OPPORTUNITIES FOR COURT-MADE LAW

- When the meaning of an existing law requires interpretation
- When existing law has not previously been applied to a novel case
- When the judge uses a rule of natural, moral or customary law and applies it to a case to make it national law
- When the judge is unable to find any existing rule at all, and chooses to decide a case on its facts without reference to any rule

COMMON LAW VS EQUITY

Common law
Uniform rules of law, characteristically applied in a strict way

Equity
Rules that pay special attention to notions of justice or fairness

*Common law and equity can be referred to jointly as 'case law' or 'the general law'

ORIGINAL HEARINGS AND APPEALS

When a case comes to court for the first time, it is referred to as 'original' or a hearing at 'first instance'. (Parties are referred to as plaintiff and defendant in civil cases)

If the case is appealed, parties are referred to as appellant and respondent

COMPONENTS OF A LAW REPORT

Court and key dates
A law report will begin by indicating which court decided the case, along with various dates. If two dates are shown, the earlier date is when the court heard argument from counsel at the end of the hearing. The later date (or a single date) indicates when judgment was given. This date is the date on which the case became a precedent for new cases.

Catchwords
List of the key words and phrases used in a law report. They provide a succinct summary of the subject matter and concepts referred to.

Headnotes
A headnote is an outline of the report. Headnotes usually include a summary of the facts of the case and a statement of the issues under consideration. If the case is an appeal, the procedural history of the case may also be outlined. Sometimes headnotes summarise the court's reasoning and conclusions. A list of previous cases relied on, or legislation applied, may also be provided.

Judges and legal representatives

Each judges' name is followed by an abbreviation CJ (chief justice) or J (justice)

Judgments

- Starts with a summary of the facts
- The particular question / legal issue that needs to be decided is stated
- The relevant law is reviewed
- Judges may explain why or how a legal rule is being interpreted, extended or modified
- The relevant rules are applied to the facts and conclusions are drawn

COURT HIERARCHIES IN AUSTRALIA

COMMONWEALTH
High Court of Australia
Full Court of the Federal Court
Federal Court of Australia
Federal Circuit Court

NEW SOUTH WALES
High Court of Australia
Court of Appeal
Court of Criminal Appeal
Supreme Court (Various jurisdictional divisions)
District Court
Local Court

QUEENSLAND
High Court of Australia
Court of Appeal
Supreme Court (Various jurisdictional divisions)
District Court
Magistrates' Court

SOUTH AUSTRALIA
High Court of Australia
Full Court of the Supreme Court
Supreme Court (Various jurisdictional divisions)
District Court
Magistrates' Court

TASMANIA
High Court of Australia
Full Court of the Supreme Court
Court of Criminal Appeal
Supreme Court (Various jurisdictional divisions)
Magistrates' Court

VICTORIA
High Court of Australia
Court of Appeal
Supreme Court (Various jurisdictional divisions)
County Court
Magistrates' Court

WESTERN AUSTRALIA
High Court of Australia
Court of Appeal
Supreme Court (Various jurisdictional divisions)
District Court
Magistrates' Court

ACT
High Court of Australia
Court of Appeal
Supreme Court (Various jurisdictional divisions)
Magistrates' Court

NORTHERN TERRITORY
High Court of Australia
Court of Appeal
Court of Criminal Appeal
Supreme Court
Magistrates' Court

NORFOLK ISLAND
High Court of Australia
Federal Court of Australia
Supreme Court
Court of Petty Sessions

THE DOCTRINE OF PRECEDENT

Two conditions for binding precedent:

- Material facts of the two cases are sufficiently similar and cannot be distinguished
- Previous decision is made by a superior court in the same court hierarchy

Otherwise, past decisions of other cases can be considered persuasive precedent

RATIO DECIDENDI

Refers to 'the reason for the decision'

Consists of two elements:

- Material facts which define the type of situation which the particular rule applies
- The precise rule of law which the court has applied to resolve the issue

OBITER DICTA

Refers to 'surrounding words'

Refers to all other elements of the judgement that are not the ratio decidendi.

PROCESS OF USING CASE LAW

Step 1

Find out the facts of the new case to be decided and identify the legal issues that arise.

- What facts do the plaintiff and the defendant rely on? What is in dispute between them?

Step 2

Look for previously decided cases that may indicate how the courts will decide the present case.

- Do the earlier cases you have found raise the same issues as the new case?
- Is there any relevant legislation? Does it override the case law you have found?

Step 3

Check that the new case and the earlier decisions are sufficiently similar on their material facts.

- Is the new case so similar to a previously decided case that they should be decided in the same way?
- Is it likely that the previous cases and the new case can be distinguished on their material facts?

Step 4

In which court was the reported case decided?

- Will the previous decision be treated as either binding or persuasive by the court in which the new case will be heard?

Step 5

Identify the ratio decidendi of the previously decided cases.

- What were the material facts of the earlier case?
- What rule was applied to those facts?

Step 6

Apply the ratio decidendi to the new case.

- Are there any different circumstances that may affect the outcome?

EXAMINABLE CASES

I. Taylor v Johnson (1983) 151 CLR 422

(a) **[HIGH COURT OF AUSTRALIA.]**

1982, *Nov.* 18,19,
1983, *Feb.* 23

(b) **TAYLOR AND OTHERS.....APPELLANTS;**
AND
JOHNSON.....RESPONDENT.

(c) *Vendor and Purchaser — Contract of sale of land — Mistake — Price — Sale of ten acres for* $15,000 *— Vendor under mistaken belief that price was* $15,000 *per acre — Purchaser aware of vendor's misapprehension — Right to rescind.*

(d) By a written contract a vendor sold two adjoining pieces of land, each of about five acres, for a total price of $15,000. The vendor subsequently refused to proceed on the ground that when she executed the contract she believed that it provided for a price of $15,000 per acre. In the purchaser's action for specific performance the trial judge found that while the vendor had been so mistaken, the purchaser was not aware of the mistake. He ordered the vendor to perform the contract. On an appeal by the vendor, the Court of Appeal concluded that the purchaser believed that the vendor was probably mistaken as to what the contract stipulated as the price, and set aside the contract.

Held by Mason A.C.J., Murphy and Deane JJ., Dawson J. dissenting, that the proper inference to be drawn from the evidence was that when the vendor executed the option and when she executed the contract in the mistaken belief about the price, the purchaser believed she was under some serious mistake or misapprehension about either the price or the value of the land and had deliberately set out to ensure that she was not disabused. Accordingly, the contract had rightly been set aside.

Smith v. *Hughes* (1871), L.R. 6 Q.B. 597; *Solle* v. *Butcher*. [1950] K.B. 671; *McRae* v. *Commonwealth Disposals Commission* (1951), 84 C.L.R. 377; and *Svanosio* v. *McNamara(1956),* 96 C.L.R. 186, considered.

Decision of the Supreme Court of New South Wales (Court of Appeal) affirmed.

APPEAL from the Supreme Court of New South Wales.

On 27 March 1975, Ivy Johnson granted an option to Laurence Colin Taylor or his nominee to purchase two adjoining pieces of land, each of about five acres, at McGrath's Hill in New South Wales for a total price of $15,000. The option was exercised on 14 April, and on 7 May 1975 Taylor's children entered into a contract to purchase the land for $15,000. Subsequently the vendor refused to proceed on the ground that when she executed the written contract she believed that it provided for a consideration of $15,000 per acre.

D.M.J. Bennett Q.C. (with him *B.W. Walker),* for the appellants ...
R.W. R. Parker Q.C. (with him *P. Dowdy),* for the respondent ...

Cur. adv. vult.

(e) The following written judgments were delivered: —

MASON A.C.J., MURPHY AND DEANE JJ.

(f)

In our view, a general inference which flows from the evidence is that Mr. Taylor and Mrs. Johnson each believed that the other was acting under a mistake or misapprehension, either as to price or value, in agreeing to a sale at the purchase price which he or she believed the other had accepted. ... We also consider that the evidence leads to an inference that Mr. Taylor, by refraining from again mentioning price and by the manner in which he procured the execution by Mrs. Johnson of the option, deliberately set out to ensure that Mrs. Johnson was not disabused of the mistake or misapprehension under which he believed her to be acting.

The judgments of Blackburn and Hannen JJ. in Smith v. Hughes (18)[1] provide support for the proposition that a contract is void if one party to the contract enters into it under a serious mistake as to the content or existence of a fundamental term and the other party has knowledge of that mistake.

... Denning L.J., in *Solle* v. *Butcher*,[2] ... likewise expressed the view that, in the absence of fraud or misrepresentation, resort must be had to equity to escape from the terms of the contract on the ground of unilateral mistake.

McRae and *Svanosio,* like *Solle* v. *Butcher*, were not cases involving a mistake as to the existence or content of an actual term of the written contract. There is, however, nothing in the joint judgments of Dixon C.J.
and Fullagar J. which would exclude such a case from their acceptance of the general proposition that neither party to a contract 'can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake'[2] (25).

In the United States and Canada, the rule that relief from contractual obligations on the ground of unilateral mistake will be granted where enforcement of the contract would be unconscionable is well established ...

The particular proposition of law which we see as appropriate and adequate for disposing of the present appeal may be narrowly stated. It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension. ... In such a situation it is unfair that the mistaken party should be held to the written contract ...

Applying the above-mentioned principle to the present case, it is apparent that the appeal must fail. ... At the time she signed both option and contract, Mrs. Johnson mistakenly believed that the relevant document stipulated that the purchase price was $15,000 per acre whereas the stipulated purchase price was $15,000 in total. The stipulation as to price was plainly a fundamental term of the contract ... the proper inference to be drawn from the evidence is that, both at the time when Mrs. Johnson executed the option and at the time when she executed the contract, Mr. Taylor believed that she was under some serious mistake or misapprehension about either the terms (the price) or the subject matter (its value) of the relevant transaction.

---

1 (1871) LR 6 QB 597, at pp 607, 609.

2 [1950] 1 KB 671, at p 691.

II. Balfour v Balfour [1919] 2 KB 571

Contract; formation; intention to be legally bound; agreements between spouses

Facts: Balfour was employed in Ceylon (now Sri Lanka). He and his wife travelled to England for a visit. When it was time to return to Ceylon, Ms Balfour was unwell and her doctor advised her to remain in England and rejoin her husband only when she was better. To provide for her while she remained in England, Mr Balfour promised to pay her £30 each month until she rejoined him. However, Mr and Ms Balfour later separated and divorced. Ms Balfour brought an action against Mr Balfour to enforce the promise to pay maintenance.

Issue: Was an agreement of this type, made between married persons, legally enforceable?

Decision: The agreement was not legally enforceable because, in the circumstances, it could not be inferred that it was intended to be legally enforceable.

Reason: Spouses make many domestic agreements, but these agreements do not become legally enforceable, 'because the parties did not intend that they should be attended by legal consequences'. The courts would be swamped if such agreements could be sued on. Atkin LJ said (at 579):
[Such agreements] are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon.

[4.6] **Balfour v Balfour**

[1919] 2 KB 571
(English Court of Appeal)

[4.7] **Facts.** The plaintiff (respondent before the Court of Appeal) alleged that her husband promised to pay her £30 per month. The plaintiff had stayed in England on doctor's advice while the husband returned to Ceylon where he was employed. He had certainly said that he would pay her £30 per month until the plaintiff was able to join him in Ceylon. Later, the parties separated and were divorced. However, when the agreement for maintenance was reached the parties had been on amicable terms.

Sargant J having decided in favour of the plaintiff, the defendant appealed to the Court of Appeal.

[4.8] **Warrington LJ and Duke LJ.** [In separate judgments to the same effect as Atkin LJ they held that the appeal should be allowed.]

[4.9] **Atkin LJ.** <578> It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves — agreements such as are in dispute in this action — agreements for allowances, by which the husband agrees that he will pay to his wife a certain sum of money, per week, or per month, or per year, to coyer either her own expenses or the necessary expenses of the household and of the children of the marriage, and in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given. To my mind those agreements, or many of them, do not result in contracts, at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. ... <579> [T]hey are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30s or £2 a week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold courts. ... <580> I think the onus was upon the plaintiff, and he plaintiff has not established any contract.

Appeal allowed.

III. Cohen v Cohen (1929) 42 CLR 91

Contract; formation; intention to be legally bound; agreements between spouses

Facts: Ms Cohen alleged that, before she married the defendant in 1918, he had promised to pay her £100 a year as a dress allowance. The money was to be paid in quarterly instalments of £25. The money was paid until early 1920. In 1923 the parties separated. Ms Cohen then claimed that Mr Cohen owed her £278, being unpaid instalments of the promised dress allowance.

Issue: Was the promise to pay a dress allowance intended to create a legally enforceable agreement?

Decision: Dixon J concluded that in the circumstances it could not be inferred that legally enforceable relations were intended.

Reason: On an arrangement between a couple engaged to be married, Dixon J said (at 96):
But these matters only arise if the arrangement which the plaintiff made with the defendant was intended to affect or give rise to legal relations or to be attended with legal consequences (Balfour v Balfour [1919] 2 KB 571; Rose & Frank Co v J R Crompton & Bros Ltd [1923] 2 KB 261). I think it was not so intended. The parties did no more, in my view, than discuss and concur in a proposal for the regular allowance to the wife of a sum which they considered appropriate to their circumstances at the time of marriage …

Cohen v Cohen
(1929) 42 CLR 91
(High Court of Australia)

[4.12] Facts. The plaintiff alleged that prior to her marriage to the defendant in July 1918 he promised to pay her £100 a year as a dress allowance. The sum was to be paid in £25 instalments and the plaintiff alleged that £278 was owing, the defendant having made payments until January 1920. The parties separated in November 1923.

[4.13] Dixon J. <96> The statement of claim alleges no consideration for this supposed contract, and none appears from the facts given in evidence unless it be the intended marriage. Probably a contract to marry had already been made between the parties before the husband promised to make a dress allowance, and, if so, it is difficult to see how the intended marriage could be a consideration which would support the defendant's new promise to pay £100 per annum. (See *Anson on Contracts*, 16th ed, pp 110 et seq.) In any case such a consideration would bring the contract within the fourth section of the *Statute of Frauds* 1677 (UK), and although that defence is not pleaded it may be said that the defendant's pleader should be permitted to wait until the plaintiff's statement of claim is amended so as to state the consideration for the agreement sued upon. But these matters only arise if the arrangement which the plaintiff made with the defendant was intended to affect or give rise to legal relations or to be attended with legal consequence (*Balfour v Balfour*) [1919] 2 KB 571; *Rose & Frank Co v J R Crompton & Bros Ltd* [1923] 2 KB 261 at 288; [1925] AC 445). I think it was not so intended. The parties did no more, in my view, than discuss and concur in a proposal for the regular allowance to the wife of a sum which they considered appropriate to their circumstances at the time of marriage. For these reasons I think this cause of action fails.

(On this issue) Judgment for the defendant.

IV. Merritt v Merritt [1970] 1 WLR 1211

Contract; formation; intention to be bound; agreements between spouses

Facts: Mr and Ms Merritt married in 1941 and borrowed money from a bank to build a house. They lived in it over the years while jointly contributing to paying off the loan. The house was originally owned by Mr Merritt alone but in 1966 it was put into joint ownership with Ms Merritt. Some time thereafter, Mr Merritt began an extramarital relationship with another woman and left his wife. Having separated, Mr and Ms Merritt met to discuss their financial position. Ms Merritt agreed to finish paying off the loan on the house, and in return Mr Merritt promised that when the loan was completely repaid he would transfer the house to Ms Merritt's sole ownership. He signed a letter to this effect but, when the time came, he refused to transfer the house to Ms Merritt. Ms Merritt brought a legal action to enforce it.

Issue: Was the promise to transfer the house to Ms Merritt intended to be a legally enforceable one, despite the parties being spouses?

Decision: It could be inferred from the circumstances that the agreement was intended to be legally enforceable.

Reason: Whether or not an agreement is intended to be legally enforceable is something that is decided objectively. The court asks what intention can reasonably be inferred from the circumstances at the time of the agreement. Lord Denning MR said (at 762):
In all these cases the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: would reasonable people regard the agreement as intended to be binding? In the present case, the court decided that when the facts of a case show that the goodwill between married persons has broken down, it can be inferred that they no longer rely on honourable understandings, and that they intend their agreements to create legal obligations.

Merritt v. Merritt [1970] 1 WLR 1211

C

LORD DENNING M.R. Husband and wife married as long ago as 1941. After the war in 1949 they got a building plot and built a house. It was a freehold house, no. 133, Clayton Road, Hook, Chessington. It was in the husband's name, with a considerable sum on mortgage with a building society. There they lived and brought up their three children, two daughters, aged now 20 and 17, and a boy now 14. The wife went out to work and contributed to the household expenses.

D

Early in 1966 they came to an agreement whereby the house was to be put in joint names. That was done. It reflected the legal position when a house is acquired by a husband and wife by financial contributions of each.

But, unfortunately, about that time the husband formed an attachment for another woman. He left the house and went to live with her. The wife then pressed the husband for some arrangement to be made for the future. On May 25 they talked it over in the husband's car. The husband said that he would make the wife a monthly payment of £40 and told her that out of it she would have to make the outstanding payments to the building society. There was only £180 outstanding. He handed over the building society's mortgage book to the wife. She was herself going out to work, earning net £7 10s. a week. Before she left the car she insisted that he put down in writing a further agreement. It forms the subject of the present action. He wrote these words on a piece of paper: —

E

F

> "In consideration of the fact that you will pay all charges in connection with the house at 133 Clayton Road, Chessington, Surrey, until such time as the mortgage repayment has been completed, when the mortgage has been completed, I will agree to transfer the property into your sole ownership.
>
> Signed, John Merritt. May 25, 1966."

G

The wife took that paper away with her. She did, in fact, over the ensuing months pay off the balance of the mortgage, partly, maybe, out of the money the husband gave her, £40 a month, and partly out of her own earnings. When the mortgage had been paid off, he reduced the £40 a month down to £25 a month.

H

The wife asked the husband to transfer the house into her sole ownership. He refused to do so. She brought an action in the Chancery Division for a declaration that the house should belong to her and for an order that he should make the conveyance. The judge made the order; but the husband now appeals to this court.

Mr. Thompson then relied on the recent case of *Gould* v. *Gould* [1970] 1 Q.B. 275, when the parties had separated, and the husband agreed to pay the wife £12 a week "so long as he could manage it." The majority of the court thought those words introduced such an element of uncertainty that the agreement was not intended to create legal relations. But for that element of uncertainty, I am sure the majority would have held the agreement to be binding. They did not differ from the general proposition which I stated at p. 280 that:

> "when husband and wife, at arm's length, decide to separate, and the husband promises to pay a sum as maintenance to the wife during the separation, the court does, as a rule, impute to them an intention to create legal relations."

In all these cases the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself: Would reasonable people regard the agreement as intended to be binding?

Mr. Thompson sought to say that this agreement was uncertain because of the arrangement for £40 a month maintenance. That is obviously untenable. Next he said that there was no consideration for the agreement. That point is no good. The wife paid the outstanding amount to the building society. That was ample consideration. It is true that the husband paid her £40 a month which she may have used to pay the building society. But still her act in paying was good consideration.

Mr. Thompson took a small point about rates. There was nothing in it. The rates were adjusted fairly between the parties afterwards.

Finally, Mr. Thompson said that, under section 17 of the Act of 1882, this house would be owned by husband and wife jointly: and that, even if this house were transferred to the wife, she should hold it on trust for them both jointly. There is nothing in this point either. This paper which the husband signed dealt with the beneficial ownership of the house. It was intended to belong entirely to the wife.

I find myself in entire agreement with the judgment of Stamp J. This appeal should be dismissed.

The first point taken on his behalf by Mr. Thompson is that the agreement was not intended to have legal relations. It was, he says, a family arrangement such as was considered by the court in *Balfour* v. *Balfour* [1919] 2 K.B. 571 and in *Jones* v. *Padavatton* [1969] 1 W.L.R. 328. So the wife could not sue upon it.

I do not think those cases have any application here. The parties there were living together in amity. In such cases their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.