possible” was expressed as a proviso, the issue was *not* one as to which the plaintiff should carry the burden of proof. But the substantive argument, in his view decisive, was that the requirement of “notice as soon as possible” was not a specific requirement applicable only to cases involving certain additional factual elements, but was rather a universal requirement “to be fulfilled by all before the main provision can be availed of”.⁶⁸ Accordingly it followed that the burden of proof must be on the plaintiff. Despite that, and despite the fact that the plaintiff’s evidence on the issue was characterised as “very thin” and “very unconvincing”, the Court was not prepared to hold that the plaintiff had not discharged her burden of proof.

These cases are deeply equivocal. At times, and especially in *Dowling v Bowie*, Sir Owen appears to be resisting Stone’s argument that the distinctions relied upon involve categories of illusory reference. But in all three cases he seems also at a deeper level to be accepting Stone’s argument, refusing to decide the issue on formalistic grounds and seeking substantive considerations by which to support a just result. In particular, both in *Dowling* and in *Vines*, the result that he arrives at is the opposite of that which the formal distinction would tend to suggest.

But perhaps the most dramatic impact of Stone’s analysis upon Dixon’s judgment came in *Thompson v Bankstown Corporation*.⁶⁹ The facts are well-known. A boy birdnesting up an electricity pole in a suburban street was shockingly injured when he came into contact with a dangling high-voltage wire, and sued for damages. As the issue came before the High Court, it was a classic

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 Note 62 *supra* at 519-20.

68 *Ibid* at 520.

69 (1953) 87 CLR 619.

example of what Stone called “categories of competing reference”.⁷⁰ If the case were determined by the general principles of the modern law of negligence, as expounded in *Donoghue v Stevenson*,⁷¹ the council which had exposed passers-by to such a danger was in breach of a general duty of care on which the plaintiff was entitled to rely. On the other hand, if the case were determined by the rules of occupiers’ liability, then the moment the boy began to climb the pole he was a trespasser, to whom no relevant duty was owed. In his joint judgment with Dudley Williams, Dixon put the case in precisely those terms, and moreover in precisely Stone’s terms of “competing categories”:

The difficulty in deciding this appeal arises from the possibility and perhaps the necessity of choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other. One category concerns the duties of an occupier of a structure with respect to the safety of those who come upon it or within the area of the control exercised or exercisable by the occupier. The other category forms part of the general law of negligence and relates to the duty of exercising a high standard of care falling upon those controlling an extremely dangerous agency, such as electricity of a lethal voltage.⁷²

This introductory paragraph presented the problem as one of naked judicial choice; and when, after discussing the precedents, Dixon came to state his conclusion, this too was presented in unabashed terms of naked judicial choice:

After full consideration we have come to the conclusion that this is not a case to be dealt with as depending upon the duties of a person in control or occupation of a “structure”... The law which, in our opinion, *should* be applied to such a case as this is that which imposes a duty of care upon those carrying on in the exercise of statutory powers an undertaking involving the employment of a highly dangerous agency.⁷³

The subsequent history is well known. In *Thompson’s* case itself no reasons were given for the choice of one category rather than the other; there was only the bald statement that the rule more favourable to the plaintiff was the one that “should” be applied. But in later cases - especially *Rich v Commissioner of Railways*⁷⁴ and *Commissioner for Railways v Cardy*⁷⁵ - Dixon and other members of the Court moved steadily closer to giving reasons why in any such case the more general principles enunciated in *Donoghue v Stevenson* should *always* be applied. In *Commissioner of Railways v Quinlan*,⁷⁶ that line of development was cut short by the Privy Council; but twenty years later, in *Hackshaw v Shaw*,⁷⁷ Sir William Deane reopened the matter, not only taking up the line of development where *Quinlan’s* case had cut it off, but arguing that its logical conclusion was that the special rules relating to occupiers’ liability should be abandoned altogether, or rather subsumed into the general principles

70 Note 12 *supra* at 138-141, 176-78. See especially his analysis of *Hynes v New York Central R.R.*, 231 NY 229 (1921).

71 [1932] AC 562.

72 Note 69 *supra* at 623.

73 *Ibid* at 628. (Emphasis added).

74 (1959) 101 CLR 155.

75 (1960) 104 CLR 274.

76 [1964] AC 1054.

77 (1984) 155 CLR 614.

flowing from *Donoghue v Stevenson*. In *Australian Safeway Stores v Zaluzna*,⁷⁸ that argument was finally accepted by a majority of the court.

By that time, of course, Justice Deane and others were carrying into their judicial work the personal impact of Professor Stone's teaching. Moreover, a course of precedent such as that which begins with *Thompson* and ends with *Zaluzna* illustrates the full meaning of Stone's teaching. The attack on legal formalism is not an end in itself, any more than law is an end in itself. Its purpose is not to demolish the judicial process or the doctrine of precedent, but to show us how that process and that doctrine can more positively be used, as they must unavoidably be used, in the interests of justice and in anxious awareness of social responsibility.

IV. CONCLUSION

Julius Stone was deeply conscious of what he called "the time dimension of knowledge", and indeed of all human experience. He wrote movingly of "the refusal of intellect to stop at the limits set for it by its own mortality - its obstinate outfacing of death". He thereby sought to evoke an image of the posture which the human intellect must adopt:

towards the horizons of vision which limit [its] exercise...at any mortal point of time. It is ever conscious that though the present horizons limit what can here and now be known, horizons are ever moving. What is now beyond may be presently within...⁷⁹

In the 1960s Adolf Berle had been able to discern in the early stages of the managerial revolution "the very beckonings of 'the city of God'";⁸⁰ but Stone, perhaps more prescient than Berle about managerialism, knew that that city was not to be seen on this earth. Insofar as we catch glimpses of it we do so through our loved ones, not through laws or courts or General Assemblies. In the trilogy of books which succeeded *Province and Function of Law* in the 1960s, the title of the second book emphasised that its vision must be limited to *human* law and *human* justice; and the haunting metaphor which closed that book reminded us that such progress as we may make towards deeper understanding of the requirements of justice, and *a fortiori* towards effective implementation of those requirements in our human communities, can at best represent only "enclaves" of justice, tenuously and uncertainly held - like clearings in a jungle whose undergrowth constantly threatens to close in again.⁸¹ No one who had witnessed the horrors and terrors of the twentieth century could hold any more sanguine view.

What is true of our experience in the struggle for justice is also true of our theorising concerning the judicial process. Towards the end of his life Stone was

78 (1987) 162 CLR 479.

79 Initially in his "'Reason' and the Time-Dimension of Knowledge" (1962) 48 *Archiv für Rechts- und Sozialphilosophie* 95; see now *Legal System and Lawyers' Reasonings* note 20 *supra* pp 3-5.

80 Quoted in Stone, *Social Dimensions of Law and Justice*, note 20 *supra* p 432.

81 *Human Law and Human Justice*, Maitland Publications (1965) pp 344-355. And see AR Blackshield, "The Enclaves of Justice: The Meaning of a Jurisprudential Metaphor" (1967) 19 *Maine Law Review* 131.

distressed by the thought that the levels of insight and awareness which the lawyers of his generation had attained in relation to the necessity for creative judicial choice, and to which he himself had contributed so much, were being undermined - or simply forgotten - as new theories and new political pressures led yet again to a resurgence of the belief that the tasks of judgment can somehow be reduced to the orderly exposition of a self-executing body of law.

Of course, once we have absorbed Stone's insight - once we recognise that it is precisely the faithful application of legal materials that *requires* and *compels* our judges to engage in substantive evaluation of the competing claims pressed upon them - that is not the end of the discussion concerning their roles and responsibilities, but only the necessary beginning. Once the necessity of choice is acknowledged, there is room for a perennial anxious debate as to *how*, and how sweepingly, that choice should be exercised, and about what considerations can properly be taken into account. Moreover, the differing views which judges conscientiously take of those questions will themselves be among the factors they must weigh in reaching their final decision. In all this there is much room for legitimate differences of opinion. But in this debate, too, we should bear in mind Stone's warning that "judicial restraint" may provide "[a]n impeccable principle of accommodation as between wielders of power", and may yet "leave the citizenry short-changed".⁸²

In the closing pages of *Human Law and Human Justice*, Stone exhorted us, as we reflect on the work of past thinkers, to appreciate their ideas in the meanings which they had for those thinkers themselves, in the context of their response to "the perplexities of their situations"; but he urged us "also and above all" to seek "the *meaning of those meanings for ourselves in our own days*".⁸³ In the opening pages of *Legal System and Lawyers' Reasonings*, he recalled what Jean Wahl had written in a similar context:

We must be both conscious of what great thinkers have accomplished, and also eager to find elsewhere a more adequate and richer vision of reality. We must be familiar with them, bear them in mind, and salute them, before bidding them a respectful adieu. We must not forget them.⁸⁴

None of us who knew Julius Stone is likely ever to forget him. Nor are we likely to forget his teachings. Nor can we afford to do so. He has left us with a legacy of ideas that must still be patiently repeated, reinterpreted, developed and fought for. And so after all I end as I began: it is not for us to finish the task; neither are we free to desist from it.

82 Note 13 *supra*, p 668

83 Note 81 *supra*, p 352.

84 Jean Wahl, *Traité de Métaphysique*, Payot (1953, reprinted 1968) 7-8, quoted in *Legal Systems and Lawyers' Reasonings* note 20 *supra* at 7.