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PA 16/3/78

29th October, 1945.

Dear Uthwatt,

Very many thanks for your note. I must say on reading it that I think there is very great force in what you say. I believe it to be only fair that in doubtful cases where the determination of a point is called for in the public interest elucidation of the point should be obtained at public expense.

When I was Attorney-General I frequently used to undertake to pay the costs of litigants in cases which I thought came within this category, whatever the result might be.

I will, if I may, keep your paper before me and consider how best I may get the whole thing considered from an authoritative point of view.

Yours sincerely,

The Honourable
Mr. Justice Uthwatt.

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TC 26721/1

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These cases are not I think numerous, but they give rise to trouble. A recent example which did go to the House of Lords is the case relating to a gift of "all my money."

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Government Departments and Public Bodies when litigants are often concerned to establish a point of principle of wide application and ready and willing and able to pay until they win or are finally beaten. The particular individual embroiled in the litigation is not concerned with anything but his particular case, and sometimes his pocket precludes proper presentation of the point and limits the possibility of appeal. A decision is obtained which may or may not be satisfactory. Anyhow the pocket loads the dice. Government Departments and Public Bodies should be relieved from the suggestion that the long purse at their disposal enables them to have the odds in favour of ultimate success.

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The intrusion of the executive and of executive decisions into the affairs of the ordinary man is becoming a feature of our social legislation. It is becoming the practice to let the executive decision determine the point subject to a limited right of appeal to the Courts. But where the case goes to the Courts, surely the individual concerned should not be compelled to fight a proper appeal from that Court at his own expense.

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Add to this the facts (i) that in our system (unlike the American system) the loser in the litigation pays a large part of his opponents' costs, (2) that the burden of costs is very heavy, and (3) the Courts are run at a profit - and the running of the Courts can therefore supply the fund.

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[This will need elaboration and working out.]

It will need consideration whether this power should be given to any Judge other than a High Court Judge.

(e) The procedure in (d) will not quite meet the bill. High Court Judges are apt to be fond of their own decisions and a Judge of first instance ought not to be put in the position of saying publicly that he thinks some former decision of a Court of Appeal is wrong. Moreover many important points come before inferior tribunals.

It will therefore be necessary that as supplementary to (d) or in substitution for (d) there should be a Committee (perhaps on the lines of the Law Reform Committee but not by reason of its composition too authoritative) empowered to certify cases. The expense to a litigant of having considered by a Committee a matter which has been decided by the High Court would be inconsiderable.

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D.2672/1/1 s.c.s No. 2/50 R

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SUPPLIED FOR THE PUBLIC SERVICE

ROYAL COURTS OF JUSTICE,

3344/81

29.10.1945

Suggestion that in certain cases where a point of law of general importance is involved it should be determined at the public expense

Memorandum by Mr. Justice Uthwatt ✓

Miss Malley	30.10.45	
Mr Gregory	16/3/48. 15.2.50.	

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Yours sincerely
Norman Birkett

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The intrusion of the executive and of executive decisions into the affairs of the ordinary man is becoming a feature of our social legislation. It is becoming the practice to let the executive decision determine the point subject to a limited right of appeal to the Courts. But where the case goes to the Courts, surely the individual concerned should not be compelled to fight a proper appeal from that Court at his own expense.

The matter is the more important because the executive sometimes deliberately breaks the law.

Examples. The Treasury Order relating to additional compensation pilloried by C. K. Allen "Law and Orders", and the Inland Revenue in modifying the law relating to E.P.T. What the Treasury do in one field, other Departments may copy in other fields!

The modern Hampden would end his days not as a national figure but as a pauper litigant.

[I am not concerned to criticise the practice of giving executive decisions the force of law and of precluding appeals to the Courts from their decisions - about which much can be said. I refer only to the cases that can come before the Courts.]

5. General.

Add to this the facts (i) that in our system (unlike the American system) the loser in the litigation pays a large part of his opponents' costs (2) that the burden of costs is very heavy, and (3) the Courts are run at a profit - and the running of the Courts can therefore supply the fund.

6. Suggestions.

(A) A system should be set up whereby in appropriate cases the point of law involved can be determined at the public expense in the higher Courts.

The machinery is a matter for consideration and I do not profess to have thought the matter out in all its implications.

I have not discussed the matter with any of my brethren; nor worked out the details of any scheme and I should imagine that to a certain extent the possible machinery for carrying out the principles, if accepted, will have to be

considered before the matter is publicly mooted.

In the following tentative suggestions I have considered only the question of appeals from judicial decisions. But query whether one might not in certain cases have to include some costs incident to the original judicial decision.

(B) I throw out the following ideas :-

(a) Preserve the principle that it is an actual case before the Courts that is to be decided. Consultative cases are out of the question (See the references collected in C.K. Allen "Law and Orders" p. 154).

(b) In any case before him - whatever the parties say or want - the Judge (qu: inferior Courts as well as the High Court) is to be at liberty to state his view that the point of law involved is one which in the general public interest should be considered by a higher Court.

(c) The loser's case is not to go to appeal unless the loser so agrees. (but see (f) below)

(d) If the loser decides to appeal and is willing to accept public aid, then put broadly the Judge should be entitled to certify that in any event the proper costs of <u>both</u> parties involved in the point of law will be met out of public funds and the Judge should be empowered in appropriate cases to limit the issues to be raised in the appellate Court to the point of law.

[This will need elaboration and working out.]

It will need consideration whether this power should be given to any Judge other than a High Court Judge.

(e) ~~This~~ The foregoing (d) will not quite meet the bill. High Court Judges are apt to be fond of their own decisions and a Judge of first instance ought not to be put in the position of saying publicly that he thinks some former decision of a Court of Appeal is wrong. Moreover many important points come before inferior tribunals.

It will therefore be necessary that as supplementary to (d) or in substitution for (d) there should be a Committee (perhaps on the lines of the Law Reform Committee but not by reason of its composition too authoritative) empowered to certify cases. The expense to a litigant of having considered by a Committee a matter which has been decided by the High Court would be inconsiderable.

As regards decisions of inferior Courts my knowledge is limited to a small acquaintance with County Courts but I can conceive that there may be greater difficulties in finding out what point of law was decided and a litigant who wished to bring his case before the Committee might be in difficulties as to time in relation to his notice of appeal. The difficulties about the inferior tribunals as to time might be met by empowering them to extend time in cases where they think that a loser was acting reasonably in proposing to ask the Committee to consider his case. But the nature of the matter suggests that the Committee should be one that can keep up with current work.

(f) Some might take the view that where it appears to the Committee that a reported decision is of wide application is bad law and the losing party has not appealed, the Standing Committee should run an appeal from the decision on the footing that the result of the appeal was not to affect the parties' rights inter se. I doubt the practicability of this.

(g) Where one of the parties to a litigation is faced with a former Court of Appeal decision which he wishes to dispute and proposes to go to the House of Lords he might be empowered to go to the House of Lords direct. I think this is Maxwell Fyfe's idea. These cases are not I think numerous.

(h) Lastly I can't help thinking that public

disincentive of a scheme such as is suggested above might lead to a widening of the issue.

It might be said (and in substance it is true) that it is the infirmity of a judge (or where he has delivered authority, the infirmity of former judges) that has led to a wrong decision. Why should the issue in an appeal be subjected to the burden of paying the costs of his unsuccessful opponent in the appellate Court? Should not long be borne by the State which has appointed the judge? It is the State's machine that has gone wrong and let be additional expense. Again the matter of costs in any connection always brings up a general discussion as to the burden caused by their amount.