the collateral attack principle would be applied, certainly in criminal proceedings and to some extent in civil matters. This means that the court may strike out claims that involve the same issues being tried again as part of proving an advocate's negligence. It is also unclear as to whether the immunity is retrospective, as case law can be. Lord Hope expressed the view (without reasons) that the abolition of immunity would only apply to future cases.

(ii) In *Moy* v *Pettman Smith (a firm) and another* [2005] 1 All ER 903 the House of Lords ruled that when giving clients advice as to whether to accept a settlement offer at the door of the court and given that the advice was not negligent barristers need not spell out all the factors and reasons behind their advice. The claimant builder sustained fractures of the left leg. The surgical treatment was he alleged carried out negligently. He brought a claim against the relevant health authority. In this claim a necessary report by a consultant orthopaedic surgeon was not obtained by the claimant's solicitors in time. Eventually a report was made and the claimant's barrister, Ms Perry, asked for an adjournment of the proceedings to adduce further evidence. A county court judge turned her request down and the proceedings went on. The health authority had made an offer to settle out of court in the sum of £150,000. However Ms Perry advised her client, the claimant, to refuse it, as he would get more by proceeding to trial. The offer was made by the health authority on the day of the trial. Ms Perry had in mind that the claimant would have a separate action against the solicitors which would make up any shortfall. This was the claimant's safety net but this did not form part of Ms Perry's advice to continue to trial. The offer of £150,000 was turned down by the claimant. When the health authority realised that the report would not be available in this trial, they dropped their offer to £120,000, which the claimant accepted contrary to advice. He then claimed against Ms Perry for negligent advice and made a separate claim against the solicitors for alleged negligence in failing to obtain the report in time to comply with the timetable set for the proceedings. Their Lordships ruled that Ms Perry was not in breach of her duty to the claimant. She was not obliged to spell out all the factors and reasons behind her advice.

Criminal conduct cannot be prevented by injunction unless the Attorney-General is prepared to take or agree to the taking of proceedings

19 ***Gouriet* v *Union of Post Office Workers*** [1977] 3 All ER 70

Under ss 58 and 68 of the Post Office Act 1953, it is an offence punishable by fine and imprisonment for persons employed by the Post Office wilfully to delay or omit to deliver packets and messages in the course of transmission and for any person to solicit or endeavour to procure another to commit such an offence. The Council of the Union of Post Office Workers called on its members not to handle mail to South Africa for a week because they disapproved of South Africa's policies. The claimant, who was the Secretary of the National Association for Freedom, asked the Attorney-General for his consent to act as claimant in relator proceedings for an injunction to restrain the Union from soliciting or endeavouring to procure any person wilfully to detain or delay a postal packet in the course of transmission to South Africa. The Attorney-General refused. The claimant took the matter to court and eventually the House of Lords decided that proceedings to prevent the infringement of public rights can only be instituted by the consent of the Attorney-General unless an individual has a special interest as where his private rights are threatened. Mr Gouriet had no such interest and was not entitled to the relief sought. Presumably, a company which dealt on a regular basis with South Africa by mail would have had the necessary *locus standi*.

CRIMINAL PROCEDURE

Excessive reporting of criminal proceedings: no need to show prejudice to accused

20 ***The Eastbourne Herald Case***, *The Times*, 12 June 1973

The *Eastbourne Herald* published an article upon the committal proceedings of a case in which a man was charged with unlawful sexual intercourse. The prosecution of the editor and proprietors which followed was based on the following matters which appeared in the articles:

(*a*) a headline reading 'New Year's day Bridegroom Bailed';
(*b*) a description of the offence charged as being 'serious';
(*c*) a description of the alleged offender as 'bespectacled and dressed in a dark suit';
(*d*) a note to the effect that he had been 'married at St Michael's Church on New Year's Day';
(*e*) a reference to the way in which the prosecuting solicitor had handled the case.

The editor and proprietors were each found guilty by the Eastbourne magistrates on the five counts relating to these different passages and were each fined a total of £2,000 and ordered to pay £37.50 costs. This strange decision stems initially from the fact that

liability may be incurred under what is now s 8(4) of the Magistrates' Courts Act 1980 where a report of committal proceedings contains any details other than those permitted by s 8(4) and quite irrespective of whether or not the details are potentially prejudicial in nature. All that the prosecution is required to show is:

(*a*) that the defendant published a report of committal proceedings to which the restrictions apply; and
(*b*) that the report contained matters for which no specific provision is made in s 8(4).

Thus, in this case it was an offence under the Act to describe unlawful sexual intercourse as a 'serious' offence for s 8(4) permits of no such qualifying adjective. Equally, it was an offence to describe the defendant as 'bespectacled and dressed in a dark suit' for s 8(4) only provides for reference to his name, address and occupation. Furthermore, it is not necessary for the prosecution to show that the offending item purported to be an account of what transpired in court, provided only that it is contained within a report of committal proceedings. Thus, in this case the magistrates held that it was an offence under the Act to refer to the fact that the defendant had been married at St Michael's Church on New Year's Day although this piece of background information does not appear to have been adduced as evidence in court.

THE LAW-MAKING PROCESS I: THE UK PARLIAMENT

The courts cannot examine the proceedings of Parliament to see whether an act or delegated legislation can be regarded as invalid on the ground that it was obtained by some irregularity or fraud

21 ***British Railways Board* v *Pickin*** [1974] 1 All ER 609

Section 259 of the Bristol and Exeter Railways Act 1836 provides that if the railway, which it set up, should at any time be abandoned, the land acquired for the track should vest in the adjoining landowners; the same provision was contained in the Act setting up the Yatton to Clevedon line. The British Railways Board, in whom the railways had become vested, closed the line in the early 1960s and took up the tracks in 1969. A private Act of Parliament, the British Railways Act, was passed in 1968 cancelling the effect of s 259 and vesting the track in the Board; the Act's preamble recited that plans and books of reference had been deposited with Somerset County Council. Pickin, who objected to the closing of the line, purchased a few feet of land adjoining the track in 1969 and sought a declaration that he owned the land as far as the middle of the track, the railway having been abandoned within s 259. In reply to the Board's defence that the land was vested in it by virtue of s 18 of the Act of 1968, Pickin pleaded that that Act had contained a false recital in that the requisite documents had not been deposited, that the Board had misled Parliament in obtaining the Act *ex parte* (in effect, without hearing other views) and that it was ineffective to deprive him of his land.

Held – by the House of Lords – the courts had no power to examine proceedings in Parliament in order to determine whether the passing of an Act was obtained by means of any irregularity or fraud; Mr Pickin failed.

Comment (i) As regards delegated legislation, in *R* v *Immigration Appeal Tribunal, ex parte Joyles* [1972] 3 All ER 213 it was alleged that some regulations made under the Immigration Appeals Act 1969 had not been properly laid before Parliament as required by s 24(2) of the 1969 Act. A Divisional Court of the Queen's Bench relied on letters from the Clerks of the Journal to the Commons and Lords stating that the rules had been duly presented and laid. The court was not prepared to go further and examine the internal proceedings of Parliament.

(ii) Of course, if it is argued that the legislation conflicts with EC law, the court is obliged to give interim relief and suspend the operation of the legislation until a final ruling is obtained (see *Factortame Ltd* v *Secretary of State for Transport* (*No 2*) [1991] 1 All ER 70).

Delegated legislation – judicial control; the application of the doctrine of *ultra vires*

22 ***Hotel and Catering Industry Training Board* v *Automobile Proprietary Ltd*** [1969] 2 All ER 582

This was a test case brought by the Board to decide whether the Industrial Training (Hotel and Catering Board) Order 1966 made by the Minister of Labour pursuant to powers conferred upon him by the Industrial Training Act 1964, was *ultra vires* in so far as it purported to extend to any members' clubs. If the order was *ultra vires*, the RAC club in Pall Mall was not liable to pay a levy to the Board by reason of its activities in providing midday and evening meals and board and lodging for reward. The relevant order was made

under s 1(1) of the Act of 1964, which provides that the Minister may 'for the purpose of making better provision for . . . training . . . for employment in any activities of industry or commerce' make an order specifying 'those activities', and establishing a board to exercise the functions of an industrial training board. The 1966 order specified 'the activities' as including the supply of main meals and lodgings for reward by a members' club. Nevertheless, this provision was only valid if the activities of members' clubs were activities of 'industry or commerce'.

Held – by the House of Lords – the general object of the Act of 1964 was to provide employers in industry and commerce with trained personnel and to finance the training by a levy on employers in the industry, and that it was not intended to allow a levy to be made on private institutions like members' clubs. Although such institutions might pursue activities not unlike those of a hotel keeper, they could not be regarded as within the phrase 'activities of industry or commerce'.

Comment The question of *ultra vires* was raised in *R* v *Secretary of State for the Environment, ex parte Spath Holme Ltd* [2000] 1 All ER 884 where Spath Holme, the landlord of flats, challenged the validity of the Rent Acts (Maximum Fair Rent) Order 1999 made under the Landlord and Tenant Act 1985, s 31. The 1985 Act gave power to cap rent increases to tenants to combat inflation, but the 1999 Order, which was made at a time of very low inflation, was intended purely to cap rent increases. The Court of Appeal, dealing with judicial review asked for by Spath Holme, ruled that the 1999 Order was *ultra vires* and of no effect.

This decision was subsequently affirmed by the House of Lords (see *R* v *Secretary of State for the Environment ex parte Spath Holme Ltd* [2001] 1 All ER 195).

Local authority by-laws can be challenged in the courts as being unreasonable

23 ***Burnley Borough Council* v *England***, *The Times*, 15 July 1978

In this case it was *held* that a by-law of the Council prohibiting any person from causing any dog belonging to him or in his charge to enter or remain in specified pleasure grounds other than a guide dog in the charge of a blind person was not unreasonable. The Council was concerned about the fouling of pleasure grounds by dogs. The court went on to say that a by-law could be unreasonable if so unjust and oppressive that no reasonable council could have made it – for example, a by-law directed against dog owners with red hair.

Interpretation Act 1978: application to statutory interpretation

24 ***Hutton* v *Esher Urban District Council*** [1973] 2 All ER 1123

The Council proposed to construct a sewer to drain surface water from houses and roads and also to take flood water from a river. The most economical line of the sewer would take it straight through the claimant's bungalow, which would have to be demolished but might be rebuilt after the sewer had been constructed. The Public Health Act 1936 empowered the Council to construct a public sewer 'in, on, or over any land not forming part of a street'. The claimant argued that the expression 'land' did not include buildings and, therefore, the Council had no power to demolish his bungalow. However, s 3 of the Interpretation Act of 1889 (see now the Interpretation Act 1978, s 5 and Sch 1) provided that unless a contrary intention appears, the expression 'land' includes buildings. It was *held* – by the Court of Appeal – that the Interpretation Act was applicable and 'land', therefore, included buildings. In consequence, the Council had the power to demolish the claimant's bungalow.

Judicial interpretation of statutes: the mischief rule: a statute is to be construed so as to suppress the mischief in the common law and advance the remedy

25 ***Gardiner* v *Sevenoaks RDC*** (1950) 66 TLR 1091

The local authority served a notice under the Celluloid and Cinematograph Film Act 1922 on the occupier of a cave where film was stored, requiring him to comply with certain safety regulations. Obviously, the common law had no such rules. The cave was described in the notice as 'premises'. Gardiner, who was the occupier, appealed against the notice on the ground that a cave could not be considered 'premises' for the purposes of the Act.

Held – whilst it was not possible to lay down that every cave would be 'premises' for all purposes, the Act was a safety Act and was designed to protect persons in the neighbourhood and those working in the place of storage. Therefore, under the 'mischief rule', this cave was 'premises' for the purposes of the Act.

Comment The mischief rule is very close to the more recent recommendation of the Law Commission for a purposive interpretation of statutes.

The golden rule of interpretation: extends the literal rule where the application of that rule leads to an absurd result

26 ***Keene* v *Muncaster*** [1980] RTR 377

Regulation 115 of the Motor Vehicles (Construction and Use) Regulations 1973 provides that a motorist may only park a motor vehicle on the road during the hours of darkness with the nearside of the vehicle to the kerb. There is an exception to this if he has the permission of a police officer in uniform to do otherwise. The defendant, a police officer in uniform, parked his vehicle with the offside to the kerb during the hours of darkness. When he was charged with an offence under reg 115, he claimed that he had given himself permission to park that way. He was convicted by the magistrates and appealed to the Divisional Court of Queen's Bench.

Held – dismissing the appeal – under the golden rule of interpretation the word 'permission' meant permission had to be requested by one person from another. The permission could not be given by the person whose vehicle was parked with the offside to the kerb.

Comment The golden rule of interpretation was considered in *Prince of Hanover* v *Attorney-General* (1957) to which reference could usefully be made again at this point.

The *ejusdem generis* rule

27 ***Lane* v *London Electricity Board*** [1955] 1 All ER 324

The claimant was an electrician employed by the defendant to install additional lighting in one of its sub-stations. While inspecting the sub-station, he tripped on the edge of an open duct and fell, sustaining injuries. The claimant claimed that the defendant was in breach of its statutory duty under the Electricity (Factories Act) Special Regulations in that the part of the premises where the accident occurred was not adequately lighted to prevent 'danger'.

Held – it appeared that the word 'danger' in the regulations meant 'danger from shock, burn or other injury'. Danger from tripping was not *ejusdem generis*, since the specific words related to forms of danger resulting from contact with electricity.

Comment This summary is concerned only with the claimant's claim under the Regulations. The failure of this claim did not prevent a claim for damages for negligence at common law.

The *expressio unius est exclusio alterius* rule of statutory interpretation: the expression of one thing implies the exclusion of another

28 ***R* v *Immigration Appeals Adjudicator, ex parte Crew***, *The Times*, 26 November 1982

An Immigration Appeals Tribunal had, in interpreting the Immigration Act 1971, ruled that a woman who was born in Hong Kong of a Chinese mother and putative English father was not entitled to a certificate of patriality (a certificate allowing immigration). There was an appeal to the Court of Appeal where the sole question was whether the word 'parent' used in the 1971 Act included the father of an illegitimate child. The father in this case was unknown. It was held that since the definition section in the 1971 Act specifically mentioned the mother alone in the context of an illegitimate child, the rule *expressio unius est exclusio alterius* served to exclude the father of an illegitimate child for these purposes as a 'parent'. The appeal was dismissed. The Act required patriality to be decided on the basis of the mother alone. The daughter of a Chinese mother was not a patrial.

The *noscitur a sociis* rule of statutory interpretation: the meaning of a word may be gathered from its context

29 ***Muir* v *Keay*** (1875) LR 10 QB 594

Section 6 of the Refreshment Houses Act 1860 stated that all houses, rooms, shops or buildings, kept open for public refreshment, resort and entertainment during certain hours of the night, must be licensed. The defendant had premises called 'The Café', and certain persons were found there during the night when the café was open. They were being supplied with cigars, coffee and ginger beer which they were seen to consume. The justices convicted the defendant because the premises were not licensed. He appealed to the Divisional Court by case stated, suggesting that a licence was required only if 'entertainment' in terms, e.g., of music or dancing was going on. The Divisional Court, applying the *noscitur a sociis* rule, *held* – that 'entertainment', because of the context in which it appeared in the Act of 1860, meant matters of bodily comfort and not matters of mental enjoyment such as theatrical or musical performances with which the word 'entertainment' is so often associated in other contexts. The justices were, therefore, right to convict.

THE LAW-MAKING PROCESS II: CASE LAW AND THE LEGISLATIVE ORGANS OF THE EUROPEAN UNION

Since its declaration of 1966 the House of Lords is not bound by its own decisions: application of the declaration

30 ***Schorsch Meier Gmbh* v *Hennin*** [1975] 1 All ER 152

The claimant, which carried on business in West Germany, had sold goods to the defendants in England. They had not been paid in full for the goods and DM 3,756 remained owing. At the date of the invoice the sterling equivalent of this sum was £452, but between the invoice date and the date of the county court summons sterling had been devalued so that the value of £452 was only £266. Consequently, the claimant asked for judgment in deutschmarks. The difficulty facing the claimant was that the House of Lords had decided in *Re United Railways of Havana* [1960] 2 All ER 332 that an English court could not give judgment for an amount in foreign currency. The claimant challenged this on the ground that the *Havana* case ran contrary to Art 106 (now 107) of the EEC Treaty (now EC Treaty). The county court judge held that he was bound by the *Havana* case and could only give judgment in sterling. On appeal, however, the Court of Appeal with Lord Denning, MR came to a different decision and found for the claimant on two grounds – (i) as an English court had since *Beswick* v *Beswick* (1967) the power to order specific performance of a contract to make a money payment, there was no longer a justification for the rule in *Havana* that judgment could only be given for a sum of money in sterling; (ii) the effect of Art 106 (now 107) of the EEC Treaty (now EC Treaty) was to require the English courts to give judgment in favour of a creditor of a member state in the currency of that state.

31 ***Miliangos* v *George Frank (Textiles) Ltd*** [1975] 3 All ER 801

This case was concerned with a contract for the sale of polyester yarn and, in particular, the money of payment and the money of account in the contract were in Swiss francs. The Swiss seller, who was unpaid, was allowed in view of the decision in *Schorsch Meier* to claim payment in Swiss francs. Sterling had fallen in value against the Swiss franc and if the new rule in *Schorsch* were to be applied, the claimant stood to gain £60,000 as opposed to £42,000 under the *Havana* principle. At first instance Bristow, J *held* that the decision in *Schorsch* had been decided *per incuriam*, the Court of Appeal having been bound by the *Havana* case. Consequently, he felt able to give a judgment only in sterling. From his judgment an appeal was made to the Court of Appeal and his decision was reversed by a court presided over by Lord Denning, who had been in the majority in the Court of Appeal when *Schorsch* was decided. From the judgment of the Court of Appeal a further appeal was made to the House of Lords. Their Lordships quickly reached the conclusion that the *Havana* case had not been overruled, since the only means by which that could have been done was by the House of Lords itself under the declaration of 1966 and, accordingly, the Court of Appeal should have felt bound by the case. It was, however, now open for the House of Lords to re-examine its previous decision in *Havana*. The House of Lords concluded that as the situation regarding currency stability had substantially changed since 1961 when the *Havana* case was decided, there was justification for a departure from that decision under the 1966 declaration. Accordingly, the House refused to follow the *Havana* case and held that an English court may give judgment in a foreign currency. However, the majority of their Lordships were highly critical of the wide interpretation of Art 106 (now 107) adopted by the Court of Appeal, Switzerland not being a member of the Common Market, and it remains to be seen when the matter comes before the courts again whether that Article is adequate to sustain the view taken in this case.

Comment (i) In *Fitzleet Estates Ltd* v *Cherry (Inspector of Taxes)* [1977] 3 All ER 996, a case concerned with the tax treatment of interest paid on a loan used to buy property, the House of Lords refused to depart from its previous decision in *Chancery Lane Safe Deposit and Offices Co Ltd* [1966] 1 All ER 1 and stated that, in the absence of a change of circumstances, it would not normally depart from a previous decision unless there were serious doubts as to its correctness. So change of circumstances would seem to be the major factor. It will be noted that in the *Miliangos* case the circumstances were very different from those which applied when the *Havana* case was decided. The situation regarding currency stability had changed. Currency values were much more volatile and this justified a departure from the *Havana* case.

(ii) A further example of the use of the 1966 declaration can be seen in *Murphy* v *Brentwood District Council* (1990) (see Chapter 21) where the House of Lords departed from a previous decision because there were serious doubts as to its correctness.

Precedent: Court of Appeal Criminal Division: considerations applying on a criminal appeal

32 ***R* v *Gould*** [1968] 1 All ER 849

The appellant was convicted of bigamy although when he remarried he believed on reasonable grounds that a decree *nisi* of divorce in respect of his previous marriage had been made absolute which it had not, so that he was still married at the time of the second ceremony. The Court of Criminal Appeal in *R* v *Wheat and Stocks* [1921] 2 KB 119 had decided on similar facts that a reasonable belief in the dissolution of a previous marriage was no defence. In this appeal to the Court of Appeal (Criminal Division) the court quashed the conviction *holding* that in spite of the decision in *R* v *Wheat and Stocks*, a defendant's honest belief on reasonable grounds that at the time of his second marriage his former marriage had been dissolved was a good defence to a charge of bigamy. Diplock, LJ, giving the judgment of the court, said that in its criminal jurisdiction the Court of Appeal does not apply the doctrine of *stare decisis* as rigidly as in its civil jurisdiction, and if it is of the opinion that the law has been misapplied or misunderstood it will depart from a previous decision.

Comment In this case a three-judge court expressly overruled *Wheat and Stocks* which was itself a decision of a five-judge Court of Criminal Appeal.

Cause of action and issue estoppel distinguished

33 ***Arnold* v *National Westminster Bank plc*** [1990] 1 All ER 529

The bank leased premises to the claimants for a term of years. The lease had rent review clauses in it. The reviews were to take place every five years. The review was to give the bank as landlords a 'fair market rent' according to a formula in the lease. At the first review in 1983 the judge who was called upon to interpret the review clause decided that upon its wording he had to give a rent on the basis that there were no review clauses in the lease. This meant a rent which would last until the end of the lease and such a rent would have to be some 20 per cent more than if the fair rent was based on a lease with regular reviews of rent.

The parties went to court again on the 1988 review and that litigation produced this decision. It appeared that following the judge's decision on the 1983 review other cases interpreting similar review clauses decided that the wording meant a fair rent based on a lease with regular rent reviews. The claimants wanted such a decision in regard to the 1988 review. The bank said the court could not give such a decision because the matter had been decided in 1983 and must stand for the whole of the lease in terms of the interpretation of the rent review clause. The Court of Appeal said that the issue could be looked at again in regard to the 1988 review. This was not cause of action estoppel but only issue estoppel and the issue could be litigated again.

Comment It is worth noting that cause of action estoppel would prevent the overruling of the 1983 decision but at least the *issue* which was at the root of the 1983 decision could be looked at again for the future.

Supremacy of EC law

34 ***Factortame Ltd* v *Secretary of State for Transport (No 2)*** [1991] 1 All ER 70

The problem in this case was the Merchant Shipping Act 1988. This required 75 per cent of directors and shareholders in companies operating fishing vessels in UK waters to be British. This effectively barred certain ships owned by UK companies controlled by Spanish nationals from fishing in British waters. This was alleged to be in conflict with the Treaty of Rome because it deprived Spanish-controlled companies and, by implication, their Spanish directors and members, of their EC rights under the common fishing policy. The matter was going to take up to two years to sort out. The Spanish would suffer financial loss during that time. They asked the court for a suspension of the operation of the 1988 Act until the final issue had been determined. The House of Lords eventually decided to refer the matter to the European Court which gave an unequivocal answer. It laid down that Community law must be fully and uniformly applied in all the member states and that a relevant Community law rendered automatically inapplicable any conflicting provision of national law. It followed that the courts were obliged to grant interim relief in cases of alleged conflict, where as in this case the only obstacle was a rule of national law. Accordingly, the House of Lords granted interim relief by suspending the relevant provision of the 1988 Act until a final ruling on the issue of conflict could be obtained.

Comment (i) The supremacy of EC law has been upheld, not only where there is a conflict, but even where there might be. The decision makes a big dent in parliamentary supremacy, to say the least.

(ii) It is worth noting that the UK Parliament repealed the relevant sections of the 1988 Act in 1993.

(iii) In 1999 the House of Lords held that Factortame Ltd and 96 other companies or shareholders or directors which had been operating British-registered fishing vessels that were barred when the 1988 Act was implemented were entitled to damages from the UK government for breach of the EC common fisheries policy (see *R* v *Secretary of State for Transport, ex parte Factortame Ltd and Others* [1999] 4 All ER 906).

PERSONS AND THE CROWN

Domicile of origin and choice: effect on taxation

35 ***IRC* v *Bullock*** [1976] 3 All ER 353

Mr Bullock was born in Nova Scotia in 1910 and had his domicile of origin there. In 1932 he came to England to join the RAF, intending to go back to Canada when his service was completed. In 1946 he married an Englishwoman and they went on a number of visits to Mr Bullock's father in Canada. In 1959 Mr Bullock retired from the RAF and took up civilian employment in England. In 1961 he was able to retire fully, having become entitled to money from his father's estate on the latter's death. Mr Bullock had always tried to persuade his wife to live in Canada but she would not do so. Even so, Mr Bullock always hoped she would change her mind. In 1966 he made a will subject to Nova Scotian law under which he said that his domicile was Nova Scotia and that he intended to return and remain there if his wife died before him. The Crown claimed that he had acquired a domicile of choice in England and that all his income from Canada was chargeable to income tax. If Mr Bullock was not domiciled in England, tax would be chargeable only on that part of the income from his father's estate which was actually sent to him in England. This was less than all the income. It was *held* – by the Court of Appeal – that the fact that Mr Bullock had established a matrimonial home in England was evidence of his intention, but was not conclusive. On the evidence of his retention of Canadian citizenship and of the terms of a declaration as to domicile in his will, it was impossible not to hold that Mr Bullock had always maintained a firm intention to return to Canada in the event of his surviving his wife, and there was a sufficiently substantial possibility of his surviving his wife to justify regarding the intention to return as a real determination to do so, in that event, rather than a vague hope or aspiration. Accordingly, Mr Bullock could not be said to have formed the intention to acquire an English domicile of choice. Thus, he could be taxed only on that part of the Canadian estate which was remitted to England.

Domicile: a person who abandons a domicile of choice without acquiring another reverts to the domicile of origin

36 ***Tee* v *Tee*** [1973] 3 All ER 1105

The parties were married in England in November 1946 when the husband was a domiciled Englishman and the wife was an American citizen. In 1951 they went to the United States and in 1953 the husband became an American citizen and acquired a domicile of choice in that country. In 1960 the husband was posted to Germany by his employer, and in 1965 he left his wife and set up home with a German woman by whom he had two children. Some time during 1966/7 the husband decided to make his permanent home in England, but it was not until November 1972 that the husband with his mistress and children actually took up residence in the house he had bought in England in May 1972. The husband had been granted a permit to work in England in 1969. In July 1972, he presented a petition for divorce. The wife challenged the jurisdiction of the English court to hear this petition, and the question for the court was whether the husband was domiciled in England in July 1972.

Held – by the Court of Appeal – the husband was domiciled in England. He had left the United States in 1960 and the intention not to return there was formed over the period 1966/7. In consequence, the two elements necessary to establish the abandonment of a domicile of choice had been proved. When a domicile of choice was lost, the domicile of origin revives; the fact that the husband did not actually take up permanent residence in England until 1972 was immaterial since it is not necessary for the revival of a domicile of origin that residence should also be taken up in that country.

Domicile: evidence of change: naturalisation: purchase of business

37 ***Steiner* v *Inland Revenue Commissioners*** [1973] STC 547

Steiner was born in the former Austro-Hungarian Empire. He lived in Berlin from 1906 but was driven out of Germany by the Nazis in 1939 and came to England. He acquired a flat in London in 1941 and by the end of 1948 had established a business in England and was naturalised in 1948. From 1948 to 1963 he spent six months of each year in Berlin where he had a property. He was assessed to income tax for the years 1960/61 to 1966/7 on rents on properties in West Berlin, the Special Commissioners holding that he had acquired an English domicile of choice. He appealed.

Held – by the Court of Appeal – the appeal would be dismissed; there were no grounds for holding the Special Commissioners' decision to be wrong in law. The court refused to grant leave to appeal to the House of Lords.

Comment (i) If a person is domiciled or resident in England and Wales, tax is charged on the full amount of income arising within a given year wherever made or received (Income and Corporation Taxes Act (1988), ss 334–336).

(ii) See also *IRC* v *Bullock* (1976) for other examples of evidence of change of domicile, e.g. by a will.

Racial discrimination: inducement to discrimination on racial grounds

38 ***The Commission for Racial Equality* v *Imperial Society of Teachers of Dancing*** [1983] ICR 473

The Society wished to employ a filing clerk. A telephone call was made to a local girls' school to find a suitable applicant. During the course of the phone call it was made clear that a 'coloured girl' would be out of place because there were no coloured employees. It was *held* by the Employment Appeal Tribunal that the words 'to induce' in s 31 of the Race Relations Act 1976 meant to persuade or to prevail upon or to bring about, and the words used did constitute an attempt to induce the head of careers at the girls' school not to send a coloured girl. In consequence, the Society had contravened s 31.

Sex discrimination: facilities and services

39 ***Gill* v *El Vino Co Ltd*** [1983] 1 All ER 398

The claimants, both women, entered a wine bar and stood at the bar and ordered wine. They were refused service under house rules but were told that if they would sit at a table their drinks would be brought to them. The claimants brought an action alleging breach of the 1975 Act. It was *held* – by the Court of Appeal – that applying the simple words of the Act the defendants had failed to provide the claimants with facilities afforded to men and by doing so they had treated women less favourably than men contrary to the 1975 Act.

Comment (i) In *James* v *Eastleigh Borough Council* [1990] 2 All ER 607 the claimant and his wife, who were both retired and aged 61, went to a leisure centre run by the Council. The wife was admitted to the swimming pool free because she was of pensionable age. The claimant had to pay because he was not. He brought proceedings alleging discrimination. Eventually the House of Lords ruled that the distinction operated by the Council was unlawful direct discrimination on the grounds of sex.

(ii) In *McConomy* v *Croft Inns* [1992] IRLR 561 the complainant was refused a drink in a public house because he wore two earrings in his left ear. He was awarded £250 damages for sex discrimination since clearly there would have been no question of not serving a woman because she was wearing earrings.

(iii) The Race Relations Act 1976, s 25 prohibits racial discrimination in relation to membership of political and social clubs with a membership of more than 25. The Sex Discrimination Act 1975 does not carry such a prohibition. Sex discrimination by private clubs is not outlawed under the provisions of the SDA 1975 relating to provision of services or facilities to the public or a section of it since private membership clubs cannot be said to provide such facilities or services. As the *Gill* case shows the position is different in relation to pubs or clubs open to the public.

Sex discrimination: credit: a requirement that a woman must have her husband's guarantee is unlawful

40 ***Quinn* v *Williams Furniture Ltd*** [1981] ICR 328

Mrs Quinn wanted to buy certain goods from a shop on hire-purchase terms. She was told by the shop assistant that if she took out a hire-purchase agreement her husband would have to give a guarantee for the credit allowed, but if he took out the agreement she would not be required to give a guarantee of his liability. She bought the goods and took out the agreement herself, her husband acting as guarantor. She then complained that the shop's refusal to give her credit facilities on the same basis as they would to a man in her position was a breach of the Sex Discrimination Act 1975. The Court of Appeal held that it was. On the facts Mrs Quinn had not been allowed credit facilities in the same way as they would normally be offered to men. Even a suggestion or advice such as this to get her husband's guarantee was unlawful. There did not have to be an outright refusal of credit.

Comment The case shows that credit restrictions based on sex, at one time usual in business, may now infringe the 1975 Act.

A registered company has a separate legal entity

41 ***Salomon* v *Salomon & Co*** [1897] AC 22

Salomon carried on business as a leather merchant and boot manufacturer. In 1892 he formed a limited company to take over the business. The memorandum of association was signed by Salomon, his wife, daughter and four sons. Each subscribed for one

share. The company paid £38,782 to Salomon for the business and the mode of payment was to give Salomon £10,000 in debentures, secured by a floating charge, 20,000 shares of £1 each and £8,782 in cash. The company fell on hard times and a liquidator was appointed. The debts of the unsecured creditors amounted to nearly £8,000, and the company's assets were approximately £6,000. The unsecured creditors claimed all the remaining assets on the ground that the company was a mere alias or agent for Salomon.

Held – the company was a separate and distinct person. The debentures were perfectly valid and, therefore, Salomon was entitled to the remaining assets in part payment of the secured debentures held by him.

Comment In a company winding-up such as this, secured creditors such as Mr Salomon must be paid before the unsecured (or trade) creditors.

Looking behind the corporate mask

42 *Gilford Motor Company* v *Horne* [1933] Ch 935

Mr Horne had been employed by Gilford. He had agreed to a restraint of trade in his contract under which he would not approach the company's customers to try to get them to transfer their custom to any similar business which Mr Horne might run himself. Mr Horne left his job with Gilford and set up a similar business using a registered company structure. He then began to send out circulars to the customers of Gilford inviting them to do business with his company. Gilford asked the court for an injunction to stop Mr Horne's activities and he said he was not competing but his company was and that the company had not agreed to a restraint of trade. However, an injunction was granted against both Mr Horne and his company to stop the circularisation of Gilford's customers. The corporate structure could not be used to evade legal responsibilities.

A member may obtain an injunction to restrain a company from acting in a manner inconsistent with its constitution

43 *Jenkin* v *Pharmaceutical Society* [1921] 1 Ch 392

The defendant society was incorporated by Royal Charter in 1843 for the purpose of advancing chemistry and pharmacy and promoting a uniform system of education of those who should practise the same, and for the protection of those who carried on the business of chemists or druggists.

Held – the expenditure of the funds of the society in the formation of an industrial committee, to attempt to regulate hours of work and wages and conditions of work between employers and employee members of the society, was *ultra vires* the charter, because it was a trade union activity which was not contemplated by the Charter of 1843. Further, the expenditure of money on an insurance scheme for members was also not within the powers given in the charter, for it amounted to converting the defendant society into an insurance company. The claimant, a member of the society, was entitled to an injunction to restrain the society from implementing the above schemes.

Disclosure of documents: Crown or public interest privilege

44 *Norwich Pharmacal Co* v *Commissioners of Customs and Excise* [1973] 2 All ER 943

The claimants held the patent of a chemical compound used in animal foods, which they discovered was being infringed by unknown importers. The Commissioners of Customs and Excise were allowing the importation and charging duty thereon, and consequently knew the identity of the importers concerned. The claimants brought proceedings against the Commissioners for infringement of their patent, and for an order that they disclose the identity of the importers. The order was granted by the judge but reversed by the Court of Appeal. On appeal to the House of Lords by the claimants it was *held* – allowing the appeal – that the interests of justice outweighed any public interest in the confidential nature of such information. The Commissioners were under a duty to assist a person wronged by disclosing the identity of the wrongdoer.

45 *Alfred Crompton Amusement Machines* v *Customs and Excise Commissioners (No 2)* [1973] 2 All ER 1169

The appellants had paid purchase tax on the wholesale value of amusement machines for some years on the basis of a formula negotiated with the Commissioners of Customs and Excise. The appellants claimed that the assessments were too high and thereupon the Commissioners investigated the appellants' books and obtained from customers and other sources information bearing on the ascertainment of the wholesale value of the machines. The appellants did not agree with the opinion of the Commissioners as to the way in which the tax should be computed and in subsequent arbitration proceedings Crown privilege was claimed in respect of documents received by the Commissioners from third parties. It was *held* – by the House of Lords – that the considerations for and

against disclosure were evenly balanced. In these circumstances it was held that the court ought to uphold the claim to privilege and trust the Executive to mitigate the ill-effects of non-disclosure.

Comment It seems that where there is a doubt in regard to disclosure, the benefit of the doubt is unfortunately to be allowed in favour of the Executive and against disclosure. On considering the issue of Crown privilege, their Lordships indicated by way of preface that the title is a misnomer; a more accurate term would be privilege on the ground of 'public interest', since privilege extends beyond cases against the Crown.

MAKING THE CONTRACT I

Offer and unilateral agreements

46 ***Carlill* v *Carbolic Smoke Ball Co*** [1893] 1 QB 256

The defendants were proprietors of a medical preparation called 'The Carbolic Smoke Ball'. They inserted advertisements in various newspapers in which they offered to pay £100 to any person who contracted influenza after using the ball three times a day for two weeks. They added that they had deposited £1,000 at the Alliance Bank, Regent Street, 'to show our sincerity in the matter'. The claimant, a lady, used the ball as advertised, and was attacked by influenza during the course of treatment, which in her case extended from 20 November 1891 to 17 January 1892. She now sued for £100 and the following matters arose out of the various defences raised by the company: (*a*) It was suggested that the offer was too vague since no time limit was stipulated in which the user was to contract influenza. The court said that it must surely have been the intention that the ball would protect its user during the period of its use, and since this covered the present case it was not necessary to go further. (*b*) The suggestion was made that the matter was an advertising 'puff' and that there was no intention to create legal relations. Here the court took the view that the deposit of £1,000 at the bank was clear evidence of an intention to pay claims. (*c*) It was further suggested that this was an attempt to contract with the whole world and that this was impossible in English law. The court took the view that the advertisement was an offer to the whole world and that, by analogy with the reward cases, it was possible to make an offer of this kind. (*d*) The company also claimed that the claimant had not supplied any consideration, but the court took the view that using this inhalant three times a day for two weeks or more was sufficient consideration. It was not necessary to consider its adequacy. (*e*) Finally, the defendants suggested that there had been no communication of acceptance but here the court, looking at the reward cases, stated that in contracts of this kind acceptance may be by conduct.

Comment (i) An offer to the public at large can only be made where the contract which eventually comes into being is a unilateral one, i.e. where there is a promise on one side for an act on the other. An offer to the public at large would be made, for example, where there was an advertisement offering a reward for services to be rendered such as finding a lost dog. It is interesting to note that an invitation to treat may be put to the world at large, as where A advertises his car for sale in the local press, inviting offers which may eventually lead to a bilateral contract, but an offer cannot be unless designed to produce a unilateral contract.

(ii) Most business contracts are bilateral. They are made by an exchange of promises and not, as here, by the exchange of a promise for an act. Nevertheless, *Carlill's* case has occasionally provided a useful legal principle in the field of business law (see, e.g., *New Zealand Shipping Co Ltd* v *AM Satterthwaite & Co Ltd* [1974] 1 All ER 1015 (Case **181**)). *As regards motive*, presumably Mrs Carlill used the ball to prevent influenza and not to recover £100. However, she had seen the offer and her motive was immaterial.

(iii) A deposit of money from which to pay is not essential. In *Wood* v *Lectrik Ltd*, *The Times*, 13 January 1932 the defendants who were makers of an electric comb had advertised: 'What is your trouble? Is it grey hair? In ten days not a grey hair left. £500 Guarantee.' Mr Wood used the comb as directed but his hair remained grey at the end of ten days of use. All the comb had done was to scratch his scalp. There was no bank deposit by the company but Rowlatt, J held that there was a contract and awarded Mr Wood the £500.

(iv) Where the offer is made to a particular person it may only be accepted by that person. Thus in *Boulton* v *Jones* (1857) 2 H & N 564 the defendant ordered (offered to buy) 50 feet of leather hose from Brocklehurst (a business). Boulton had earlier on the same day bought the Brocklehurst business of which he had been the manager. Boulton 'accepted' the offer and supplied the hose. It was held that there was no contract since the offer was made to Brocklehurst personally. It was important to Jones that he was dealing with Brocklehurst because he was owed money by him and was intending to deduct that sum from the price of the goods (called a set-off). Since Jones had used the hose before he received Boulton's invoice, he could not be required to return it and Boulton failed in his claim for the purchase price.

(v) In *Boulton* v *Jones* the problem would not have arisen if the Brocklehurst business had been a company in which Boulton had acquired, by way of its purchase, a controlling interest in its shares. Why?

Offer and invitation to treat – auction sales

47 *Harris* v *Nickerson* (1873) LR 8 QB 286

The defendant, an auctioneer, advertised in London newspapers that a sale of office furniture would be held at Bury St Edmunds. A broker with a commission to buy furniture came from London to attend the sale. Several conditions were set out in the advertisement, one being: 'The highest bidder to be the buyer.' The lots described as office furniture were not put up for sale but were withdrawn, though the auction itself was held. The broker sued for loss of time in attending the sale.

Held – he could not recover from the auctioneer. There was no offer since the lots were never put up for sale, and the advertisement was simply an invitation to treat.

Comment (i) A sensible decision, really. The statement, 'I *intend* to auction some office furniture' is not the same as an offer for sale, and in any case there seems to be no way of accepting the 'offer' in advance of the event.

(ii) In *British Car Auctions* v *Wright* [1972] 3 All ER 462 the auctioneers sold an unroadworthy vehicle. An attempt to charge them with the offence of 'offering' the car for sale contrary to road traffic legislation failed. The bidder made the offer and not the auctioneer (and see *Partridge* v *Crittenden* (1968)).

Invitation to treat: price indications, circulars, etc.

48 *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401

The defendants' branch at Edgware was adapted to the 'self-service' system. Customers selected their purchases from shelves on which the goods were displayed and put them into a wire basket supplied by the defendants. They then took them to the cash desk where they paid the price. One section of shelves was set out with drugs which were included in the Poisons List referred to in s 17 of the Pharmacy and Poisons Act 1933, though they were not dangerous drugs and did not require a doctor's prescription. Section 18 of the Act requires that the sale of such drugs shall take place in the presence of a qualified pharmacist. Every sale of the drugs on the Poisons List was supervised at the cash desk by a qualified pharmacist, who had authority to prevent customers from taking goods out of the shop if he thought fit. One of the duties of the Society was to enforce the provisions of the Act, and the action was brought because the claimants alleged that the defendants were infringing s 18.

Held – the display of goods in this way did not constitute an offer. The contract of sale was not made when a customer selected goods from the shelves, but when the company's employee at the cash desk accepted the offer to buy what had been chosen. There was, therefore, supervision in the sense required by the Act at the appropriate moment of time.

Comment (i) The fact that a price ticket is not regarded as an offer is somewhat archaic, being based, perhaps, on a traditional commercial view that a shop is a place for bargaining and not a place for compulsory sales. However, because currently there is a return to bargaining in some areas of purchase, e.g. cars, white goods and electrical goods, the price ticket is perhaps rightly regarded in those areas as an invitation to treat; a starting point for the bargaining.

(ii) Although a trader can *refuse to sell* at his wrongly advertised price, he commits a criminal offence under ss 20 and 21 of the Consumer Protection Act 1987 for giving a misleading price indication where the price ticket shows a *lower* price than that at which he is prepared to sell.

(iii) The relevant provisions of the 1933 Act are now in ss 2 and 3 of the Poisons Act 1972.

(iv) See also *Esso Petroleum Ltd* v *Customs and Excise Commissioners* [1976] 1 All ER 117 where the House of Lords decided that price indications at a petrol filling station were invitations to treat.

(v) The concept of invitation to treat also applies to goods displayed with a price ticket in a shop window (*Fisher* v *Bell* [1960] 3 All ER 731).

49 *Partridge* v *Crittenden* [1968] 2 All ER 421

Mr Partridge inserted an advertisement in a publication called *Cage and Aviary Birds* containing the words 'Bramblefinch cocks, bramblefinch hens, 25s each'. The advertisements appeared under the general heading 'Classified Advertisements' and in no place was there any direct use of the words 'offer for sale'. A Mr Thompson answered the advertisement enclosing a cheque for 25s, and asking that a 'bramblefinch hen' be sent to him. Mr Partridge sent one in a box, the bird wearing a closed ring.

Mr Thompson opened the box in the presence of an RSPCA inspector, Mr Crittenden, and removed the ring without injury to the bird. Mr Crittenden brought a prosecution against Mr Partridge before the Chester magistrates alleging that Mr Partridge had offered for sale a brambling contrary to s 6(1) of the Protection of Birds Act 1954 (see now s 6(1) of the Wildlife and Countryside Act 1981), the bird being other than a close-ringed specimen bred in captivity and being of a species which was resident in or visited the British Isles in a wild state.