ladies. However, for the reasons which have been given, we have come to the conclusion that this tribunal is not the proper place to investigate the validity of the evaluation study. We, certainly, no more than an industrial tribunal may, are not going to venture on any evaluation study ourselves.

For these reasons, in our view, this appeal must succeed to the limited extent that it is to be remitted for further consideration on the basis that in the first place this is a case which falls to be considered under s 1(5) where there is *prima facie* in existence a valid and proper evaluation study. If it is to be called into question, it can only be done within a very limited area, and we are quite confident that an industrial tribunal is quite capable of deciding for itself how far it can go in examining the validity of the evaluation study. Consequently this case must be remitted to a fresh tribunal to consider it along the lines that we have indicated.

Appeal allowed.

Solicitors: *Anderson & Co*, Nottingham (for the female employees).

Salim H J Merali Esq Barrister.

Gouriet v Union of Post Office Workers and others

COURT OF APPEAL, CIVIL DIVISION
LORD DENNING MR, LAWTON AND ORMROD LJJ
15th, 18th, 19th, 20th, 21st, 27th JANUARY 1977

Attorney-General – Relator action – Refusal of consent to relator action – Right of member of public to sue in own name – Claim for declaration or injunction – Enforcement of criminal law – Interlocutory injunction – Public interest – Effect of refusal of Attorney-General's consent to relator action – Right of member of public to bring action in own name – Plaintiff having no particular interest above that of other members of public – Action to restrain postal workers' union from instructing members to interfere with postal services in breach of criminal law – Attorney-General refusing consent to relator action – Right of member of public suing in own name for declaratory judgment – Right to interim injunction – Supreme Court of Judicature (Consolidation) Act 1925, s 45(1).

On the evening of Thursday, 13th January 1977, the plaintiff saw a news bulletin on television in which it was reported that the executive council of the Union of Post Office Workers had resolved that day to call on its members to impose a boycott on all postal communications between Britain and South Africa. On the following day The Times newspaper contained a report of the resolution, indicating that the action proposed to be taken by the union was in response to a call for 'international solidarity' from the International Confederation of Free Trade Unions to its member unions to protest against the South African government's policy of 'apartheid'. The boycott was to come into effect on the following Sunday, 16th January. At 12.45 p m on the Friday the plaintiff applied to the Attorney-General for his consent to act as plaintiff in a relator action for an injuction against the union on the ground that the actions of the union's members in interfering with postal communications and the action of the union in soliciting or endeavouring to procure such interference would constitute criminal offences under ss 58[a] and 68[b] of the Post Office Act 1953. At 3.32 p m the Attorney-General made the following statement: 'Having considered all the circumstances including the public interest . . . I have come to the conclusion that in relation to this application I should not give my consent.' Thereupon the plaintiff issued a writ in his own name, claiming an injunction restraining the union from soliciting or endeavouring to procure any person wilfully to detain or delay any postal packet in the course of transmission between England and Wales and the Republic of South Africa. At 3.50 p m he applied ex parte to a High Court judge in chambers for an interim injunction in the same terms. The judge dismissed the application, holding that since the Attorney-General had refused his consent to a relator action, the plaintiff himself had no locus standi to bring an action. The plaintiff appealed and on the next day, Saturday, the Court of Appeal granted an interim injunction until the following Tuesday and gave leave to the plaintiff to add the Attorney-General as a defendant. The union complied with the injunction and the boycott did not take effect. At the hearing on the Tuesday the Attorney-General appeared and contended that the court had no jurisdiction to question his decision to refuse his consent to a relator action and that, since the plaintiff had no particular interest in preventing the postal boycott other than his interest as a member of the public, he was not entitled to bring the action in his own name after the Attorney-General had refused his consent.

Held – (1) Despite the refusal of the Attorney-General to give his consent to relator proceedings, the court had jurisdiction to grant an interim injunction in the plaintiff's action for the following reasons—

(i) (per Lord Denning MR) The discretion of the Attorney-General was absolute only to the extent that the courts would not enquire into it where he had exercised it by granting his consent. Where, however, he had refused his consent his decision could be overriden, indirectly, by the court to the extent that if he refused leave in a proper case the plaintiff could himself apply to the court for a declaration or, where appropriate, for an injunction, joining the Attorney-General as a defendant. In particular, where the Attorney-General refused to give his consent to an action seeking the enforcement of the criminal law, any citizen could come to the court and ask that the law be enforced. In those circumstances the court could not only grant a declaration but also an injunction, whether interlocutory or final, to prevent the commission of a criminal offence (see p 715 *e*, p 716 *a* and *b* and p 718 *a* to *h*, post); dictum of Lord Denning MR in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority* [1973] 1 All ER at 698, 699 and *Thorson v Attorney-General of Canada* (1973) 43 DLR (3d) 1 applied; dicta of Ormrod J in *Montgomery v Montgomery* [1964] 2 All ER at 23 and Lord Denning MR in *Thorne v British Broadcasting Corpn* [1967] 2 All ER at 1226 disapproved.

(ii) (per Lawton and Ormrod LJJ) The decision of the Attorney-General to refuse his consent to an action to enforce the law was not subject to review by the court. Where his consent was refused however it did not follow that the plaintiff was thereby barred from seeking any relief. Where there was no discernible reason why threatened breaches of the criminal law should not be restrained, but the Attorney-General had refused his consent to relator proceedings to restrain those breaches, it was open to a member of the public who might be inconvenienced or suffer material loss by reason of the breaches to bring proceedings in his own name for a declaratory judgment that the threatened actions would in fact constitute breaches of the criminal law. In such proceedings the court had jurisdiction, under s 45(1)[c] of the Supreme Court of Judicature (Consolidation) Act 1925, to grant an interlocutory injunction restraining the threatened actions (see p 721 *j*, p 723 *d* to *h*, p 724 *c*, p 725 *d* to *g*, p 726 *b* to *f* and *h*, p 730 *f* to *h* and p 731 *f* to *h*, post); *Attorney-General v Dyson* [1912] 1 Ch 158 and *Attorney-General v Westminster County Council* [1924] All ER Rep 162 applied; dicta of Viscount

a Section 58, so far as material, is set out at p 700 *f*, post
b Section 68 is set out at p 700 *h*, post

c Section 45(1), so far as material, provides: 'The High Court may grant . . . an injunction . . . by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do.'

Maugham and Lord Wright in *London Passenger Transport Board v Moscrop* [1942] 1 All ER at 103, 104, 107 explained; *Thorne v British Broadcasting Corpn* [1967] 2 All ER 1225 distinguished.

(2) Since the plaintiff, in common with other members of the public, had an interest in the availability of the postal and telephone services and a real interest in ensuring that those facilities were not interfered with by the illegal acts of the defendants, the court had exercised its jurisdiction properly in granting his application for an interlocutory injunction. The plaintiff would be granted leave to amend his pleadings to ask for a declaratory judgment but, since the original injunction had been effective and the passage of time had removed the prospect of the threatened boycott, it would not be continued (see p 719 *b* and *c*, p 725 *g*, p 726 *f*, p 731 *h* and p 732 *b*, post).

Notes

For the relator procedure, see 30 Halsbury's Laws (3rd Edn) 310-312, para 570, and for cases on the subject, see 16 Digest (Repl) 537, 538, 541-543, 3770-3790, 3821-3842; for the office and functions of the Attorney-General, see 8 Halsbury's Laws (4th Edn) paras 1274-1282.

For the grant of an injunction for the protection of public rights generally, see 21 Halsbury's Laws (3rd Edn) 347, 403, 404, paras 727, 844-846, and for related cases, see 28(2) Digest (Reissue) 961-964, 36-51.

For the Post Office Act 1953, ss 58, 68, see 25 Halsbury's Statutes (3rd Edn) 442, 448.

For the Supreme Court of Judicature (Consolidation) Act 1925, s 45, see 25 ibid 717.

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Adams v Adams (Attorney-General intervening) [1970] 3 All ER 572, [1971] P 188, [1970] 3 WLR 934, 8(2) Digest (Reissue) 664, 37.

Attorney-General v Ashborne Recreation Ground Co [1903] 1 Ch 101, 72 LJCh 67, 87 LT 561, 67 JP 73, 1 LGR 146, 28(2) Digest (Reissue) 961, 36.

Attorney-General v Birmingham, Tame & Rea District Council [1910] 1 Ch 48, 79 LJCh 137, 101 LT 796, 74 JP 57, 8 LGR 110; *affd with variation* [1912] AC 788, [1911-13] All ER Rep 926, 82 LJCh 45, 107 LT 353, 76 JP 481, 11 LGR 194, HL, 28(2) Digest (Reissue) 1124, 1233.

Attorney-General v Chaudry [1971] 3 All ER 938, [1971] 1 WLR 1614, 70 LGR 22, CA, 28(2) Digest (Reissue) 533, 59a.

Attorney-General v Great Eastern Railway Co (1879) 11 Ch D 449, 48 LJCh 428, 40 LT 265, CA; *affd* (1880) 5 App Cas 473, HL, 38 Digest (Repl) 384, 519.

Attorney-General v Great Northern Railway Co (1860) 1 Drew & Sm 154, 29 LJCh 794, 2 LT 653, 6 Jur NS 1006, 62 ER 337, 16 Digest (Repl) 541, 3825.

Attorney-General v Harris [1960] 3 All ER 207, [1961] 1 QB 74, [1960] 3 WLR 532, 58 LGR 242, CA; *rvsg* [1959] 2 All ER 393, [1960] 1 QB 31, [1959] 3 WLR 205, 16 Digest (Repl) 542, 3831.

Attorney-General v Logan [1891] 2 QB 100, 65 LT 162, 55 JP 615, DC, 16 Digest (Repl) 537, 3770.

Attorney-General v London County Council [1901] 1 Ch 781, 70 LJCh 367, 84 LT 245, CA; *on appeal* sub nom *London County Council v Attorney-General* [1902] AC 165, HL, 33 Digest (Repl) 127, 818.

Attorney-General v Magdalen College, Oxford (1854) 18 Beav 223, 23 LJCh 844, 24 LTOS 7, 18 Jur 363, 52 ER 88; *rvsd on other grounds* sub nom *St Mary Magdalen, Oxford (President, etc) v Attorney-General* 6 HL Cas 189, 26 LJCh 620, 29 LTOS 238, 21 JP 531, 3 Jur NS 675, 10 ER 1267, SWR 716, HL, 17 Digest (Reissue) 289, 565.

Attorney-General v Sheffield Gas Consumers Co [1853] 3 De GM & G 304, 22 LJCh 811, 21 LTOS 49, 17 Jur 677, 43 ER 119, 7 Ry & Can Cas 650, LC [illegible] LJ, 25 Digest (Repl) 519, 18.

Attorney-General & Spalding Rural District Council v Garner [1967] 2 KB 480, 76 LJKB 965, 97 LT 486, 71 JP 357, 5 LGR 944, 16 Digest (Repl) 537, 3773.

Attorney-General v Westminster City Council [1924] 2 Ch 416, [1924] All ER Rep 162, 93 LJCh 573, 131 LT 802, 88 JP 145, 22 LGR 506, CA, 16 Digest (Repl) 537, 3776.

Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority [1973] 1 All ER 689, [1974] QB 629, [1973] 2 WLR 344, CA, Digest (Cont Vol D) 209, 3785a.

Benjamin v Storr (1874) LR 9 CP 400, [1874-80] All ER Rep Ext 2000, 43 LJCP 162, 30 LT 362, 36(1) Digest (Reissue) 481, 602.

Devonport Corpn v Tozer [1902] 2 Ch 182, 71 LJCh 754, 86 LT 612; *affd* [1903] 1 Ch 759, CA, 28(2) Digest (Reissue) 964, 51.

Dyson v Attorney-General [1911] 1 KB 410, 81 LJKB 217, 105 LT 753, CA; *subsequent proceedings* [1912] 1 Ch 158, CA; 11 Digest (Reissue) 693, 308.

Flast v Cohen, Secretary of Health, Education and Welfare (1968) 392 US 83.

Lang v Purves (1852) 15 Moo PCC 389, 5 LT 809, 8 Jur NS 523, 15 ER 541, PC, 21 Digest (Repl) 436, 1452.

London Passenger Transport Board v Moscrop [1942] 1 All ER 97, [1942] AC 332, 111 LJCh 50, 166 LT 202, 106 JP 97, 40 LGR 67, HL; *rvsg* [1940] 4 All ER 281, [1941] Ch 91, CA, 45 Digest (Repl) 542, 1227.

Montgomery v Montgomery [1964] 2 All ER 22, [1965] P 46, [1964] 2 WLR 1036, Digest (Cont Vol B) 380, 6527d.

Padfield v Minister of Agriculture, Fisheries & Food [1968] 1 All ER 694, [1968] AC 997, [1968] 2 WLR 924, HL; *rvsg* [1968] AC 997, [1968] 2 WLR 924, CA, Digest (Cont Vol C) 388, 569a.

Queen, The, v Prosser (1848) 11 Beav 306, 18 LJCh 35, 12 LTOS 509, 13 Jur 71, 50 ER 834, 16 Digest (Repl) 277, 450.

R v Metropolitan (or Metropolis) Police Comr, ex parte Blackburn [1968] 1 All ER 763, [1968] 2 QB 118, [1968] 2 WLR 893, CA, Digest (Cont Vol C) 279, 1113a.

Ross Smith v Ross Smith (orse Bradford) [1962] 1 All ER 344, [1963] AC 280, [1962] 2 WLR 388, HL, Digest (Cont Vol A) 243, 1067b.

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Southport Corpn v Esso Petroleum Co Ltd [1954] 2 All ER 561, [1954] 2 QB 182, [1954] 3 WLR 200, 118 JP 411, 52 LGR 404, [1954] 1 Lloyd's Rep 446, CA; *rvsd in part* sub nom *Esso Petroleum Co Ltd v Southport Corpn* [1955] 3 All ER 864, [1956] AC 218, [1956] 2 WLR 81, 120 JP 54, 54 LGR 91, [1955] 2 Lloyd's Rep 655, HL, Digest (Cont Vol A) 1213, 68a.

Thorne v British Broadcasting Corpn [1967] 2 All ER 1225, [1967] 1 WLR 1104, CA, Digest (Cont Vol C) 565, 1009a.

Thorson v Attorney-General of Canada (No 2) (1974) 43 DLR (3d) 1.

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Attorney-General v De Keyser's Royal Hotel [1920] AC 508, 89 LJCh 417, HL.

Attorney-General v Premier Line Ltd [1932] 1 Ch 303, 101 LJCh 132.

Attorney-General v Wimbledon House Estate Co Ltd [1904] 2 Ch 34, 73 LJCh 593.

Attorney-General v Pontypridd Waterworks Co [1908] 1 Ch 388, 77 LJCh 237.

Boyce v Paddington Borough Council [1903] 1 Ch 109, 72 LJCh 28.

Congreve v Home Office [1976] 1 All ER 697, [1976] QB 629, CA.

Institute of Patent Agents v Lockwood [1894] AC 347, HL (SC).

Laker Airways Ltd v Department of Trade [1977] 2 WLR 234, CA.

Liverpool Taxi Owners' Association [1972] 2 All ER 589; sub nom *R v Liverpool Corpn, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299, CA.

M'Bain v Crichton 1961 [illegible] (J) 25; sub nom *McBain v C* 1961 SLT 209.

Mareva Compania Nav[illegible] A v International Bulkcarriers Ltd [1975] 2 Lloyd's Rep 509, CA.

Newton, ex parte (1855) 4 E & B 869, 119 ER 323; sub nom *R v Newton* 24 LJQB 246.

R v Greater London Council, ex parte Blackburn [1976] 3 All ER 184, [1976] 1 WLR 550, CA.

Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665, [1976] 3 WLR 641, HL.

Stratford (J T) & Son Ltd v Lindley [1964] 3 All ER 102, [1964] AC 269, HL.

Interlocutory appeal

On 14th January 1977 the plaintiff, John Prendergast Couriet, applied to Her Majesty's Attorney-General for his consent to bring an action at the relation of the plaintiff against the Union of Post Office Workers ('the UPW') for an injunction restraining the UPW from soliciting or endeavouring to procure any person wilfully to detain or delay any postal packet in the course of transmission between England and Wales and the Republic of South Africa. The Attorney-General refused to give his consent. Thereupon the plaintiff in his own name issued a writ against the UPW seeking the same relief. On the same day he applied ex parte to Stocker J in chambers for an injunction in the same terms as that claimed in the writ. The judge dismissed the application and the plaintiff appealed. The appeal was heard on the following day, Saturday, 15th January. The facts are set out in the judgment of Lord Denning MR.

George Newman for the plaintiff.

Ian Hunter and *Michael Supperstone* for the UPW.

LORD DENNING MR. The Post Office operates a great public service. It is essential to the well-being of the community. I feel sure that all from the humbler grades, the postmen and the telegraph boys, up to the top, they are those who would wish to abide by the law of the land. It is as well that the law of the land should be known to everyone concerned in the Post Office. It is enacted not by old Acts of Queen Anne (as someone seems to have suggested on the television) but by statutes passed by governments of various colours in the last 20 or 30 years.

The important section here is s 58 of the Post Office Act 1953, which says:

> 'If any officer of the Post Office, contrary to his duty . . . wilfully detains or delays, or procures or suffers to be detained or delayed, any . . . postal packet, he shall be guilty of a misdemeanour and be liable to imprisonment for a term not exceeding two years or to a fine, or to both.'

That applies to every officer (however humble) in the Post Office, whether in the sorting office, on the delivery round or the like. If he puts a letter on one side deliberately meaning that it should be delayed for an hour or two, or a day or two, he is guilty of an offence. Any person in the land can lay an information before a magistrate in respect of it.

Then also s 68 of that Act says:

> 'If any person solicits or endeavours to procure any other person to commit an offence punishable on indictment under this Act, he shall be guilty of a misdemeanour and be liable to imprisonment for a term not exceeding two years.'

That applies to the offence which I have spoken of, of detaining or delaying any postal packet. It applies forcibly not only to the humbler servants but especially to those who issue orders to them, whether it be a trade union or the like. If they solicit or endeavour to procure any person to commit an offence of detaining or delaying a postal packet they are guilty under that separate section. Let there be no doubt about it. That is the law of the land which everybody must adhere to.

Furthermore, the words 'officer of the Post Office', [redacted] amending Act in 1969[1] (when the Post Office ceased to be a government department and became a nationalised undertaking), are to be construed as referring to any person employed in the business of the Post Office authority. So you see how comprehensive the law is and how clear in regard to the mail and postal packets.

So as to make it complete, the law applies not only to the mail but also to the telephone, the telegraph, the cable, the teleprinter and any other communication by the Post Office. That is by s 45 of the Telegraph Act 1863 which says:

> 'If any person in the employment of the company [and that applies to the Post Office] Wilfully or negligently omits or delays to transmit or deliver any message; Or by any wilful or negligent act or omission prevents or delays the transmission or delivery of any message; Or improperly divulges to any person the purport of any message; He shall for every such offence be liable to a penalty not exceeding twenty pounds.'

Moreover, anyone who solicits or procures such prevention or delays is guilty as an aider and abettor.

Many statutes are not at all clear but those are clear beyond doubt. Every person in the service of the Post Office should know it.

Now for what has happened in this case I cannot do better than to read the very short affidavit which has been put before us. '1. On [Thursday last], 13th January 1977', says Mr Couriet in his affidavit (that was Thursday and here we are only at Saturday)—

> 'I watched the 9 o'clock News relayed on television, by the British Broadcasting Corporation on Channel 1. In the course of that news bulletin it was reported that the Executive Council of [the UPW] had resolved that day to call upon their members to interfere with the passage of mail in the course of transmission by post between the Republic of South Africa and England and Wales.
>
> '2. Immediately after the above announcement an interview was screened with Mr Tom Jackson, the General Secretary of [the UPW], and it was put to him that the action the Council of his Union had resolved to take was in fact unlawful and illegal. He replied in terms to the effect that this matter had never been tested in the Courts, and that the laws relating to it dated from Queen Anne and were more appropriate for dealing with highwaymen and footpads.
>
> '3. There is now produced and shown to me a copy of "The Times" newspaper dated 14th January, 1977, wherein a report of the Executive Council's resolution is set out . . .'

In the extract from The Times newspaper of yesterday (Friday, 14th January) it is reported:

> 'With unanimous resolve, the 31 members of the executive of the Union of Post Office Workers decided yesterday to brave possible legal action under the Post Office Act and boycott all telephone calls, mail and telegrams to South Africa next week. Their action, taken in response to a call for "international solidarity" from the International Confederation of Free Trade Unions, is being followed by other unions who hope to influence apartheid policy . . . The Post Office Engineering Union said it would instruct its members not to provide or maintain circuits to the country except in a matter of "life and death".'

Now there are some people, certainly amongst them the plaintiff, Mr Couriet, who were distressed by those happenings. They went to see their lawyers and steps moved quickly. We have been given the time-table. After seeing counsel, at 12.45 pm yesterday the Attorney-General was approached through his officers for his consent. He was asked to [redacted] it to what is called a 'relator' action being brought in the courts against the UPW workers on account of their proposed breach of the law.

The general position is that if a person seeks to come to the courts on a matter in

1 Post Office Act 1969, s 87(1)

which the public at large are concerned he should do so, in the ordinary way, by approaching the Attorney-General and getting his consent. As we say in the law, the Attorney-General then brings an action at the applicant's 'relation', but that person being the one who is really responsible for it and who pays all the costs if he fails. The only thing he has to do is to get the Attorney-General's consent when the public interest is involved.

The Attorney-General treated it (very properly) as a matter of serious concern. He dealt with it no doubt as quickly as he could. Mr Gouriet had drafted his writ and statement of claim already and put them before the Attorney-General for consideration. At 3.32 p m yesterday the Attorney-General refused his consent. It is important that I should read what the Attorney-General said:

> 'Having considered all the circumstances including the public interest relating to the application for my consent [I need not read out the remainder of the preamble] I have come to the conclusion that in relation to this application I should not give my consent.'

So the Attorney-General did not consent to this action being brought to enforce the law of the land.

Thereupon a writ was immediately issued by Mr Gouriet's solicitors on his own account without the consent of the Attorney-General. At 3.50 p m yesterday they applied to the judge in chambers, Stocker J, for an injunction to restrain the breaches of the law which were proposed. The judge heard it for nearly an hour and a half. At 5.15 last night he regretted that he felt he could not grant the injunction or the relief asked for. The reason was because no case had ever occurred before where the Attorney-General had refused his consent and yet an individual had been allowed to proceed in the courts. The judge regretted that decision because he felt there was a breach of the law going to take place, but on account of the omission of the consent of the Attorney-General he felt he could do nothing and the courts were powerless to enforce the law.

Now counsel for Mr Gouriet has come before us today. We have sat specially today to hear the case, because the action proposed by the resolution of this union is due to take place tomorrow (Sunday) and, if anything is to be done, it has to be done today.

One appreciates very much that, although it is an ex parte application, the UPW have appeared before this court and have instructed counsel, who has argued the case on their behalf exceeding well. But at the outset I may say that counsel for the UPW very frankly has told us that he could not concede that there was any breach of the criminal law, actual or proposed; but he felt he could urge no argument to the contrary. Indeed we have heard no argument to the contrary.

Viewing those plain words of the statute, it seems to me that for any person employed in the Post Office to delay or interfere with communications with South Africa—mails, cables or whatever it may be, would be a clear breach of our law, for each individual concerned would be liable to be brought before our criminal courts. An information could be laid not merely by the authorities or the police but by any ordinary individual. Any of those concerned, whether they be postmen or working in the sorting office or wherever it may be, could be brought before the courts for a breach of our criminal law. So it seems to me there is impending a breach of the law directed, encouraged or procured by the executive of the UPW. That is plain. There is nothing that was urged to the contrary.

What is to be done about it? Are the courts to stand idly by? Is the Attorney-General to be the final arbiter whether the law should be enforced or not? It is a matter of great constitutional principle. We considered it in the case when the late Mr McWhirter[1] came to us. In that particular case, in the [redacted] the Attorney-General did give his leave but in the meantime Mr McWhirter, because he did not get leave in time, came to us very hurriedly. Without going into all the matters which we there considered, I would like to quote what I said[1]:

> '... I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the Attorney-General, if need be, as defendant ... I have said so much because I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then in the last resort any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced.'

Lawton LJ said words substantially to the same effect.

Now in this case, the Attorney-General not having consented, Mr Gouriet comes himself. In a way I wish we could hear the Attorney-General to give his reasons more fully, to see what were the grounds on which he refused his consent, because at this stage, to me at least, it seems difficult to see why his consent should be refused when, on the face of it, there is impending a plain breach of our law.

As to the UPW itself, apart from the workers, it has to be remembered that it has, in this regard, no privileged position before the law of England. I know that, under the Trade Union and Labour Relations Act 1974, no action lies in respect of any tort. This is not an action for tort. I have no doubt that, in disputes within this country, trade unions are granted a great deal of protection in regard to acts in consequence of or in relation to a 'trade dispute', but this does not involve any matter of that kind. This comes straight within s 2(1)(*d*) of the 1974 Act, which makes it clear that a trade union is liable to be proceeded against 'for any offence alleged to have been committed by it, or on its behalf' and proceedings may be brought against it in its own name. So the UPW and its officers and, in the end, every person employed by the Post Office, are as much subject to the law as anyone else.

So we come back to the point: is the absence of the consent of the Attorney-General a bar to anything being done, so that the courts are powerless to enforce the law? In my judgment, this is not the case, at all events at this stage. Mr Gouriet comes here. He does not show any special interest in himself above all others; but every individual in the land has an interest in the channels of communication being kept open between this country and other countries, never mind whether it is South Africa or anywhere else. This is so whether the channel of communication be by letter, cable or wireless. If the members of a trade union say they will make an exception in a matter of 'life and death', who are to be arbiters of that? Who is to know whether the cable is on the ground of some person dying or some person wanting to see a relative or whatever it may be? It seems to me quite plain that a union cannot be the arbiters in this matter. The plain fact is that the law must be obeyed. Of course, if we could see that the Attorney-General had only been influenced by legitimate considerations and had not taken into account anything extrinsic or irrelevant, it would be a different matter; but, as far as I can see at the moment, that is a very debatable question. It is very debatable whether he has directed himself properly in regard to all the considerations in the matter. So debatable is this, to my mind, that I think we should, under our jurisdiction in regard to injunctions (which is the widest possible) preserve the position meanwhile, so that the law is obeyed until the time when the Attorney-General can come before [redacted] d show us his good reasons (if there are) why the proceedings should not cont[redacted]

[1] *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority* [1973] 1 All ER 689, [1973] QB 629

[1] [1973] 1 All ER 689 at 698, 699, [1973] QB 629 at 649

So I will now read the request that is made in this action:

> '[Mr Gouriet] claims: An Order that [the UPW] by itself its servants or agents or otherwise be restrained from soliciting or endeavouring to procure any person wilfully to detain or delay any postal packet in the course of transmission between England and Wales and the Republic of South Africa.'

That order which is sought is nothing more nor less than repeating the very words of the Act of Parliament itself—it does not add to it or detract from it by the least. All we are asked to do is to make an order against the UPW saying it must obey the Act of Parliament. Surely no objection could be taken by anyone in the land to an order in that form. But in view of this point about the Attorney-General having a veto (so to speak), I would like to say that it is such an important constitutional point that we cannot decide it today in the absence of the Attorney-General. So I would only grant the injunction for a short time until the Attorney-General can be here and be heard. Meanwhile the law should be maintained. I would grant an injunction in the terms asked but for a very short time, say until Tuesday morning, with notice to the Attorney-General and with him being made a defendant, so that he can come here and say why this law should not be enforced, if that be the case.

So in my opinion this appeal should be allowed, the order should go in the terms asked until Tuesday morning, or until after the hearing of the further application to this court, whichever is the later. I would allow the appeal accordingly.

LAWTON LJ. There is ample evidence before this court that the UPW, by its resolution passed on Thursday last and any instructions it may already have sent out to its members, has committed an offence contrary to the provisions of s 68 of the Post Office Act 1953. The UPW can be prosecuted; all the officers who were parties to that decision can be prosecuted. As a result of that resolution tens of thousands of working people all over England and Wales, from Cornwall to Northumberland, from Anglesey to Kent, on Monday will be placed in a very difficult position. They will want to be loyal to their union; on the other hand, many of them will want to obey the law of the land. If they are loyal to their union and carry out the union instructions every man and woman of them will be liable to conviction and to such penalties as the court may pass in the event of a conviction. It has been said on behalf of the UPW that if that be the law, and it has not been suggested positively that it is not, this court can do nothing about the matter at all. It cannot come, says the UPW, to the aid of those postmen, counter clerks, sorters, telegraph boys, who are placed in the dilemma to which I have referred. If that be the state of the law, it is a very odd state indeed.

It was submitted to us on the old authorities that it was the state of the law. This court had to review that law in the case of the late Mr McWhirter, which is reported as *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[1]. In the course of that case two members of the court envisaged a situation in which it might be necessary for this court to intervene. In the course of my judgment I said[2] this:

> 'I agree with Lord Denning MR that if at any time in the future (and in my judgment it is not the foreseeable future) there was reason to think that an Attorney-General was refusing improperly to exercise his powers, the courts might have to intervene to ensure that the law was obeyed.'

The Attorney-General was asked on behalf of the plaintiff to see that the plain terms of the law were obeyed. They are so plain that anyone who can read must have

1 [1973] 1 All ER 689, [1973] QB 629
2 [1973] 1 All ER 689 at 705, [1973] QB 629 at 657

appreciated that what the UPW proposed constituted a criminal offence. The Attorney-General refused himself to intervene and to give his consent to the plaintiff intervening. I have used my imagination as best I can to see what good legal reason there can have been for the Attorney-General to refuse to take such steps as he could to ensure that the criminal law of the land was obeyed. It is not a criminal law which is obsolescent. It is not a criminal law dating back to the reign of Queen Anne. It is a criminal law enacted by Parliament as recently as 1953 and it is a criminal law which Parliament had an opportunity of reviewing, if it were so minded, in 1969 when the most recent Post Office Act was passed. I can conceive of many political reasons why the Attorney-General decided not to intervene, but political reasons are not necessarily good legal reasons. In those circumstances I am in this position, that until such time as there is some explanation as to why the Attorney-General did not intervene, then on the face of it his failure to do so must have been for some reason which was not a good reason in law.

A further question arises, if counsel for the UPW's submissions are well founded, that even if the Attorney-General was refusing to intervene for improper reasons (says counsel) no one can take any action at all. As Lord Denning MR has said, these are matters of grave constitutional importance. For my own part, I am making no final judgment of any kind. The Attorney-General may be able to persuade the court, if he decides to try, that this court has no powers of any kind if the Attorney-General refuses to intervene either directly or by a so-called relator action. I would add this for his consideration: this court in 1911 in the great case of *Dyson v Attorney-General*[1] decided that declaratory judgments could be made relating to the rights of private citizens. If a declaratory judgment can be made, then the problem arises whether this court can go on to say: 'That being the state of the law, obey it.' It seems to me, as at present advised, that this court here and now could make a declaratory judgment that the action of this union was illegal and contrary to the criminal law of the land. The problem is, can we go on to say: 'And stop breaking the criminal law'? I for my part, like Lord Denning MR, am prepared to say to the UPW: 'You can stop breaking the law until 10.30 on Tuesday morning'—when this court can reconsider the whole matter and, it hopes, with the help of the Attorney-General.

I would allow the appeal.

ORMROD LJ. I agree. The UPW are clearly in breach of s 68 of the Post Office Act 1953, and are therefore guilty of the criminal offence of soliciting or endeavouring to procure other persons to commit an offence under s 58 of the same Act. They are guilty of a misdemeanour and liable to be sent to prison for up to two years if they are prosecuted.

The only question is whether there is jurisdiction in this court to entertain an application for a declaration or injunction by any member of the public who seeks to enforce this provision of the exisiting law. This is obviously a very important and fundamental question which cannot be finally decided on an interlocutory application. But there can be no doubt whatsoever that the court has this power to restrain this or similar breaches of the criminal law either at the suit of the Attorney-General himself or in a relator action. That is simply an action in which the Attorney-General has consented that the person concerned may sue in his (the Attorney-General's) name. The Attorney-General is not required himself to pursue the action or to take any step other than to give his consent.

But the Attorney-General has in this case refused. Had he given his consent there can be no possible doubt, in my judgment, but that the court would have granted an injunction in the terms claimed in the writ without the slightest hesitation; no court could possibly have refused to do that.

1 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158

The question, therefore, is whether such refusal of consent by the Attorney-General deprives this court of jurisdiction to entertain the application for the injunction which is before it. As I say, this is a very difficult and fundamental question which requires much further consideration before any concluded view can be formed and it would be of the greatest assistance, quite plainly, if the court had the advantage of hearing the Attorney-General's view on it.

The next question is: what action (if any) should the court take today? On the one hand, we are dealing in this case with the plainest breach of the criminal law which it is possible to imagine and equally clearly with explicitly threatened future breaches. On the other hand, the UPW, as I see it, will suffer no loss certainly, and possibly not even any inconvenience, if an injunction is granted over a short period in the terms claimed in the writ. I therefore agree that an injunction should be granted in those terms, limited to a short period such as until 10.30 a m on Tuesday.

Appeal allowed. Order of Stocker J reversed. Interim injunction granted and ordered to continue until 10.30 a m on Tuesday, 18th January, or such later time as would enable the appeal to be disposed of after allowing the Attorney-General an opportunity to come before the court on the question whether his refusal to consent to a relator action at the plaintiff's request barred the court from granting relief. Similar injunction ordered against the Post Office Engineering Union on an ex parte application. Leave to the plaintiff to amend his statement of claim by adding the Post Office Engineering Union as a party to the proceedings in respect of the proposed breach of the Telegraph Act 1863, s 45, and joining the Attorney-General as a defendant.

Solicitors: *Trower, Still and Keeling* (for the plaintiff); *Simpson, Millar* (for the UPW).

In accordance with the leave of the court the plaintiff amended his statement of claim (i) by adding the Post Office Engineering Union ('the POEU') as second defendant and claiming an injunction to restrain it from counselling, procuring or inciting in any way whatsoever any person in the employment of the Post Office wilfully or negligently to omit or delay to transmit or deliver any message in the course of transmission between England and Wales and the Republic of South Africa or by any wilful or negligent act or omission prevent or delay the transmission or delivery of any such message; and (ii) by adding the Attorney-General as third defendant. The plaintiff also amended the statement of claim by adding a claim for a declaration that in refusing his consent to the plaintiff to bring the relator proceedings the Attorney-General had acted improperly and wrongfully exercised his discretion.

At the resumed hearing on 18th January the Attorney-General applied to have the claim for a declaration against him struck out. At the close of the hearing it was agreed between the parties that it should be amended to claim a declaration that notwithstanding the refusal of the Attorney-General to consent to relator proceedings the plaintiff was entitled to proceed with the action. The UPW and the OPEU applied for an order under RSC Ord 18, r 19(1), striking out the writ and statement of claim against them on the ground that as the Attorney-General alone could seek an injunction in a civil court to prevent a threatened breach of the law, the plaintiff's pleadings disclosed no reasonable cause of action.

George Newman for the plaintiff.
Mark Saville QC and *Ian Hunter* for the UPW.
Mark Saville QC and *V V Veeder* for the POEU.
The Attorney-General (*Samuel Silkin QC*), *Harry Woolf* with him, in his own behalf.

The Attorney-General. It is a vital constitutional issue that the exercise of the Attorney-General's discretion to give his consent at the request of a member of the public to act as plaintiff in relator proceedings should not be subject to review by the courts and should be absolute. The same view has been expressed in the courts for decades. I regard it as my duty not to act as a rubber stamp but to satisfy myself in each case that the case is a proper one for giving my consent. In coming to my decision I have to have regard to many different factors, of some of which the courts can have no knowledge. I have to consider broader questions of public interest in making my decision. I certainly took into account nothing that, in accordance with precedent, it was not proper for me to take into account. In refusing my consent I followed the normal, if not invariable, practice of giving no specific reasons. That practice is fully established by the law governing the exercise of the functions of my office and is not subject to review by the courts.

As to the opinion expressed in your Lordships' judgments on Saturday, 15th January, that my reasons for refusing to intervene were political reasons, but not good legal reasons, the term 'political' has more than one meaning. I adopt the distinction[1] made by the present Lord Chancellor when Attorney-General in 1969:

> 'In the field of responsibility for litigation, party political considerations do not affect the Attorney-General's judgment. But it is of the nature of his office that he must have constant regard towards what is politic in the broad sense of what is in the public interest.'

The contention that his discretion to consent or refuse to act as plaintiff in relator proceedings is absolute, and not to be questioned or reviewed by the court, is based on judicial statements expressed in the courts and statements made by numerous distinguished textbook writers as well as law officers past and current. If the Attorney-General is wrong, he is answerable to Parliament and to Parliament alone.

In *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[2] the court, including my predecessor, Sir Peter Rawlinson QC, expressly accepted the principle that the Attorney-General has an absolute discretion and is answerable to Parliament alone.

In that case Lord Denning MR said[3] that if the Attorney-General refused leave for no good reason, or on entirely wrong grounds, an aggrieved citizen might come to the courts for a declaration, but that is not the issue in this case.

The function of the Attorney-General in issue in the present proceedings was one of many functions of a discretionary nature exercised by him, not in a ministerial capacity, but in a special sphere divorced from the collective responsibility of ministers. Some of those functions are statutory, such as the grant or withholding of the Attorney-General's fiat for certain types of prosecution. Others are of ancient origin such as the power to go to the court ex officio; the relator function which is in issue directly in the present case; and the power to bring before the court matters which the Attorney-General asks the court to say are in contempt of court. The common thread running through them all is the Attorney-General's answerability to Parliament and not to the courts.

It follows that the court cannot question the Attorney-General's reasons for acting or refusing to act. It cannot question his reasons directly or indirectly or deduce what those reasons were. I say with the utmost respect to your Lordships but also with the utmost firmness that the courts must not assume the mantle of Parliament.

These propositions are supported by Professor Edwards in his book[4] when he says:

> 'There is no need . . . to add to the catalogue of common law powers and privileges associated with the first Law Officer of the Crown, except to mention

1 [1969] CLJ 48
2 [1973] 1 All ER 689, [1973] QB 629
3 [1973] 1 All ER 689 at 698, 699 [1973] QB 629 at 648
4 J Ll J Edwards, The Law Officers of the Crown (1964), p 7

the absolute discretion he exercises in issuing or withholding his fiat in relator actions. The courts have repeatedly recognised their impotence to control the Attorney-General in the performance of his discretionary powers.'

They are also supported by the following classic and often cited passage in Lord Halsbury LC's judgment in *London County Council v Attorney-General*[1]:

'My Lords, one question has been raised . . . which I confess I do not understand. I mean the suggestion that the courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first Law Officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction, it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the courts to determine whether he ought to initiate litigation in that respect or not . . . In a case where as a part of his public duty he has a right to intervene, that which the courts can decide is whether there is excess of power which he, the Attorney-General, alleges. Those are the functions of the court: but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me very undesirable to throw any doubt upon the jurisdiction, or the independent excercise of it by the first Law Officer of the Crown.'

On the second major issue concerning more specifically the question of the power of the individual to bring proceedings to restrain the commission of some unlawful act or illegality of general public importance in cases where the individual has no special legal standing enabling him to bring the proceedings himself, two questions arise: (1) to what extent is the Attorney-General's name required as plaintiff? (2) are there circumstances in which his name being unavailable as plaintiff he can be joined as defendant and by such joinder the want of his name as plaintiff can be cured? Subject to a recent statutory exception under s 222 of the Local Government Act 1972, the Attorney-General alone can move the court to restrain the commission of a crime as such, whether he does so ex officio or by lending his name as plaintiff in a relator action. But there are other cases, of which the present may well be one, where it is open to a person or body having a special interest to take proceedings without the Attorney-General's help. For example the Post Office itself as employer could proceed in tort for an injunction against persons seeking to induce a breach of contract and could seek a declaration against the unions to clear up any doubt whether an offence has been or would be committed. Nor is the Attorney-General's consent required in an action for a declaration by any person who has a sufficiently proximate interest: any businessman who could show that he would be likely to be adversely affected by the action of the postal or telegraph workers could seek a declaration. There is no need for an injunction to make the law clear. In the present case the plaintiff has disclaimed any such special interest and sought my consent for proceedings for an injunction only. If a person with no special interest could obtain a declaration without the Attorney-General's consent, there is no need to join the Attorney-General as a defendant, nor to seek his consent to obtain declaratory relief

1 [1902] AC 165 at 167, 168

which would settle the issue whether the unions' action is lawful or not. Whilst I concede that there is a case for reviewing that part of the law to see whether the ancient procedures are still necessary, I cannot concede that the right way of changing the law is by a decision of one court looking at one case. Only Parliament, which is able to look at all aspects of the matter, can conduct such a review. Furthermore I refute the suggestion that the safeguards exercised by the Attorney-General have become obsolescent.

There is a very important difference between cases where the Attorney-General consents to the use of his name to invoke the court's procedure for injunctive relief to restrain the commission of criminal offences and the parallel procedure, which can be used by anyone who wishes, of going to the magistrates' court and taking out a summons. Where the Attorney-General has allowed his name to be used in a criminal context, the courts in the exercise of their own discretion to grant relief by way of injunction start with the presumption that if the attorney has given his consent, prima facie the injunction should be granted because he would not have done so if the public interest were not involved. This is not to imply that the court's discretion was removed, but the court would give the greatest possible weight to that fact.

The question has been raised, if a declaration can be obtained without the Attorney-General's consent, why not an injunction? When there is a breach, or threat of a breach, of the law affecting the public generally, a private person with no greater interest than that of other members of the public can only apply for an injunction with the Attorney-General's consent. *Dyson v Attorney-General*[1] said no more than that a declaration could be made against the Crown. It is no authority for the suggestion that the Attorney-General can be made a defendant. Nor do I wish to be taken as accepting what was said in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[2] which was based on *Dyson v Attorney-General*[1].

The recent cases of *Congreve v Home Office*[3] and *Secretary of State for Education and Science v Metropolitan Borough of Tameside*[4] are examples of the court holding ministers' decisions to be unlawful, but in those cases the decisions were the responsibility of all members of the government; but the present case is not of that character. It falls within that discretionary sphere involving onerous and embarrassing decisions as to what is the balance of public interest, as for example, in deciding whether or not to prosecute. In that sphere the Attorney-General alone is responsible for his functions and his conduct. Although he may get information from whatever source he thinks proper to enable him to make up his mind, and may consult with colleagues, it is he in the end who has to do the balancing act, however unpopular that may make him. It is drilled into newly appointed ministers by the prime minister of the day that they must not seek to seek to dictate to the Attorney-General what decision he should take. When he makes his decisions he has to accept complete responsibility for them. It is a most important part of the constitutional framework.

Saville QC for the UPW and the POEU. I adopt everything that the Attorney-General has said. There are a number of differences between the position of the UPW and the POEU the chief one being that in the case of the POEU no application was made for the Attorney-General's consent.

The plaintiff, though seeking to enforce a public right, cannot act as parens patriae or purport to act on behalf of the public. In both *Attorney-General v Bastow*[5] and *Attorney-General v Harris*[6], the Attorney-General became the plaintiff. He came in

1 [1911] 1 KB 410
2 [1973] 1 All ER 689, [1973] QB 629
3 [1976] 1 All ER 1116, [1976] QB 629
4 [1976] 3 All ER 665, [1976] 3 WLR 641
5 [1957] 1 All ER 497, [1957] 1 QB 514
6 [1900] 1 All ER 207, [1901] 1 QB 71

not as the agent of the individual applicant but as the representative of the public, protecting public rights. The action thereafter became one between the Crown and the defendants. The plaintiff's amended statement of claim contains nothing in support of the usual incidents of locus standi. It does not show that the plaintiff has suffered any peculiar or special damage or infringement of any private legal right. To the extent that it claims infringement of a public right that a criminal offence should not be committed, the Post Office Act 1969 makes it clear that there is not even a public right to the mails or telegraph services and s 9(4) provides that the duties and liabilities laid on the Post Office are not to be enforceable by court proceedings.

Lawton LJ. There is an implicit public right that people can use the postal and telegraphic services and the right to have the criminal law obeyed is owned by the public at large. If in breach of the criminal law the public loses its rights, is it to be said that the court can do nothing because that right is nowhere written down?

Saville QC. Even assuming that the plaintiff establishes a right to use the Post Office facilities of which the unions without lawful justification threaten to deprive him, that is a claim in tort. The Trade Union and Labour Relations Act 1974, s 14(1), extending the immunity given by Trade Disputes Act 1906, provides that a trade union cannot be sued in tort and that means that it cannot have a declaratory judgment made against it.

Lord Denning MR. A union is not immune under s 2(1)(*d*) of the 1974 Act from criminal proceedings.

Saville QC. Nothing in s 14 prevents trade unions from prosecution for the commission of criminal offences but the section does prevent the court from granting an injunction against a union to restrain the commission of a tort which is also a criminal offence.

Newman for the plaintiff. The authorities support my submission that the courts have a control over the Attorney-General if he neglects or wrongly performs his duty. They do not support the assertion that the Attorney-General has an absolute discretion whether proceedings should be initiated.

Cur adv vult

27th January. The following judgments were read.

LORD DENNING MR. On the Saturday before last, 15th January, an ordinary citizen came to this court. He came, he said, on behalf of the public at large. He told us that a powerful trade union was breaking the law, and was going on breaking it. He asked us to make an order restraining them from doing so. We made the order. We made it in the very words of the statute of the realm. Our order was effective. The trade union, to its credit, obeyed it. So there has been no trouble. The breach of the law has been averted.

Yet the Attorney-General came before us on the next Tuesday, 18th January; and speaking with all the great authority of his office, he rebuked us. He told us that we had no jurisdiction to make that order. We had no right to do it without his consent; and he had refused his consent. It was for him, and for him alone, to decide whether this trade union should be restrained from breaking the law. And that so far as he was concerned, he was going to do nothing to stop it. He was not going to make any application to the court. And that no member of the public could come either.

This submission is, to my mind, contrary to the whole spirit of the law of England.

These courts are open to every citizen who comes and complains that the law is being broken. So long as he has a proper case for consideration, we will hear it. No one shall forbid him access. He is not to be turned away on some technical objection about locus standi. That is why we heard Mr Blackburn[1], when he complained that the Commissioner of Police was not enforcing the law as he should. It was why we heard Mr Ross McWhirter[2] when he told us that the Independent Broadcasting Authority was about to fail in its statutory duties. It is why we have heard Mr Gouriet now.

Yet the submission has been made; and the matter is of such great constitutional importance that I must examine it in detail. It arises out of events in a far-off land, South Africa. It has great problems. One of them is the organisation of labour in trade unions. The handling of it by the government of the country has come under criticism by an international organisation of trade unions. This international organisation seeks to build up public opinion against South Africa. It launched a campaign of protest and called on the trade unions of other countries to support the campaign. It called for 'international solidarity'. The trade union leaders of England responded to the call. They asked the trade unions of England to boycott all dealings with South Africa for one week, from midnight on Sunday, 16th January 1977. One of these unions was the Union of Post Office Workers ('the UPW'). This union determined to impose a boycott of all communications between this country and South Africa.

It was all done very quickly without consulting the workers and before anyone could do anything about it. This is the time-table. On Thursday, 13th January, the executive committee of the UPW met, 31 of them, and unanimously decided to impose a boycott. They knew that it might possibly be illegal, and yet they decided to do it. At least I so infer from the evidence, which has not been contradicted. On that very evening on the nine o'clock news bulletin it was reported that the executive council of the UPW had resolved that day to call on their members to interfere with the passage of mail in the course of transmission by post between the Republic of South Africa and England and Wales. Immediately afterwards the general secretary of the UPW spoke on television. It was put to him that the action was in fact unlawful and illegal. He replied that the matter had never been tested in the courts, and that the laws relating to it dated from Queen Anne and were more appropriate for dealing with highwaymen and footpads.

On the next day, 14th January, The Times newspaper carried this report:

> 'With unanimous resolve, the 31 members of the executive of the Union of Post Office Workers decided yesterday to brave possible legal action under the Post Office Act and boycott all telephone calls, mail and telegrams to South Africa next week. Their action, taken in response to a call for "international solidarity" from the International Confederation of Free Trade Unions, is being followed by other unions who hope to influence apartheid policy ... The Post Office Engineering Union said it would instruct its members not to provide or maintain circuits to the country except in a matter of "life and death".'

There is an association called the National Association for Freedom of which we know nothing except that it has a secretary, Mr John Prendergast Gouriet. It is said by its critics to be a right wing pressure group. But that is no concern of ours. On Friday morning Mr Gouriet consulted lawyers to see if the action of the UPW was lawful or not; and, if it was unlawful, whether anything could be done to stop it. The lawyers advised that it was unlawful and that Mr Gouriet's proper course, as a citizen, was to draw the matter to the attention of the Attorney-General so as to see if he would himself take action or, alternatively, would give his consent to Mr Gouriet

1 *R v Metropolitan Police Comr, ex parte Blackburn* [1968] 1 All ER 763, [1968] 2 QB 118

2 *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority* [1973] 1 All ER 689, [1973] QB 629

himself taking action to stop it. If the Attorney-General took action himself, it would be what we call an action ex officio, in which he would put the whole weight of his office and authority behind it. If he did not take action himself, but gave his consent for Mr Gouriet to take action, his fiat as the lawyers call it, then it would be what we call a 'relator action', that is an action by the Attorney-General 'on the relation of Mr Gouriet', or, more understandably, on the information given by Mr Gouriet. In that case the Attorney-General would himself be, in strictness of law, the party to the suit, but Mr Gouriet would be, as an old writer put it, 'the life of the suit': see Calvert on Parties[1]. If it failed, Mr Gouriet would be liable to pay the costs. But Mr Gouriet, as relator, would be acting not on behalf of himself alone, or of the association of which he was secretary, but on behalf of the public at large.

At 12.45 p m on the Friday, the Attorney-General was asked for his consent. At 3.32 p m he refused, saying:

> 'Having considered all the circumstances, including the public interest . . . I have come to the conclusion that in relation to this application I should not give my consent.'

Thereupon Mr Gouriet issued a writ in his own name against the union, asking for an injunction to restrain the UPW from breaking the law. He applied to the judge in chambers for an injunction. It was refused. On Saturday, 15th January Mr Gouriet appealed to this court. We granted an injunction which the trade union obeyed. So the proposed boycott did not take place.

Was the boycott illegal?

At the heart of this case lies this question: suppose a trade union, or its officers, call on the workers in the Post Office to detain or delay any letters which are addressed to a named firm or to a named country; is their action lawful?

In some quarters doubts have been expressed. As recently as 4th November 1976, in the House of Commons, the Secretary of State for Employment[2] said that the question 'has never been tested in a court . . . in the absence of any court decision as guidance, it would be most improper for me to express a view whether a criminal act had been committed'. This doubt was repeated by the general secretary of the UPW on television on Thursday, 13th January, when he said: 'This matter has never been tested in the courts. The laws relating to it date from Queen Anne and are more appropriate for dealing with highwaymen and footpads.'

Seeing that these doubts have been expressed in such high quarters, I must say, as firmly as I can, that if a trade union or its officers gave such a call to its workers, it would be acting unlawfully. It matters not that the call was in contemplation or furtherance of a 'trade dispute'. May be it was. May be it was not. No matter. The very call to the workers would be a criminal offence by the trade union and its officers; and every worker who obeyed the call would himself be guilty of a criminal offence. The union itself could be prosecuted in the criminal courts in its own name: see s 2(1)(*d*) of the Trade Union and Labour Relations Act 1974. Its officers could be prosecuted too. So could each one of the workers. The prosecution could be undertaken by the police, or by any private citizen. Any one of them could undertake a prosecution. If it was proceeded with, no one could stop it except the Attorney-General. He could enter what we lawyers call a 'nolle prosequi', that is, he could say that he was not willing that the prosecution should continue: although, I must say, that I cannot imagine him doing it in any such case as I have visualised—at any rate not if he was doing his duty.

It was suggested that this offence was out of date, that it was fitted for the days of Queen Anne, and not for present times. To this Parli[illegible] itself has given the answer. The offence, it is true, dates back to the year 1710. That was the year in which the General Post Office was first established. By s 40 of 9 Anne c 10, it was made an offence wilfully to detain or delay any postal letter or packet. The penalty was £20 for every such offence. That would be about £500 now. It could be recovered by any informer by action or information in the civil courts. Moreover, any worker in the Post Office so offending lost his job, and he was debarred for ever from being employed by the Post Office. They were pretty strict in those days. Since that time Parliament has re-enacted the law in virtually the same words, but altering the penalties, making it simply imprisonment or fine. This law was re-enacted by the Post Office Acts in the days of coaches and horses in 1837, of railway trains in 1907, of motor cars in 1953, and of aircraft in 1969. The modern language is s 58 of the Post Office Act 1953 (as amended):

> 'If any officer of the Post Office, contrary to his duty opens . . . any postal packet in the course of transmission by post, or wilfully detains or delays, or procures or suffers to be detained or delayed, any such postal packet, he shall be guilty of a misdemeanour and be liable to imprisonment for a term not exceeding two years, or to a fine, or both.'

Section 68 provides:

> 'If any person solicits or endeavours to procure any other person to commit [such an offence], he shall be guilty of a misdemeanour, and be liable to imprisonment for a term not exceeding two years.'

Those enactments are so clear that I see no reason for any one to require the position to be tested in the courts. If the trade union, or its officers, asked for the advice of any lawyer, the answer must have been: 'You cannot do it. It is contrary to law.'

I would only add this one word about a 'trade dispute'. If the trade union, or its officers, made the call in contemplation or furtherance of a 'trade dispute', they could not be sued in tort. No private individual could sue them in respect of his private rights either for damages or for an injunction: see s 14 of the Trade Union and Labour Relations Act 1974; but this would not relieve the union, or its officers, or the workers, in the slightest degree of their responsibility before the criminal law.

It was half suggested that the dispute in this case might be a 'trade dispute'; but that will not bear examination for one moment. This was not a dispute 'between employers and workers, or between workers and workers' within s 29 of the 1974 Act. It was a dispute between the International Confederation of Free Trade Unions and the South African government, which would not affect the workers in Great Britain in the slightest.

I would mention one interesting sidelight. It is about some other vital industries. In 1875 Parliament put the workers in gas or water works on the same footing as post office workers. They were guilty of a criminal offence if they did anything wilfully to deprive people of their gas or water supply: see s 4 of the Conspiracy and Protection of Property Act 1875. The same also applied to electricity workers: see s 31 of the Electricity (Supply) Act 1919. Those provisions as to gas, water and electricity were repealed in 1971: see the Industrial Relations Act 1971, Sch 9. But the provisions as to post office workers have remained unrepealed to this very day. I expect that the Union of Post Office Workers think that this is unfair discrimination against them by Parliament. If the workers can deprive the public of their gas, water or electricity without being subjected to the penalties of the criminal law, why should not the post office workers likewise be at liberty to deprive the public of their postal services? The answer is that Parliament has not thought fit to do so. It has re-affirmed the law as it has existed for the last 266 years, that if any employee of the post office wilfully delays [illegible]ains a letter or postal packet he is guilty of an offence. Unless and until the law is repealed by Parliament, the Union of Post Office Workers must obey it. So must all the postal workers. Let there be no mistake about it.

1 Calvert's Treatise upon the Law respecting Parties to suits in Equity (2nd Edn, 1847), p 398

2 918 H of C Official Report (5th series) cols 1646, 1647

A person who suffers special damages

Mr Gouriet comes, as I have said, as one of the public at large. He does not come as a man who has suffered or will suffer special damage. But I must say what would happen then. Suppose that there was someone in England who would suffer greater damage or inconvenience from the boycott than the generality of the public. For instance, if a businessman had to exercise an option in South Africa by Wednesday, 19th January, and the boycott would prevent him; or, if a father wanted to cable money to his son in South Africa to pay for medical attention. Such a person would, under our law, in the ordinary way, have a standing of his own to come to the court to complain of a wrong to him personally, that is, of a tort: see *Benjamin v Storr*[1]; and *Southport Corpn v Esso Petroleum Co*[2]. But in this case he would be met by a formidable objection. It was explained to us by counsel for the UPW. He would find his complaint blocked by the provisions of s 14 of the Trade Union and Labour Relations Act 1974. That section gives a great immunity to a trade union. It cannot be sued in tort either for damages for a wrong already committed, or for an injunction to prevent wrongs which are about to be committed.

So great is this immunity—and so formidable was this objection—that counsel for Mr Gouriet did not put forward anyone as plaintiff who had suffered or would suffer special damage from the boycott. He declined to add any such person as plaintiff. He put forward Mr Gouriet as simply one citizen out of many—one out of all the public at large—who would be adversely affected by the boycott, just the same as everyone else. If he wished to communicate with anyone in South Africa during the week, the boycott would prevent him.

Counsel for Mr Gouriet pointed out, too, another objection. He gave us an account of a case last November, when the UPW imposed a boycott on all mail to and from a mail order firm. It was suffering special damage and brought an action against the union to stop it. Within four days the union settled the case with that company, leaving itself free to impose a boycott in other cases. Counsel for Mr Gouriet did not want this case to go off like that one; because here he was concerned for the public at large, and not for any one individual.

The public at large

Now, so far as the public at large are concerned, the law has provided a special machinery for the protection of the public. It shuns the thought of every one of the public being able himself to bring an action. That would be highly inconvenient. So it has laid down that, whenever the rights of the public at large are affected, the proper person to sue, in respect of the public interest, is the Attorney-General himself: see *Attorney-General v Great Northern Railway*[3]; and *Attorney-General & Spalding Rural District Council v Garner*[4]. The correct course is for the complainant to lay the matter before the Attorney-General and ask for his consent to bring a 'relator action'. In every case in the books so far, there has been no difficulty about getting the consent of the Attorney-General. In every case where there is a sufficient public interest to be considered, he has given his consent. This is the first case in our books where he has refused his consent. So it is a case of the first importance.

It is clear that, in granting his fiat, the Attorney-General has a discretion. It has been said that this discretion is absolute—I will consider that a little later—but, meanwhile, as I read our books, the first and paramount consideration for him is that the law should be observed and respected. It was well stated nearly 100 years ago by a lord justice who had himself been a law officer, Baggallay LJ, in *Attorney-General v Great Eastern Railway Co*[5]:

1 (1874) LR 9 CP 400, [1874-80] All ER Rep Ext 2000
2 [1954] 2 All ER 561 at 571, [1954] 2 QB 182 at 197
3 (1860) 1 Drew & Sm 154 at 161, 162, 29 LJCh 704 at 800
4 [1907] 2 KB 480 at 486, 76 LJKB 905 at 908
5 (1879) 11 Ch D 449 at 500, 48 LJCh 428 at 444

'It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed . . . it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues *ex officio* or at the instance of relators.'

In doing his duty, the Attorney-General should not allow himself to be influenced by the merits or demerits of the particular relator; because it is not his interests which are in question but those of the public at large: see *Attorney-General v Logan*[1]. The relator may be acting as a member of a pressure group, of whom he disapproves, but that is immaterial. If there is a public interest which is sufficiently serious as to need protection, the Attorney-General should give his consent.

No doubt the Attorney-General may consider what his predecessors have done in similar cases. He may consider, too, the repercussions that may follow on his decision. On this he may consult his colleagues in the government who may be better informed than he. They may have confidential information of which he ought to be aware. But he must not let his decision be directed by them. He must make up his mind himself, remembering, however, that he must rigorously exclude any advantage or disadvantage that may assist or beset his own political party as a result of his decision. This may be difficult for him to do, especially because he is, as he told us, a 'political animal'. But still he must do it.

The nature of the discretion

It has been submitted that the discretion of the Attorney-General is an absolute discretion which will not be enquired into by the courts. I agree with this when he has exercised it by granting his consent to his name being used. Even if he gave his consent in a trifling or unsuitable matter, the courts will not review it. That was made clear by Lord Halsbury LC in his oft-quoted dictum in *London County Council v Attorney-General*[2] in the House of Lords. But that dictum does not cover a case when he has refused his consent. I am sure that Lord Halsbury LC did not have such a case in mind, for the simple reason that it had never arisen for consideration at that time; and it has never arisen since until now.

So it falls to us to consider it. The Attorney-General tells us that, when he refuses his consent, his refusal is final. It cannot be overridden by the courts. He is answerable to Parliament, and to Parliament alone. He declines even to give his reasons for his refusal.

This is, to my mind, a direct challenge to the rule of law. Let me take some instances; only hypothetical of course, but to test this claim of his. Suppose that he refused his consent for corrupt motives, or in bad faith. The Attorney-General went so far as to say that even this could not be questioned. That is an extreme hypothesis which can be put on one side. But take a lesser hypothesis. Suppose that he refused his consent for party political reasons, and not in the interests of the public at large. Is he then to be answerable to Parliament alone? Where he would, perchance, be supported by his own political party? Or, even a still lesser hypothesis. Suppose he refused his consent because he considered that the information was laid by a pressure group, of which he disapproved; but yet it was a matter which ought to be taken up in the interests of the public at large. Would his refusal then be justifiable? In all these cases he would be failing in his duty, as I have earlier stated it. Does it mean then that nothing can be done about it? That no one can come to the courts and inform us of it? I should have thought that, in order to dispel suspicion, he could come and tell us what his reasons were, or, at least outline them without disclosing anything confidential or secret. But that he declines to do.

1 [1891] 2 QB 100 at 103, 65 LT 102 at 104
2 [1902] AC 165 at 168, 169

These instances are, of course, entirely hypothetical. I would not suggest for one moment that they existed here. But the possibility of them convinces me that his discretion to refuse is not absolute or unfettered. It can be reviewed by the courts. If he takes into account matters which he ought not to take into account, or fails to take into account matters which he ought to take into account, then his decision can be overridden by the courts. Not directly, but indirectly. If he misdirects himself in coming to his decision, the court can say: 'Very well then. If you do not give your consent, or your reasons, we will hear that complaint of this citizen without it.'

I adhere, therefore, to the declaration which I made when the late Mr McWhirter came to us. I repeat it now[1]:

> '... I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can apply to the court itself. He can apply for a declaration, and, in a proper case, for an injunction, joining the Attorney-General, if need be, as defendant ... I regard it as a matter of high constitutional principle that, if there is good ground for supposing that a government department or a public authority [or, I will add now, a trade union] is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of her Majesty's subjects, then in the last resort, anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced.'

The Attorney-General disputed that principle. He said that there was nothing to support it. But I have discovered that there is. Only three years ago. No less an authority than the Supreme Court of Canada. It is *Thorson v Attorney-General of Canada*[2]. The Parliament of Canada had passed a statute which affected every taxpayer in the land. Mr Thorson sought to challenge it as being unconstitutional. He asked the Attorney-General to take proceedings; but the Attorney-General refused. Mr Thorson then brought an action on his own. The court held that he was entitled to do so. The judgment of the majority (six to three) was given by Laskin CJ. He referred to the case of Mr McWhirter, and drew on it. He said[3]:

> '... where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayer's action and denying any standing at all when the Attorney-General refuses to act, it may choose to hear the case on the merits.'

Similarly, the Supreme Court of the United States has likewise admitted a taxpayer to come on his own: see *Flast v Cohen, Secretary of Health, Education and Welfare*[4].

Crown prerogative

I would test the matter in another way also, remembering the way it was put by the Attorney-General. He says that this is a prerogative of the Crown on which he is entitled to insist. Although there is threatened a plain breach of the criminal law—to the prejudice of all Her Majesty's subjects—then, without his consent, no one of them can apply to the courts to stop the breach.

If this be so—if the Attorney-General's submission be correct—it means that he and his predecessors and successors—can, one after another, suspend or dispense with the execution of the laws of England. Take the sequence of events in regard to this very union. There are three previous occasions which have been drawn to our attention.

1 [1973] 1 All ER 689 at 698, 699, [1973] QB 629 at 692
2 (1974) 43 DLR (3d) 1
3 43 DLR (3d) 1 at 18
4 (1968) 392 US 83

In 1971 there was a strike in which the postal workers stopped work for several weeks. I would not be prepared to assert that this was a breach of the criminal law. It could be said that, by stopping work, they did not wilfully detain or delay the mail. It was, moreover, a trade dispute for which the union was not liable in the civil courts. Howsoever that may be, no action was taken in the courts at that time to test the legality of the action. But then, in 1973, there was an occasion which was very parallel to the present. The French government was about to conduct nuclear tests in the Pacific ocean. By way of protest the UPW decided to boycott the mail to France. No action was taken by the Attorney-General of the day (Sir Peter Rawlinson) to stop the boycott. No one asked his consent for a relator action. No one came to the courts. This incident has been regarded by the UPW as a precedent to be followed in the present case. The general secretary of the UPW is reported as saying: 'It is totally illogical that the law lords should allow Rawlinson to do nothing and then complain bitterly when Silkin does the same thing.' The truth is, of course, the contrary. The trade unions are complaining that they cannot repeat today the illegal action that they took in 1973. Just as the Conservative Attorney-General did not intervene then; so the Labour Attorney-General was right not to intervene now. The latest incident was in August 1976, when there was a trade dispute in North London. The employees of a mail-order firm came out on strike. They were supported by the UPW. On 29th October 1976 the UPW authorised its members not to handle mail to or from the company; and they did so. From Monday, 1st November 1976, the postal workers refused to accept outgoing mail, or to hand over incoming mail. The Attorney-General did not intervene. I do not know whether he was asked or not. He might have had very good reasons for not intervening or allowing his name to be used. At any rate he did not intervene. And the mail-order firm themselves issued a writ against the union. They applied for an injunction. Four days later, on Thursday, 4th November 1976, the UPW instructed its members to work normally. This was announced during a debate in the House of Commons on that very day. Now if the contention of the Attorney-General were correct, it would mean that the mail-order firm had no right to come to the court at all. They could not come to enforce any private right of their own, because it might be blocked by the Trade Union and Labour Relations Act 1974. They could not come as members of the public at large—to enforce the criminal law—unless the Attorney-General gave his consent.

What then does it all come to? If the contention of the Attorney-General is correct, it means that he is the final arbiter whether the law should be enforced or not. If he does not act himself—or refuses to give his consent to his name being used—then the law will not be enforced. If one Attorney-General after another does this, if each in his turn declines to take action against those who break the law, then the law becomes a dead letter. It may be that each Attorney-General would have good reason of his own for not intervening. He may fear the repercussions if he lends the weight of his authority to proceedings against the infringers. But as one like situation follows another—as it does here—it means that a powerful trade union will feel that it can repeat its performance with impunity. It will be above the law. That cannot be.

Take warning from history. Not from a previous Attorney-General; but from a King himself. James II claimed that, by virtue of his prerogative he could suspend or dispense with the execution of all penal laws in matters ecclesiastical. He had reasons which, to him at least, were most compelling. He desired religious toleration and civic equality. But the people of England would have none of this prerogative. The jury showed this at the trial of the Seven Bishops[1]. And at the very first opportunity Parliament enacted the Bill of Rights of 1688[2]. It declared:

> '... that the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall: [and] that the

1 (1688) 12 *State Tr* 183
2 1 Will & Mar Sess 2 c 2

pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath been assumed and exercised of late is illegall.'

Mercifully our Constitution has, I believe, provided a remedy. It is what I have said already. If the Attorney-General refuses to give his consent to the enforcement of the criminal law, then any citizen in the land can come to the courts and ask that the law be enforced. This is an essential safeguard; for were it not so, the Attorney-General could, by his veto, saying 'I do not consent', make the criminal law of no effect. Confronted with a powerful subject whom he feared to offend, he could refuse his consent time and time again. Then that subject could disregard the law with impunity. It would indeed be above the law. This cannot be permitted. To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: 'Be you never so high, the law is above you.'

Procedure

But when a citizen comes in this way on his own—to enforce a right owed to the public at large—he ought, I think, not only to sue the infringers, but he ought also to join the Attorney-General as a defendant. That is, I think, clear from what Lord Kingsdown said in *Lang v Purves*[1], and Viscount Maugham said in *London Passenger Transport Board v Moscrop*[2]. For once the Attorney-General is there—as plaintiff or defendant—to give his assistance for or against—the court can make a declaration of what the law is. So that the defendant thenceforward will have no excuse for not obeying it. That follows from *Dyson v Attorney-General*[3]; especially from the judgment of Farwell LJ[4]. As there, so here. It would be a blot on our system of law and procedure if there was no way by which a decision on the scope of the criminal law could be obtained save by launching a private prosecution. And, if the court can grant a declaration, I see no reason why it should not grant an injunction against the infringers; even a final injunction. For the last 100 years, ever since the Supreme Court of Judicature Act 1873, the courts have by statute had jurisdiction to grant an injunction 'in all cases in which it appears to the court to be just or convenient' that such order should be made. I know that it has been said by Ormrod J in *Montgomery v Montgomery*[5], and by me in *Thorne v British Broadcasting Corpn*[6] that this only applies to an injunction 'to protect a right'. But that was too narrowly stated: see Spry on Equitable Remedies[7], incidentally, a book from Australia. It is now established by decisions of this court that an injunction can be granted to prevent the commission of a criminal offence. It can certainly be granted when one of the public sues with the consent of the Attorney-General: see *Attorney-General v Harris*[8]; and *Attorney-General v Chaudry*[9], where I said, I believe rightly: 'The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient to do so.' And if the court has jurisdiction when the Attorney-General is the plaintiff, so also it has a jurisdiction when a member of the public is the plaintiff.

Of course, it does not follow that, if the court grants an injunction, it will be followed up, in case of disobedience, by committal to prison or sequestration of assets, or anything of that kind. I trust that this will never be necessary. The trade union in this case has very properly obeyed the law. If it should happen in the future—I trust it never will—that a trade union should disobey the order of the court—then consideration would have to be given to the measures necessary to enforce it. But that I would leave till another day. All that is necessary today is to declare what the law is.

1 (1852) 15 Moo PCC 389 at 422
2 [1942] 1 All ER 97 at 104, [1942] AC 332 at 345
3 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158
4 [1911] 1 KB 410 at 421
5 [1964] 2 All ER 22 at 23, [1965] P 46 at 50
6 [1967] 2 All ER 1225 at 1226, [1967] 1 WLR 1104 at 1109
7 (1971) pp 309, 310
8 [1960] 3 All ER 207, [1961] 1 QB 74
9 [1971] 3 All ER 938 at 947, [1971] 1 WLR 1614 at 1624

Conclusion

Returning to the present case. Our decision that Saturday has been justified by events. We issued an injunction. It was obeyed. The boycott was called off. If we had held that Mr Gouriet had no locus standi, we could have done nothing. The law would have been broken. The boycott would have continued. This proves to my mind that we were right to hear him and to issue an injunction. There is no need to continue the injunction. The week has passed quietly. There is no threat of a further boycott. But the great constitutional issue remains. It has been retained in the form of this question: notwithstanding the refusal of consent by the Attorney-General to bring relator proceedings, was the plaintiff entitled to proceed in his action for an injunction against the trade union? My answer is that the plaintiff was entitled so to proceed. I would not strike the action out. I would, if need be, grant a declaration.

There is one thing more. The Attorney-General told us that, if we decided as we do today, we should be changing the law; and that we had no right to do so. It could only be done by Parliament. In one sense that is true. In another it is not.

It is true when we are considering the enacted law. That is, in this case the law which says that postal workers must not detain or delay any letters in the course of transmission by post; and which says that no one shall solicit or endeavour to procure them to do so. That is the law enacted by Parlament. It is, I take it, the will of Parliament that it shall be obeyed. Even by the most powerful. Even by the trade unions. We cannot change that law. We sit here to carry out the will of Parliament. To see that the law is obeyed. And that we will do.

In another sense the proposition put forward by the Attorney-General is not true. It is not true when we are considering the powers of the Attorney-General and the prerogative which he claims. Parliament has passed no enactment on it. There is no binding precedent in our books on it. It is a new thing. Whenever a new situation arises which has not been considered before, the judges have to say what the law is. In so doing, we do not change the law. We declare it. We consider it on principle; and then pronounce on it. As the old writers quaintly put it, the law lies 'in the breast of the judges'. And when the Attorney-General comes, as he does here, and tells us that he has a prerogative—a prerogative by which he alone is the one who can say whether the criminal law should be enforced in these courts or not—then I say he has no such prerogative. He has no prerogative to suspend or dispense with the laws of England. If he does not give his consent, then any citizen of the land—any one of the public at large who is adversely affected—can come to this court and ask that the law be enforced. Let no one say that in this we are prejudiced. We have but one prejudice. That is to uphold the law. And that we will do, whatever befall. Nothing shall deter us from doing our duty.

LAWTON LJ. The issue in this case, in my judgment, is not whether the Attorney-General is answerable to the courts as to the discharge of his functions, but whether the plaintiff, after the Attorney-General's refusal to consent to a relator action for an injunction against the UPW, has any right to ask the court to stop a threatened breach of the criminal law. If he has, it is my judicial duty to ensure that he gets what he is entitled to. Chapter XXIX of Magna Carta[1] says so.

There is no question of a clash between the courts and Parliament. Still less is there any question of this court impugning, as has been suggested, the honour, reputation and r[illegible] Parliament, and in particular of the House of Commons. The

1 (1297) 25 Edw 1

opposite is the case. In 1953 Parliament enacted the Post Office Act with its prohibition, under the penalties of the criminal law, of the wilful detaining or delaying of any postal packet. The same Act, by s 68, forbade any person to solicit or endeavour to procure any person to detain or delay postal packets. Parliament considered this Act again in 1969 and amended it[1]. Postal workers continued to be subject to the prohibitions set out in s 58 of the 1953 Act. Persons who were not postal workers (and this would include trade unions and their officers) were still to be bound by s 68. In 1969 it cannot have escaped the notice of many members of both Houses of Parliament that this section would prohibit trade unions and their officers from urging industrial action which would interfere with the mails; yet s 68 remained in force. I infer that Parliament intended the law as set out in those two Acts to be enforced. It would not have enacted either Act if it had not so intended.

It is my judicial duty to ensure as best I can within the jurisdiction invested in me that the law, as enacted by Parliament, is obeyed. The oath, which as required by Parliament, I took when I became a judge required me to 'well and truly serve our Sovereign Lady the Queen' and to 'do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill will'. I should be acting in breach of my oath and of my duty to the Sovereign and Parliament if on being asked to enforce the law as laid down by Parliament I did not do whatever I could to see that it was not broken.

The Attorney-General has submitted firmly that without his consent no citizen can ask the court to enforce the clear provisions of an Act of Parliament even though there is ample evidence that if no action is taken in all parts of the realm there are likely to be widespread breaches of the law which will interfere with the rights of all Her Majesty's subjects. This is not a new contention by a law officer. The previous holder of the office of Attorney-General, Sir Peter Rawlinson, made the same submission in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[2]. This court queried the submission which the Attorney-General made but was not called on to decide then, whether it was well founded, as in the end he gave his consent to relator proceedings. In this case the Attorney-General has stood his ground. For the first time ever this court has been called on to adjudge whether his submission, which accords with the opinions of many of his predecessors, is sound. Although the issue is one of general constitutional importance, as in all cases, it must be considered against the background of facts. Lord Denning MR has said what they are. I will deal solely with what seems to me to be the consequences which must have followed from Mr Tom Jackson's appearance on television on Thursday, 13th January 1977, and were likely to follow if after midnight on 16th January the members of his union did what the union seemed about to tell them to do.

Had not this court intervened on Saturday, 15th January, on the following Monday tens of thousands of ordinary law-abiding citizens, some young, some nearing retirement, would have had to choose between being loyal to their union or breaking the law. Mr Jackson's reference to the antiquity of the law may have led some to think that the law was obscure and out of date. It was neither. Refusal to obey union instructions could have had unpleasant and serious consequences; so could breaking the law. If ever a situation called for someone in a position of authority and influence to state what the law was, this was it.

The public generally was likely to be affected by the threatened union action. For seven days they would be unable to use such facilities as the Post Office provided for communication with South Africa. Some, like the plaintiff, would not be badly affected; they would merely be deprived of the facilities if they wanted to use them. Others, such as those engaged in industry and commerce, might be badly affected.

1 Post Office Act 1969, s 87(1)
2 [1973] 1 All ER 689, [1973] QB 629

They might have to face heavy losses. Exports orders could have been lost. Communication between family and friends would have been interrupted. Lastly, but not least, the many people in this realm, who to their credit, try to help, encourage and sustain the coloured population of South Africa would have been deprived of the channels of communication.

Those who were likely to be affected financially in their business may, as individuals, have been unable to prevent loss and damage by applying to the court for an injunction to restrain what seemed to be threatened criminal acts. This is what counsel for the UPW and the POEU submitted in a clear and powerful argument. An action to restrain a trade union from committing an illegal act which is likely to cause financial loss is, he said, an action in tort even though it is also a crime. Section 14 of the Trade Union and Labour Relations Act 1974 provides that no such action shall lie. It follows, if this be right (and it may be), and the Attorney-General also is right in his submission, then a citizen who is likely to suffer financial loss if a crime is committed cannot ask the courts to stop the threatened crime. All he can do, submitted counsel for the UPW is to prosecute after the crime has been committed. By the same reasoning, as was pointed out in the course of argument, if a union instructed a picket line to prevent by force a man from entering his own property, he could not ask the courts for protection. All he could do would be to prosecute after he had been assaulted.

The Attorney-General was not in court when counsel for the UPW made his submission so I do not know whether he agrees with it; but if counsel's submission is right, this might well be the state of the law. If it is, the public in my opinion have cause for concern. In this case we do not have to decide whether counsel for the UPW's submission is right because the plaintiff has not asked us to protect his personal right to use the facilities of the Post Office. He has asked us by injunction to try to stop what seems to be a threatened breach of the criminal law, the Attorney-General having refused to take action himself or consent to the plaintiff doing so in his name.

If there is a gap in the law which leaves citizens unprotected, I am mindful of the Attorney-General's courteous and tactful reminder to the court that we have no right to legislate to fill that gap. This is for Parliament to do. I agree. But is there such a gap as to leave the judges powerless to prevent a threatened breach of the criminal law? Our predecessors on the bench have not in the past been stopped from doing justice according to the law and usages of the realm because of procedural difficulties. From such researches into the past as counsel have been able to carry out in the short time available to them, the relator action itself was a procedural device evolved by the old courts of Chancery and Exchequer to enable justice to be done.

What does justice require in the kind of circumstances arising in this case? First, that no person (and that includes a trade union) should be allowed to put himself above the law. Secondly, that the law should be applied to all without fear or favour, affection or ill will. Thirdly, that no one, be he judge or minister, should dispense with or suspend the laws and their execution without the consent of Parliament. The Bill of Rights (1688)[1] says so. Now the law does not enforce itself. Someone has to act in the name of the law. In these days there are many persons and bodies who have the duty of enforcing the law. At the head of them all stands the Attorney-General. Any such persons, other than the Attorney-General, who do not discharge their duty can be obliged to do so by order of the court: see *R v Metropolitan Police Comr, ex parte Blackburn*[2] per Lord Denning MR and Edmund Davies LJ. No order can be made against the Attorney-General because he acts on behalf of the Crown. If for his own reasons he decides not to enforce the law this court cannot make him do so. Nor can it make him reveal what his reasons for not acting were. It does not follow that if he will not act, no one else [redacted].

1 1 Will & Mar Sess 2 c2
2 [1968] 1 All ER 763 at 769, 777, [1968] 2 QB 118 at 136, 148, 149

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Law enforcement has two aspects, the prevention of law breaking and the punishment of law breakers. It is a principle of the day-to-day administration of the criminal law that law enforcement officers such as the police are better employed trying to prevent the commission of offences than by prosecuting offenders. In the Attorney-General's law enforcement capacity this principle should, in my opinion, apply to him too. If he applies for an injunction, the threatened criminal act may never be committed. He must, of course, have a discretion. He is no one's lackey to put the law into operation at the behest of busybodies and mischief-makers. But a citizen, such as the plaintiff, who invites the Attorney-General's attention to threatened widespread breaches of the criminal law which, if committed, will affect everyone in the realm, and some gravely, should not be regarded either as a busybody or a mischief-maker. In his prosecuting capacity, in my opinion, the Attorney-General's discretion is much wider. He is not then concerned with preventing breaches of the law but with securing the punishment of offenders. He must act in mercy. He can look at each case; but if he approaches his function of preventing breaches of the criminal law in the same way, there is a danger that he may unwittingly end by dispensing with the law in favour of individuals. That the courts must do their best to prevent. Even when the Attorney-General does decide not to prosecute, any private citizen can do so unless Parliament has expressly taken that right away.

Some long time ago (it is not clear when, may be in the 17th century) the relator action began. It seems to have been a procedural device. Its history, as far as it is known, is set out in Professor S A de Smith's Judicial Review of Administrative Action[1]. By the middle of the 19th century it is clear from the reports that the relator action was much used when there had been an alleged breach of the law having public consequences which did not affect the relator any more than any one else. In cases involving charities it seems that in some cases the Attorney-General could be required 'to call upon the Courts to give relief and assistance to the objects of a charity who do not apply for it themselves'; see *Attorney-General v Magdalen College, Oxford*[2]. There is evidence from the reports of this period that the getting of the Attorney-General's consent for legal processes had become little more than a formality. Thus in cases where a party sought to repeal letters patent he applied to the Attorney-General for his fiat to issue a writ of scire facias. The writ seems to have issued as of course. Lord Langdale MR in *The Queen v Prosser*[3] said that it ought not to be so issued.

During the second half of the 19th century it does not seem to have been difficult to get the Attorney-General's consent to take relator proceedings to enforce rights having public consequences. Disputes arose as to whether he should have given his consent. The courts showed no reluctance to enquire into this question. The Attorney-Generals of this period did not seek to say that the courts had no jurisdiction to question their discretion. An example is provided by *Attorney-General v Great Eastern Railway Co*[4]. The Great Eastern Railway Co were alleged to have exceeded their powers. An action was commenced by the Attorney-General, at the relation of a manufacturer of rolling stock, to restrain the company from letting rolling stock on hire and from manufacturing any rolling stock for the purpose of so letting it. The Attorney-General, Sir John Holker, appeared. The Court of Appeal was concerned about his standing in that case. Argument was heard. The Attorney-General did not submit that the court had no jurisdiction to enquire into his standing or to challenge his discretion in giving his consent to the relator proceedings. Between the members of the court there was a difference of opinion as to the right of the Attorney-General to intervene in the case. James LJ was of the opinion that the Attorney-General should

1 3rd Edn (1973), pp 385-388
2 (1854) 18 Beav 223 at 242
3 (1848) 11 Beav 306 at 313
4 (1879) 11 Ch D 449

not have given his consent. Baggallay LJ took the opposite view. He said[1] that the Great Eastern Railway Co had exceeded their powers and had done and threatened to do that which the law forbade. He went on[2]:

> 'It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed, as in my opinion it has been by the *Great Eastern Company*, it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues *ex officio* or at the instance of relators.'

I infer from the cases that until the end of the 19th century everyone, including the judges and the law officers, appreciated that relator actions were a convenient procedural device enabling members of the public to enforce public rights when the public interest justified enforcement.

At the beginning of this century came the case of the *London County Council v Attorney-General*[3]. The headnote[3] of the report of that case includes this statement:

> 'The jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators is absolute.'

It is based on what Lord Halsbury LC[4] said, and what he said was concurred in by Lord Macnaghten[5]. In that case the statement was obiter because as Lord Halsbury LC[6] himself said: '... the thing has not been argued here at all ...' That does not matter because in other cases, and in particular in *Attorney-General v Westminster City Council*[7], which is binding on this court unless it can be distinguished on well-known grounds, the dictum was followed and applied. For my part I am of the opinion that I must follow it as far as it goes. I accept that the courts have no jurisdiction over the discretion of the Attorney-General as to when, and when not, he should seek to enforce the law having public consequences. The courts cannot make him act if he does not wish to do so; nor can they, as of right, call on him to explain why he has not acted. In this case he was given an opportunity to explain but, as he was entitled to do, he did not. I accept, too, that on the cases binding on me, this court cannot proceed in relation to the Attorney-General's law enforcement function on the same basis as it has proceeded when ministers have been alleged to have acted in excess of powers. I have in mind such cases as *Padfield v Minister of Agriculture*[8] in which the House of Lords rejected the minister's claim that he had an absolute discretion whether to refer a complaint to a statutory committee of investigation. The problem still remains, however, whether, after the Attorney-General's refusal to consent to a relator action, the plaintiff is without rights of any kind to try to get the criminal law enforced when its breach will deprive him and all other persons in the realm of their right to use the facilities provided by the Post Office.

Counsel on behalf of the Attorney-General submitted that this problem had been decided by *Thorne v British Broadcasting Corpn*[9] which was a decision of this court. Dr Thorne brought an action against the British Broadcasting Corporation claiming an injunction to restrain them from conducting propaganda of racial hatred against the German people contrary to the provisions of s 6 of the Race Relations Act 1965.

1 (1879) 11 Ch D 449 at 499, 500
2 11 Ch D 449 at 500
3 [1902] AC 165
4 [1902] AC 165 at 168, 169
5 [1902] AC 165 at 170
6 [1902] AC 165 [illegible]
7 [1924] 2 Ch 416, [illegible] All ER Rep 162
8 [1968] 1 All ER 694, [1968] AC 997 at 1016
9 [1967] 2 All ER 1225, [1967] 1 WLR 1104

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There was a short answer to this claim. It was given by Danckwerts and Winn LJJ[1]. Parliament by statute had given control of the remedies under the Race Relations Act 1965 to the Attorney-General. All the members of the court, however, adjudged that the plaintiff's claim also failed because he had not alleged, and did not have, any legal right of his own which had been infringed by the alleged acts of the British Broadcasting Corporation. Further, he had not tried to get the Attorney-General's consent to a relator action. I would distinguish that case from the present on the ground that in the present case the plaintiff had himself a right which was threatened. The fact that every other person in the realm had it too does not make it any less a right which he could use. He has asked this court to enforce the criminal law so that he and the rest of the public can enjoy that right.

The court cannot give him leave to bring a relator action: it has no jurisdiction to do so. It cannot invent causes of action. What it can do is to use, apply and, if necessary, adapt, existing procedures. One procedure which may be available is the declaratory judgment. It had been known for a very long time to the courts of Chancery and Exchequer. It fell into abeyance in the first half of the 19th century; but under the Supreme Court of Judicature Act 1873, it became part of the inheritance of the Supreme Court of Judicature.

Since 1883 the Rules of the Supreme Court have regulated the practice and procedure of the court in the making of declaratory judgments. This was done by RSC Ord 25, r 5, of the 1883 rules. The present rule is RSC Ord 15, r 16. Under the present rule no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought and the courts are empowered to make binding declarations of right whether any consequential relief is or could be claimed or not.

At first after 1883 the courts seem to have been reluctant to make declarations save in cases where other relief might have been claimed for a legal wrong and insisted that the jurisdiction should be exercised with great caution. Then came *Dyson v Attorney-General*[2]. Since then the jurisdiction to make declaratory judgments has often been used but it remains a discretionary one. Can the plaintiff obtain against the Attorney-General a declaratory judgment such as he is now seeking in his re-amended statement of claim?

The Attorney-General submitted that no one can obtain a declaratory judgment as to the criminal law without his intervention. RSC Ord 15, r 16 provides no such limitation. If it exists, it must be found elsewhere. Counsel for the unions submitted that it is to be found in the principle enunciated by the House of Lords in *London Passenger Transport Board v Moscrop*[3]. The question for decision was whether the appellant board had contravened the provisions of s 6(1) of the Trade Disputes and Trade Union Act 1927. The respondent asked for a declaration that they had. At the trial, which was before Morton J[4], no question arose whether in the circumstances it was competent for the court to make a declaratory judgment. In the House of Lords counsel are not reported as having raised any query about this. Viscount Maugham[5], however, did so in these terms:

> 'I cannot call to mind any action for a declaration in which (as in this case) the plaintiff claimed no right for himself, but sought to deprive others of a right which does not interfere with his liberty or his private rights. Still less can I think that there is any precedent for such an action in the absence of the persons who are interested in opposing the declaration. It has been stated again and again, and also in this House, that the jurisdiction to give a declaratory judgment should be exercised "with great care and jealousy" ... What special interest had the respondent to enable him to bring this action? We are not here concerned with anything but his civil right, if any, under the section. I think it is plain that there has been no interference with any private right of his, nor has he suffered special damage peculiar to himself from the alleged breach of the general prohibition as to certain acts directed to local or public authorities contained in sect. 6 ... Therefore, he could not sue without joining the Attorney-General."

1 [1967] 2 All ER 1225 at 1227, [1967] 1 WLR 1104 at 1109, 1110
2 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158
3 [1942] 1 All ER 97, [1942] AC 332
4 [1940] 3 All ER 225, [1940] Ch 775
5 [1942] 1 All ER 97 at 103, 104, [1942] AC 332 at 344, 345

Lords Russell of Killowen, Macmillan and Porter did not make any reference to the jurisdiction to make declaratory judgments; Lord Wright[1] did. He said:

> 'The respondent is not claiming any relief or advantage for himself, and the case is not one in which the court should exercise its discretionary power to make a declaratory judgment.'

The weighty opinions of their Lordships bear heavily on me. I have given most anxious consideration as to whether they apply to this case. If they did, I must accept them and give judgment accordingly. What the plaintiff has asked this court to restrain is a breach of the criminal law which will take away his own right to use the facilities of the Post Office. Having regard to s 14 of the Trade Union and Labour Relations Act 1974, it seems probable that save by means of a declaratory judgment and, if the law allows, an injunction to protect what Parliament intended the criminal law to protect, he would be left without the protection of the law. That surely cannot be.

If this court has jurisdiction to grant the declaratory judgment for which the plaintiff asks I can see no difficulty about granting an interim injunction. As counsel for the UPW pointed out, this court cannot make an interlocutory declaratory judgment; but pending making one it can grant an interim injunction if it is just and convenient to do so. Section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 says so. If, when a final order is made there seems any reason why the plaintiff's declared right, if any, is threatened, it will be for the Attorney-General to enforce the law, if he sees fit, under his ordinary powers. If he did not do so he would have to answer both to the Prime Minister and to Parliament. I am satisfied that the court has jurisdiction to hear and determine a claim for a declaratory judgment in circumstances such as these. At present the plaintiff's pleadings are not in order. Unless he amends his statement of claim to ask for declaratory judgments against the two unions, it will have to be struck out as far as it applies to them. In saying this, I have not overlooked the fact that the plaintiff did not ask the Attorney-General for his consent to relator proceedings against the Post Office Engineering Union. If he had, it is obvious that he would not have got it. These and other technicalities are of no importance if my approach to the issue by way of declaratory judgment is right.

I consider it important to stress that this is an interlocutory judgment. If the parties wish to have a final determination of the issue they are at liberty to do so. The Attorney-General as a defendant will be entitled to submit to the court that considerations of the public interest, which were not easily discernible to this court on 15th January last, point against the making of any declaratory judgment or the granting of an injunction: see *Adams v Adams (Attorney-General intervening)*[2] per Sir Jocelyn Simon P. If he did so submit, the court would give most careful consideration to what he said and would probably refuse the relief.

At the end of the argument counsel on behalf of the Attorney-General invited the court's attention to the kind of difficulties which might be met if members of the public were allowed to apply for injunctions for the enforcement of the criminal law.

1 [1942] 1 All ER 97 at 107, [1942] AC 332 at 351
2 [1970] 3 All ER 572 at 577, [1971] P 188 at 198

As far as the difficulties he envisages are procedural, they could be dealt with under the inherent jurisdiction of the court and the existing Rules of the Supreme Court. If new rules were necessary to stop abuse, they could be made.

I am more concerned about the basic problem in this case. I accept the Attorney-General's submissions first, that considerations of public interest have to be taken into account in the discharge of his duties of law enforcement; secondly, that he has access to sources of information which are not, and could not, be available to the courts; and thirdly, that he may be in a better position to weigh the factors affecting public interest than the judges. What I cannot, and do not, accept is that he and he alone, in relation to law enforcement through the civil courts, is the sole arbiter of what is the public interest. I have never doubted that no one can question in the courts his discretion whether, and when, to prosecute. In that sphere, the citizen who disagrees can prosecute himself, unless Parliament has enacted otherwise. The difficulty lies in the exercise of the preventive side of his functions. He does not claim infallibility. He may be wrong. If he is, many members of the public may be inconvenienced or suffer material loss. I envisage that it will only be in the rare case in which, so far as the court can see, there is no discernible reason why threatened breaches of the criminal law should not be restrained that the court will allow a plaintiff to proceed. If at any time, whether at the beginning of the case or at the final determination, the Attorney-General elected to reveal the factors of public interest which were not discernible, the court in the exercise of its discretion would assess the new information and judge accordingly. Further I envisage that the court would vigorously deny relief to busybodies, mischief-makers and anybody who was not likely to be personally affected by the threatened criminal acts. Someone living in Cornwall for example, would not be allowed to proceed with a claim for an injunction to restrain a local authority in the north of England from committing a statutory nuisance contrary to the provisions of the Public Health Act 1936. I would have thought, too, that a condition precedent for applying to the court would be that an application for consent to a relator action had been made to the Attorney-General and refused. I personally would regard the refusal of consent as strong evidence that the public interest was not involved.

For these reasons I would allow the action to proceed against the Attorney-General and against the two unions if the statement of claim is amended as I have suggested. I would discharge the interim injunction as time has removed the threat of illegality.

ORMROD LJ. This case raises not one but two questions of major constitutional importance, first, whether the Attorney-General is answerable to the court, or only to Parliament, for the exercise of his discretionary powers; and, secondly, whether there are any circumstances in which a member of the public may take proceedings to restrain illegal acts of a public nature without the assistance of the Attorney-General, or, as The Times put it, does the Attorney-General 'stand between the citizen and the courts'?

The first question may be answered, in my judgment, shortly and unequivocally. The Attorney-General's discretion is not subject to review by the court, he is not answerable to the court in this respect, and like everyone else, he cannot be compelled to act as a plaintiff against his wish. There is, therefore, no clash or conflict in this respect between Parliament and the court or between the court and the Attorney-General.

The second question, however, is extremely difficult. Hitherto, it has always been assumed that a member of the public has no locus standi to invoke the aid of the civil courts in respect of a so-called public right, unless he can sh[illegible] particular interest in the subject-matter, or special damage in some form, and [illegible]t only the Attorney-General can sue in such circumstances.

Counsel for the plaintiff, however, has challenged this assumption and asserts the plaintiff's right, as a member of the public, adversely affected by the defendant unions' illegal acts, to come to the court himself to ask for relief. He expressly disclaims any attempt to overcome the difficulties by trying to find in the plaintiff some, however nebulous, particular interest or special damage. The weight of the tradition which he must displace if he is to win his case could hardly be greater but, in the best traditions of the Bar, he has not hesitated to attack what he submits is a false doctrine. I would like to pay my tribute to the exemplary way in which he has conducted an extremely difficult case.

The starting point of his submission is that, since the assumption has never been questioned before, the courts have never been called on to consider the position which arises when the Attorney-General declines to assist a member of the public to take relator proceedings. The position is therefore, res integra and there is no direct authority which stands in his way. It follows that there is no direct authority in his favour, so that his argument must proceed by way of principle and attack on the foundations of the assumption. The mere fact that it has stood unchallenged for so long is not conclusive; the court, particularly in matters going to jurisdiction, will not hesitate to examine the validity of long-standing rules, if their foundations can be shown to be insecure (see in a different context *Ross-Smith v Ross-Smith*[1]), but longevity may add much to the burden of the advocate of change.

At a late stage in his submissions counsel for the plaintiff posed a pregnant question. He asked why are there two concurrent and closely similar, yet distinct, proceedings by which, apparently, the Attorney-General can bring before the court, if he wishes, matters of the kind with which we are concerned in this case. The answer to that question, in my judgment, will throw much light on the problems in this case and may help to resolve some of the anomalies which make the reasoning and the argument so elusive.

The co-existence of two parallel and very similar procedural pathways to the same end suggests that, underlying them, there may be a legal fiction of the kind which is familiar to students of legal history in other areas, and which has been one of the most powerful evolutionary forces in our law. If this hypothesis is correct it will account for some of the difficulty of distinguishing between form and substance which bedevils this case.

The two procedures open to the Attorney-General are to proceed of his own motion ex officio, or to authorise relator proceedings to be taken, that is, the Attorney-General consents to appear as the plaintiff in such proceedings at the request of some other person or body. The former is quite straightforward and need not be further considered. The latter is another thing altogether and must now be examined in some detail.

These dual procedures are of great antiquity. They existed in Blackstone's day and are described in detail in the Commentaries[2] under their old name of 'Information':

> '[The] informations that are exhibited in the name of the sovereign alone . . . are also of two kinds: first, those which are [and I emphasise these words] *truly and properly his own suits*, and filed *ex officio* by his own immediate officer, the attorney general; secondly, those in which, though the Crown is the [and I emphasise the next words] *nominal prosecutor*, yet it is at the relation of some private person or common informer; and they are filed by the Queen's coroner and attorney in the Court of the Queen's Bench, usually called the master of the Crown-Office, who is for this purpose the standing officer of the public.'

Blackstone goes on to say that the objects of the species of information filed on the complaint or rel[illegible] of any private subject are—

1 [1962] 1 All ER 344, [1963] AC 280
2 Commentaries on the Laws of England (1857) Bk IV, pp 308, 309

'any gross and notorious misdemesnors, riots, batteries, libels and other immoralities of an atrocious kind, not peculiarly tending to disturb the government . . . but which, on account of their magnitude or pernicious example, deserve the most public animadversion.'

It is quite plain from these and later passages that, at that time, the relator action was a pure procedural fiction, which enabled private citizens to use a convenient procedure which, in theory, was available to the Crown alone. The remedy of quo warranto seems to have been made available to private citizens by a similar fiction, and to private persons wishing to challenge a patent by use of the writ scire facias[1]:

'If the grant be injurious to a subject, the sovereign is bound of right to permit him (upon his petition) to use his royal name.

In *The Queen v Prosser*[2] Lord Langdale MR commented in such a case: 'It has been said, that the writ issues of course, the fiat of the Attorney-General for issuing it being granted as of course.' Then he went on to say that this ought not to be the case.

The essentially fictional character of relator proceedings can in my judgment be demonstrated by an examination of the factual situation in most of the reported cases extending up to the present day. In case after case, the reality of the matter is that it is the relator who is seeking relief, sometimes for himself, sometimes on behalf of a group of citizens, sometimes on behalf of a wider public. He is the real plaintiff while the Attorney-General is the nominal plaintiff. Phrases such as 'the plaintiff must sue in the name of the Attorney-General', and references to the Attorney-General 'lending his name' which are used repeatedly in the reports indicate the fictional character of proceedings of this type. Sometimes, in other cases, it is overt, for example *Attorney-General v Sheffield Gas Consumers Co*[3], which seems to have been a relator action in which the real plaintiff was a rival gas company, where Lord Cranworth said[4]:

'In substance, however, I cannot but come to the conclusion, that the Attorney-General and the public here are a mere fiction, and that the real parties concerned are only those that were parties to the first suit.'

In the course of argument, counsel for the defendants[5] is reported as saying:

'Although the name of the Attorney General is used, it is quite clear that he has never been consulted and that any advantage from these litigations to the public is the last thing which those who have set it on foot have thought of.'

Attorney-General v Great Eastern Railway Co[6] was a relator action brought on the relation of a person representing a body of manufacturers of locomotive engines to restrain the defendants from letting engines and rolling stock on hire, which was said to be ultra vires. The real plaintiffs, obviously, were the manufacturers suing to restrain competition, but using the name of the Attorney-General to get over certain procedural obstacles. Sir John Holker, the Attorney-General, appeared in that case himself, which is unusual in relator actions, and seems to have had an awkward time. James LJ[7] held that it was not such a case of sufficient public wrong as to make it the duty of the Attorney-General to interfere. Baggallay LJ[8], however, said:

1 Op cit (1857), Bk III, p 261
2 (1848) 11 Beav 306 at 313
3 (1853) 3 De GM & G 304
4 3 De GM & G 304 at 313
5 3 De GM & G 304 at 309
6 (1879) 11 Ch D 449
7 11 Ch 449 at 479
8 11 Ch 449 at 500

'It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed . . . it is the duty of the Attorney-General to take the necessary steps to enforce it . . .'

Attorney-General v London County Council[1] was an action on the relation of a large number of proprietors of omnibuses in London to restrain the London County Council from running buses, on the ground that it was ultra vires. Again the real plaintiffs were the rival bus owners who were suing in the name of the Attorney-General to restrain competition. It is plain from the judgments in the Court of Appeal that injury to the public interest could only be founded on the broad ground that the law ought to be obeyed. The case went to the House of Lords, and the doubts about the Attorney-General's role in the case which had been forcibly expressed[2] by counsel for the defendants (Mr Haldane, QC) in the Court of Appeal, led Lord Halsbury LC[3] to make his well-known pronouncement about the position of the Attorney-General in these cases. He said in substance that if there was an 'excess of power' which concerns the public it was for the Attorney-General to decide whether or not to initiate litigation and not for the courts to determine whether or not he ought to have done so.

Then there is the large group of cases in which local authorities are the relators and often also plaintiffs. All of these followed from the decision in *Devonport Corpn v Tozer*[4] by Joyce J, that a local authority could not obtain an injunction to enforce its by-laws except by an information on the part of the Attorney-General. In all these cases ranging from *Attorney-General v Ashborne Recreation Ground Co*[5] to *Attorney-General v Harris*[6] and later cases, the real plaintiff is the local authority, the action is conducted by the local authority itself, the purpose of the litigation is to obtain an injunction, but the ground is said to be the invasion of public rights, which justifies the intervention of the Attorney-General as the nominal plaintiff, which in turn enables the court to grant the injunction, which is what the local authority wants. The consent of the Attorney-General to act as plaintiff is conclusive of the public interest but, nonetheless, it is said to be open to the court to refuse to grant an injunction if it does not consider it a proper case for relief: see *Attorney-General v Birmingham, Tame & Rea District Council*[7].

The situation is summed up in a passage in Professor Edwards's book[8] where he writes, quoting a speech by Sir Jocelyn Simon[9], then Solicitor-General, in the House of Commons on 1st December 1960:

'Although the Attorney-General is the nominal plaintiff in the action, in reality the action is brought by the complainant. Once the consent of the Attorney-General is obtained the actual conduct of the proceedings is entirely in the hands of the relator who is responsible for the costs of the action.'

This is exemplified by Sir Peter Rawlinson, the Attorney-General, in *Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority*[10]. Having appeared in court as 'amicus curiae' on the question of the locus standi of the plaintiff, he stated that he would give his consent to relator proceedings if the pleadings were properly amended. He was then joined as co-plaintiff, whereupon he withdrew from the court,

1 [1901] 1 Ch 781
2 [1901] 1 Ch 781 at 793
3 [1902] AC 165 at 168, 169
4 [1902] 2 Ch 182, 71 LJCh 754
5 [1903] 1 Ch 101, 72 LJCh 67
6 [1960] 3 All ER 207, [1961] 1 QB 74
7 [1910] 1 Ch 48[illegible] LJCh 137
8 J LI J Edward[illegible] Law Officers of the Crown (1964) p 288
9 631 H of C Official Report (5th series) col 691
10 [1973] 1 All ER 689, [1973] QB 629

leaving the subsequent conduct of the proceedings to the relator, McWhirter (see the description of the proceedings in Professor S A de Smith's Judicial Review of Administrative Action[1]).

This brief and necessarily incomplete review of the cases supports the view that there is a fictional element in these relator actions which has varied in extent from time to time, depending, no doubt, to some extent on the views of the Attorney-General for the time being. Analysed in real terms, it could be said that this procedure is tantamount to the Attorney-General giving the complainant leave to proceed. Analysed in formal terms, it is a procedure by which the Attorney-General delegates to the complainant who has no particular interest in the subject-matter authority to apply to the court for an injunction to enforce public rights which the Attorney-General alone, in theory, can enforce.

Hitherto, it seems to have worked, largely because a crisis arising out of an irreconcilable disagreement between a complainant and the Attorney-General has not arisen. It has, however, not always worked smoothly. There are numerous cases in which defendants have attempted to question the Attorney-General's decision to give his consent on the ground that the public interest element in the case was trivial or too slight to justify his intervention: see, for example, *Attorney-General v Westminster City Council*[2] where counsel for the defendants sought to argue that the Attorney-General had no right to intervene to prevent a course of action which was not the subject of express statutory provisions and not contrary to the public interest. In this court it was held that the court must accept the discretion exercised by the Attorney-General to authorise the action.

Attorney-General v Harris[3] was another example. There, Salmon J said in his judgment at first instance[4] that he had 'no hesitation in holding in the special circumstances of this case that the defendants have caused no injury to the public'. His decision was overruled in this court[5] on the ground that the community has 'a larger and wider interest in seeing that the laws are obeyed . . .'

The crisis has now occurred. A complainant with, on the face of it, a strong prima facie case for saying that the unions were threatening to cause inconvenience, and even hardship, to the public by acts which appeared, equally clearly, to be illegal and, in fact, criminal, has been refused the Attorney-General's consent to a relator action. Has he in these wholly exceptional circumstances, the right to come before the court himself and ask for relief or is he barred in limine from making any application?

He is, in my judgment, in the absence of direct authority, entitled to ask the court to consider whether or not he can establish sufficient standing to proceed with his action. For that reason, an interim injunction was granted on the first hearing to preserve the position while this question was argued. He has now through his counsel put forward his contentions. The next question, therefore, is whether there is any jurisdiction in the court to grant him, not the Attorney-General, any relief. If there is, the refusal of the Attorney-General to allow him to proceed in relator proceedings will not bar him.

It is conceded that the plaintiff, as a member of the public, could prosecute the unions for offences under the Post Office Act 1958 and the Telegraph Act 1863, after illegal acts had been committed. In my judgment, he is also in a position to claim a declaration that the acts threatened would, if committed, amount to a breach of the relevant sections of these Acts of Parliament. I can see no relevant distinction between the present case and *Dyson v Attorney-General*[6], and I agree with Lawton LJ that

1 3rd Edn (1973), Appendix 3, p 527
2 [1924] 2 Ch 416, [1924] All ER Rep 162
3 [1960] 3 All ER 207, [1961] 1 QB 74
4 [1959] 2 All ER 303 at 306, [1960] 1 QB 31 at 39
5 [1960] 3 All ER 207 at 216, [1961] 1 QB 74 at 95
6 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158

Viscount Maugham's observations in *London Passenger Transport Board v Moscrop*[1] do not touch this case. The nature of the declaration sought in that case was quite different. *Dyson's* case[2] does not appear to have been cited and there seems to have been no argument on locus standi. The plaintiff in this case, like the rest of the public, has a very real interest in the availability of the postal and telephone services and a real interest in ensuring, if he can, that these facilities are not interfered with by the illegal acts of the defendant unions or others.

Although he does not claim a declaration in his statement of claim, it is a remedy which, in circumstances like the present, may be of real value. An authoritative statement about the law, made by a competent court, in the course of public proceedings, is likely to affect the minds of many people who are contemplating, or being asked to perform, acts which are illegal. Courts are entitled to assume, unless law and order has broken down completely, that responsible bodies like trade unions and their members will not, knowingly, act illegally, still less criminally. There are considerable potential advantages in removing from the minds of those contemplating illegal acts any real, or alleged, doubts about their legality. Indeed, much of the practical efficacy of injunctions is attributable to this factor, although the ultimate sanction of proceedings for contempt of court is not a negligible influence. An injunction which has to be enforced is an injunction which has failed.

The question whether a private citizen can go further than a declaration and apply for an injunction as a substantive remedy for an actual or a threatened invasion of a public right is another matter. This problem is usually discussed in terms of locus standi but I think it is better to consider it in terms of jurisdiction. If the court has jurisdiction, no question of locus standi arises. In the past, the courts did not grant injunctions as a substantive remedy to persons who could not show that their private rights were in danger or that they were likely to suffer some special damage over and above that suffered by the public generally; so it was said that such a person had no locus standi before the court. This aspect of the case has been touched on but not very fully argued.

In my judgment, it is necessary to draw a distinction between injunctions which are in the nature of final orders, made after a trial of the issues, and interlocutory orders which are made while proceedings are pending. The jurisdiction to make the former appears to have remained unchanged from that exercised by the courts of equity before the Supreme Court of Judicature Act 1873. Jurisdiction to grant the latter is governed by s 25(8) of that Act, which is now s 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which provides that the court can grant an interlocutory injunction whenever it is 'just and convenient so to do.'

There is, therefore, no jurisdiction, in my judgment, to grant injunctions of a final or permanent nature unless the plaintiff can bring himself within the limits set by the former courts of equity. This, the plaintiff cannot do, because he cannot show any particular interest or special damage. On the other hand, if he can bring an action for a declaration or for some other relief, the court in law has a discretion to grant him a temporary injunction whenever it is both just and convenient to do so, for instance, to preserve the position pending final judgment, but it will not exercise this discretion unless it is necessary to ensure that justice is done. In the circumstances which have happened in this case it is not now necessary to continue the injunction but it would have required an exceptionally strong case to justify continuing it any further.

I have said some harsh things about the relator procedure generally because it appears to me obsolete. It has the practical advantage of preventing a large number of frivolous, futile or merely mischievous cases coming to the courts but there are other ways of dealing with that problem. It has the grave disadvantage of putting the Attorney-General in the invidious position of appearing to be the prime mover in

1 [1942] 1 All ER 97 at 103, 104, [1942] AC 332 at 334, 335
2 [1911] 1 KB 410; *subsequent proceedings* [1912] 1 Ch 158

litigation conducted by some other person, with motives which may be quite different from his, or of forcing him to decide whether to sanction such proceedings as in the present case, and thus to appear to be standing between a private citizen and the court. Quasi-legal fictions may be intelligible to lawyers; in the public mind they produce nothing but confusion, and sometimes frustration.

My conclusion is, therefore, that on the facts of the present case and in the existing state of the law the plaintiff is entitled to sue the first and second defendants for a declaration. The court has an unfettered discretion to decide whether to grant or refuse such a declaration. The Attorney-General, who should be served with a copy of the proceedings, is entitled to intervene in the action at any stage. In very exceptional cases, the court may grant a temporary or interlocutory injunction for a short time to preserve the status quo until a full hearing can take place but the plaintiff cannot obtain a permanent or final injunction unless he is in a position to add the Attorney-General as a plaintiff in the proceedings.

Interim injuction discharged. Leave to plaintiff to amend statement of claim by claiming relief by declaration in terms to be agreed and approved by Court of Appeal. Leave to the Attorney-General and the UPW and POEU to appeal to the House of Lords.

4th February. The court considered the draft order which had been prepared with the agreement of counsel for all parties, and the further amendments to the plaintiff's amended statement of claim. The court approved the reamended statement of claim whereby the plaintiff claimed (i) an injuction against the UPW in the same terms as the original statement of claim; (ii) a declaration that it would be unlawful for the UPW to solicit or endeavour to procure any person wilfully to detain or delay any postal packet in the course of transmission between England and Wales and the Republic of South Africa; (iii) an injuction against the POEU restraining it from counselling, procuring or inciting any person in the employment of the Post Office wilfully or negligently to omit or delay to transmit or deliver any message in the course of transmission between England and Wales and the Republic of South Africa, and a declaration that any such act would be unlawful; and (iv) a declaration against the Attorney-General that notwithstanding his refusal to consent to relator proceedings the plaintiff was entitled (a) to proceed with his applications for declarations against the UPW and the POEU and (b) pending the final determination of those applications, to obtain relief by way of interim injunctions.

The court then made the following orders: (i) that the plaintiff's claim for final injunctions against the UPW and the POEU be struck out under RSC Ord 18, r 19; (ii) that the applications by the UPW and the POEU to strike out the plaintiff's claim for a declaration be dismissed; (iii) that the application by the Attorney-General to strike out the declaration claimed against him in the reamended statement of claim be dismissed; (iv) that all parties should have leave to lodge petitions of appeal to the House of Lords.

Orders accordingly.

Solicitors: *Trower, Still & Keeling* (for the plaintiff); *Simpson Millar* (for the UPW); *Shaen Roscoe & Bracewell* (for the POEU); *Treasury Solicitor.*

Sumra Green Barrister.

United Overseas Bank v Jiwani

QUEEN'S BENCH DIVISION
MACKENNA J
30th, 31st MARCH 1976

Estoppel – Representation – Prejudice suffered by party misled by representation – Prejudice making it inequitable to require party misled to make restitution – Money paid to party misled under mistake of fact – Money spent by party misled – Banker and customer – Banker mistakenly crediting sum to customer's account – Representation by banker to customer as to balance of account – Balance stated including sum mistakenly credited to account – Customer drawing on account to buy hotel as an investment – Customer would still have bought hotel with other resources if misrepresentation as to balance not made – Whether banker estopped from claiming restitution of sum wrongly credited.

In 1969 the defendant opened a bank account with the plaintiffs in Geneva. At the end of August 1972 the balance of the account stood at, approximately, $10,000. On 2nd October the defendant drew a cheque on the account for $20,000 in favour of P from whom he was planning to buy an hotel as an investment. On 6th October a Zurich bank informed the plaintiffs, by telex, that on the instructions of an unnamed client they were crediting the plaintiffs, as from 6th October, with the sum of $11,000 in favour of the defendant. That day the plaintiffs sent a credit advice to the defendant, who was in London, informing him of the transfer of the $11,000. On the same day, 6th October, the Zurich bank sent the plaintiffs a written advice of payment stating that they had transferred $11,000 to the plaintiffs in favour of the defendant. The advice was stamped with words indicating that it was sent in confirmation of the telex message but the plaintiffs' clerk who dealt with the advice overlooked the stamped words and treated the advice as if it were a new transfer of a second sum of $11,000. In consequence, two credit entries, each of $11,000, were made by the plaintiffs in the defendant's account, bringing the apparent balance of the account to, approximately, $32,000; and the plaintiffs sent the defendant a second credit advice informing him that the Zurich bank had transferred to the plaintiffs, in his favour, a second sum of $11,000. On 16th October the defendant enquired of the plaintiffs by telephone about the state of his account, and on 17th October he called at the bank to inquire about his account. On both occasions he was told that the balance stood at $32,000. The defendant thereupon requested the plaintiffs to transfer to P a further $11,000, in addition to the cheque for $20,000 drawn on 2nd October. The plaintiffs transferred the $11,000 to P under the mistake of fact that the Zurich bank had transferred two sums of $11,000 in favour of the defendant. After payments of the $20,000 and $11,000 to P, the defendant's apparent credit balance stood at $1,107.90. If the account had been correctly stated, after the payments to P it would have shown a debit of $9,892.10. On 20th October the plaintiffs discovered their error in crediting the second sum of $11,000. On 25th October they informed the defendant of the error and asked him to cover the overdraft of $9,892.10. The defendant received, but did not reply to, that letter. Subsequently the plaintiffs obtained a promissory note from him for the amount of the overdraft but it was dishonoured. The transfer of the $11,000 to P enabled the defendant to complete the purchase of the hotel, which was a good investment for him and his family, but if the plaintiffs had not transferred the $11,000 to P the defendant would still have purchased the hotel since he would have found money from other sources for the purchase. The plaintiffs brought an action against the defendant claiming the $9,892.10 as money had and received together with interest. The defendant denied liability contending that the plaintiffs were estopped from claiming restitution of the sum mistakenly credited to his account, since, in breach of duty, they had misrepresented to him the state of his account, that misrepresentation