



The dog that did not bark in the night: Researches on the absence of litigation

by Professor Terence Daintith

Gregory: "Is there any other point to which you would wish to draw my attention?"

Holmes: "To the curious incident of the dog in the night-time."

Gregory: "The dog did nothing in the night-time."

Holmes: "That was the curious incident."¹

Introduction

Not so very long ago any young law lecturer anxious to get into print in the law journals was likely to be advised to start by writing and submitting notes on significant new cases. Appropriate experience of this discipline could be expected to lay the basis for the more ambitious project of writing full-length scholarly articles, where the author's skills in case analysis might be deployed on the wider canvas of discussion of some particular legal rule or doctrine. The assumptions that underlay this sort of apprenticeship – that people might ordinarily be recruited as law lecturers, whether from practice or elsewhere, before publishing any academic writing, that very junior lawyers could properly set themselves up as critics of the work of experienced appellate judges, and that academic legal writing would be based on the same premises as the writing of judgments themselves – have all since been challenged. New law lecturers commonly have a PhD, or publications, or both; public evaluation of law schools' research performance has raised the bar for the first few years' work far above the preparation of a few case notes; and social science knowledge and theory regularly underpin academic critiques of legal performance, whether judicial or legislative. In addition, the academic legal community is readier than it was a few decades ago to acknowledge, both in its research and its teaching activity, that many fields of law are now largely ordered by legislation rather than by judicially developed principles of common law.

Despite all this, case analysis and critique remains an important style of legal research. The "Comments" sections of leading United Kingdom and United States law journals continue to publish case-notes, whether in traditional "black-letter" style or applying economic, political, sociological or other social science analyses, and case-law remains an important subject for treatment in full-length articles. To take but one recent example, in the July 2013 issue of the journal *Public Law*, three out of the four shorter pieces and three out of eight main articles are devoted to case analysis. It is, I hope, not cynical to suggest that one feature of the reported appellate judgement that makes it an attractive subject for academic discussion, especially in case-note form, is its presentation of a ready-made issue for consideration: was this the right – or the best – decision? Litigants, counsel and judges have between them done much of the spade-work, and the commentator can concentrate on summarising their efforts and adding his or her wisdom on the issues they have marked out.

It is easy to assume that the production by appellate judges of attractive case-law material for academic commentators is an unproblematic process, something that has happened since cases

¹ Arthur Conan Doyle, "Silver Blaze", in *The Memoirs of Sherlock Holmes* (George Newnes Ltd. 1894).

were first reported and that will go on happening as long as the wind blows and the tides rise and fall. I do not question the general truth of this assumption, but in this short paper I want to draw attention to the possibility of exceptions: that is, that there may not always be any case-law where we would expect to find it. We may be confronted with an issue that might reasonably be the subject of litigation – but there does not appear to have been any. Such absences may present research puzzles and problems that are likely to be much more difficult than those involved in developing a critique of a decided case or cases, and it is these problems that I want to investigate here.

My interest in this question stems from having encountered this sort of litigation lacuna in the course of research on the development of property rights in oil and gas, and I shall draw on this work by way of illustration.² Taking the absence of case-law as a subject for discussion involves addressing three different types of challenge. In the first place, why should such absences be a matter of interest? Second, how can we be sure that case-law is, in fact, absent? And third, if we can identify problematic absences, what kinds of explanation may there be and how may we choose between them?

To whom are absences interesting?

One can identify at least three kinds of research enterprise in which a lack of case-law may need to be a subject for investigation.

1. Practitioner research

A barrister or advocate preparing a case may find that the point that needs to be made has apparently not been argued before. The case is one of “first impression.” This need not mean that it is bad, but clearly the argument is riskier than if there is some relevant line of authority available. There are some obvious reasons for such absences which we do not need to linger over: the case may, for example, have arisen on the interpretation of recently enacted legislation, or in connection with the use of new technical processes. The position is more delicate where it appears that the circumstances are not obviously unprecedented, but no-one has previously taken the point. An advocate going into court with this kind of argument would therefore be wise to spend time first to establish whether it really is new (as opposed to just bad), and if so, why it has previously been neglected.

2. Historical research

Here the concern of the researcher is to explain the development of a given area of legal doctrine, shaped in whole or in part by case-law. The tendency, nurtured by our tradition of case-law literature, is always to focus on the decided cases that shaped the doctrine. But the “cases” that were not decided, because not presented for decision, may be just as interesting. If the law develops in one direction, in default of any argument in favour of a plausible alternative, the reasons for that default call for explanation. Why were potential rights not asserted?

My own recent research dealt with the history of property rights in oil and gas. “Conventional” oil and gas exist in nature in the pore space of sedimentary rocks (sandstone), forming reservoirs where they are confined by impermeable layers of rock above and below.³ In typical reservoir, there is a gas

² See generally Terence Daintith, *Finders Keepers? How the Law of Capture Shaped the World Oil Industry* (RFF 2010), especially chs. 2 and 3, where full references are provided in support of the discussion below.

³ We now need to distinguish such “conventional” oil and gas from “unconventional” hydrocarbons, like shale gas, which remains trapped in the relatively impermeable rocks in which they were formed, or coalbed methane, found in association with seams of coal.

cap at the top, then oil, and then water beneath, all under a pressure of several times atmospheric pressure, so that when one drills into the reservoir and release the pressure the oil or gas beneath the drill stem will come to the surface and oil or gas or both will move within the reservoir towards the low pressure point. If ownership of the land overlying the reservoir is divided between different individuals, this means that oil which was under one person's lot may, as a result of drilling on another lot, be "captured" by the owner of that other lot. In most parts of the world, including the United Kingdom, ownership of oil and gas in the ground has been separated from ownership of the surface and vested in the state, so it does not much matter on whose land oil comes up,⁴ but the modern oil industry began in the United States in 1859, and there the principle was, and remains, that minerals are the property of the owner of the surface beneath which they lie.

Despite this principle, the rule adopted for oil and gas in the United States has been that

[t]he owner of a tract of land acquires title to the oil and gas which he produces from wells drill thereon, although it may be proved that part of such oil and gas migrated from adjoining lands.⁵

The result of applying this rule was that landowners, or the oil companies to which they granted oil and gas leases over their land, engaged in a race to be among the first to exploit any new oil discovery, drilling as many wells as possible as fast as possible in order to enjoy high levels of production before the consequent loss of reservoir pressure made it necessary to resort to more expensive pumping of oil. Such production methods, Americans were soon to learn, were immensely wasteful in terms of unnecessary use of capital, damage to reservoirs leaving much unrecoverable oil in the ground, and risks of fire and pollution, though it was not until the 1920s that States began to enact legislation to impose more rational practices.⁶ According to the conventional wisdom among United States oil and gas lawyers this wasteful competition was forced upon the American oil industry by ill-considered judicial decisions in favour of capture, based on naive and superficial analogies between rights in oil and gas and those in wild animals.

What this conventional wisdom neglects, however, is a remarkable absence of litigation on this point that extended over more than a quarter of a century. The first successful oil well was drilled in Pennsylvania in 1859, starting a local oil boom that lasted for forty years. Within two years, it was clear that drilling close to a successful well could affect its production, either killing the well or diverting the flow to the new, rival well. Though the phenomenon of capture, or drainage, was thus apparent from the earliest days of the industry, the first reported direct challenge to the legality of the practice did not occur until . . . 1897, more than thirty years later. This was in Ohio, in the case of *Kelley v Ohio Oil Co.*⁷ In two other States courts had already stated (in 1886 and 1889 respectively) that the law would give no remedy for drainage that was the result of lawful drilling, but in these cases drainage as such was not in issue: the legitimacy of capture was mentioned simply as a step *en route* to a conclusion on a different point. That a practice which, on general principles of mineral law, involved an unlawful taking should go unchallenged for twenty-five years and then be judicially acknowledged, in passing, as legitimate, is surely something that merits investigation.

⁴ Difficulties may nonetheless arise if the state leases oil and gas rights over limited areas to different companies, so that two or more leaseholders may drill into the same reservoir, but those problems need not concern us here. See further Daintith, ch. 11.

⁵ Robert E. Hardwicke, "The rule of capture and its implications as applied to oil and gas," (1935) 13 *Texas Law Review* 391, at 393.

⁶ On US oil conservation regulation see Daintith, ch.9.

⁷ 57 Ohio St. 317, 49 NE 399 (1897).

It seems plausible to suggest that such significant silences may be encountered in many areas of the law, at least where there is no comprehensive legislation to provide more or less detailed and authoritative answers and thus eliminate significant judicial choices. The puzzles posed by such silences may be encountered in relation to substantive legal issues, but also in connection with legal procedures. An example is offered by the "Agreement for Promotion, Protection and Guarantee of Investments among Member States of the OIC", one of eight economic agreements entered into by members of the Organisation of Islamic Co-operation, a body that now includes 57 states. The Agreement, which was signed in June 1981 and came into force in February 1988,⁸ spells out the basic principles governing the promotion of capital transfers among member states and the protection of investments against commercial risks while guaranteeing the transfer of capital and its proceeds abroad, and provides for the settlement of disputes between states and investors. Those provisions, however, remained dormant until, in August 2011, Hesham AlWarraq, a Saudi investor in Indonesia's banking sector, filed for UNCITRAL arbitration seeking damages and other reliefs against Indonesia, relying upon the hitherto cosmetic OIC Investment Agreement which has been signed and ratified by Indonesia. Although the case is as yet officially unreported, it is now clear that the UNCITRAL tribunal in the jurisdiction phase has decided on the applicability of the Agreement and has ruled that on the basis of its Article 17 Indonesia is bound to arbitrate its dispute with Mr AlWarraq.⁹ It is hard to believe that there was no case between 1988 and 2011 where an eligible investor suffered prejudice at the hands of an OIC signatory to the Agreement and had no more convenient remedy.

3. *Socio-legal research*

At least a part of the reason for the non-use of the remedies offered by the OIC Agreement may possibly have been the reluctance of investors to initiate proceedings that the host government would see as hostile, creating the risk of unsympathetic treatment for the investor on other connected or unconnected matters. This sort of explanation links this case with another kind of research to which the absence of litigation may be significant: socio-legal research exploring the relationships between specific classes of actors. An important part of such research may concern the way such actors manage disputes, and in particular the degree to which they resort to litigation for this purpose. A preference for avoiding litigation in the interest of maintaining valued ongoing relationships in good order has been a key theme of empirical work on commercial contracts by people like Stewart Macaulay in the United States or Hugh Beale and Tony Dugdale in the United Kingdom.¹⁰

Generally speaking this kind of work is not much concerned with the way the litigation propensities of actors bear on the way the law develops. In some cases, however, it may be possible, especially where comparative information is available, to discern some links between litigation behaviour and legal development. One striking contrast between the behaviour of American resource companies in domestic environments and that of resource companies elsewhere is the readiness of United States companies to test in litigation federal and state government decisions that affect them adversely, as compared with the reluctance of companies in other jurisdictions to do just that: a phenomenon that extends even to jurisdictions like Australia and the United Kingdom where public

⁸ See http://www.oic-oci.org/uploads/file/conventions/en/conv_brief/en_conv_promotion_protection_investment.pdf (accessed 28 July 2013).

⁹ I am indebted for this example to Nima Mersadi Tabari, PhD student at the Institute of Advanced Legal Studies.

¹⁰ S. Macaulay, "Non-contractual relations in business: a preliminary study," 1963) 28 *American Sociological Review* 55; H. Beale and T. Dugdale. "Contracts between Businessmen: Planning and the Use of Contractual Remedies," (1975) 2 *British Journal of Law and Society* 45. For an application of such analysis in the field of transnational minerals contracts see T. C. Daintith, "The Design and Performance of Iron Ore Supply Contracts", in International Bar Association, *Energy Law '86* (Matthew Bender 1986), pp. 123-162.

servants have won a reputation for dealing fairly even with companies that have been “difficult”.¹¹ The similarity of the issues that arise between governments and companies in particular areas, like the management of offshore oil and gas exploration and production, means that one can sometimes point even to parallel decisions that have provoked litigation in the United States but have gone unchallenged in the United Kingdom or Australia. For example, offshore lease awards are regularly challenged by disappointed bidders in the United States;¹² this has never happened in either of the other two jurisdictions. We may simply put this down to a more aggressive litigation culture in the United States, but it is also worth considering, when such cases present themselves, whether the relevant claim might be likely to receive less sympathetic treatment from British or Australian than from American judges. The almost total absence of case-law on oil and gas licensing in the United Kingdom and Australia indeed becomes self-sustaining, by reason of the greater risk that appears to attach to venturing into such unknown territory.

Verifying the absence of case-law

An important element of research on “missing” litigation is to understand reporting practice in the relevant jurisdiction. The more comprehensive it is, the lower the risk of missing a significant decision when undertaking a conventional case search. As between different common law countries and jurisdictions within them, practice may vary as to how selective reporting is, or how far down the judicial hierarchy it goes; and within jurisdictions, it may have varied over time. Policy in England and Wales, based on a paper given in 1863 by the future Master of the Rolls Nathaniel Lindley QC, is that there should be reported only cases which

introduce or appear to introduce, a new principle or a new rule.

materially modify an existing principle or rule.

settle, or materially tend to settle, a question upon which the law is doubtful.

for any reason are peculiarly instructive.¹³

Criteria of this kind may well relegate to the mass of unreported decisions case in which counsel unsuccessfully challenged some then current common law precept. Other jurisdictions may however

¹¹ An example from Australia is offered by the Commonwealth Government's treatment of Chevron, which refused, unlike its co-venturers, to undertake additional petroleum exploration in substitution for an exploration programme that was abandoned – contrary to the consortium's commitment to government – as unlikely to produce satisfactory results. Chevron was in consequence deemed by government not to be in “good standing” with the consequence that it could not expect to obtain any new exploration rights over the following five years. Nonetheless, the Commonwealth Government was ready to provide Chevron with a “comfort letter” designed to facilitate its ongoing offshore projects by explaining that this lack of “good standing” did not mean that Chevron was an unsatisfactory or unreliable partner. Some of the background can be found in Maloney, ‘Australia's Offshore Petroleum Work Programme Bidding System’ (2003) 21 *Journal of Energy and Natural Resources Law* 127.

¹² See cases collected in R.A. Brazener, “Grant, administration, and construction, under Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. §§ 1331 et seq.), of leases to explore for oil and gas deposits under continental shelf,” 31 ALR Fed. 615, part II, §§ 4(c), 4(d).

¹³ Cited in a speech by Lord Judge, the Lord Chief Justice, complaining of the current over-citation of unreported cases: see http://www.iclr.co.uk/assets/media/iclr-press_release-lord_judges_speech.pdf, accessed 3 August 2013.

follow more comprehensive approaches.¹⁴ Where cases have been reported, electronic retrieval has made it easier to be confident that all such cases have been collected, though some risks remain: for example, that particular special series may not (yet) have been incorporated into Lexis/Westlaw databases.¹⁵ At the same time, in recent years a steadily increasing volume of cases that have not been thought worthy of being formally reported, in one of the official or unofficial series of reports, is nonetheless accessible through the posting of transcripts on a range of websites. To the extent that these sites are searchable by reference to subject-matter or keywords, they effectively add to the corpus of reported cases. Nonetheless, the majority of judicial decisions, especially at the lower levels, remain both unreported and with no transcript of reasons readily available. Even, therefore, if there is apparently no case-law, the point in which we are interested may still have been argued in the past at first instance, and either not pursued on appeal or summarily dismissed at that level.

Those conducting socio-legal research of the type discussed above may nonetheless get help from sources like the annual Judicial Statistics in the United Kingdom.¹⁶ These will offer, among other things, analyses of the annual caseloads of courts at different levels by type of issue, and may permit the observance of trends in the relative weight of particular kinds of claim over the years; but they offer no information relating to the particular points of law that are of interest to the other kinds of research. To get further on that kind of line of inquiry, therefore, it is necessary to descend a level or two deeper into judicial records, by examining the case records held by courts. Again, there have been substantial recent advances in electronic access to such records, but the value of such access for our purposes is limited by their short time range and the fact that they rarely if ever permit searching by subject, only by docket numbers and party names. While locally held records may include relevant information, like statements of claim, dispositive orders and even judicial statements of reasons, finding them might look like a task of finding a needle (which may perhaps not be there at all) in a field of haystacks. In many cases it would be sensible to abandon such a search as impossible, but there may sometimes be relevant factors which enable the range of inquiry to be restricted. In particular, issues specific to a particular industry or area may have registered in non-judicial media that are easier to get at: trade journals, for example, or local newspapers. Articles and stories of this kind may point to particular places to undertake a court search, or dates or people to look out for.

In the case of my own research it was possible to use this approach. The oil industry started in a particular valley in north-western Pennsylvania, and though it spread to adjoining areas quite rapidly, it was several years before exploration and production activity passed beyond the boundaries of a particular County Court, that of Venango County, whose records, over a period of some ten years, I was thus able to concentrate on. While opinions were seldom recorded at the time, and the formal information on the file sometimes left doubt as to the grounds for decision, it seemed clear that no-one had raised a claim that oil property had been taken by way of drilling on adjacent land. An earlier researcher conducted a rather broader inquiry of the same kind – with similar results.¹⁷

¹⁴ The West National Reporter system in the United States reports most federal court decisions and decisions of State appellate courts.

¹⁵ An example I encountered in my own research was Pennypacker's reports, covering Pennsylvania cases in the first few decades of the oil industry and including a number of cases not included in the official state reports or the West reporter series.

¹⁶ Available on line at <https://www.gov.uk/government/publications/judicial-and-court-statistics-annual>. Comparable publications exist in other common law systems: see for example the Annual Report of the Superior Court of Pennsylvania, available at <http://www.pacourts.us/news-and-statistics/reports>.

¹⁷ This was James Veasey, former General Counsel of Carter Oil, a Standard Oil Company subsidiary, who in retirement planned a work on oil property rights that he never completed: A preliminary account of some of his findings is to be found in James A. Veasey, *Inquiries leading to a change in one element of the rule of*

Explaining absence of case-law

Even in absence of the evidentiary reinforcement that such inquiries can provide, it may be possible to advance as a plausible working hypothesis the absence of any litigation, for example where, as in the United States, reporting, at least at appellate level, is comprehensive. This brings us to the task of explanation. Here a first possibility to acknowledge, but then put to one side, is that no-one litigated the “absent” point because it was simply a bad one. It would clearly be possible (but pointless) to predicate unlimited “absences” of arguments for points that no-one could have won anyway. What makes absences interesting is the emergence, after a long silence, or reported judicial argument on the point, culminating, perhaps, in its adoption as part of the law.

This did not happen in my case. The litigation that occurred in the 1880s and 1890s led to rulings in favour of the rule of capture, which is still law in the United States. It has however since been recognised that the practical implications of these rulings were disastrous in terms of industry economics, and that the opposite view (which would acknowledge that taking oil which comes from under someone else’s ground is a wrong) was arguably better in terms of principle, fitting better with general principles of property law. But if there was a strong, or at least plausible, case for litigation, the puzzle is why, apparently, it was never attempted until 1897. Certainly the people connected with the United States oil industry, in its early years no less than later, did not constitute one of those litigation-averse communities documented by Macaulay. By 1898 George Bryan was able to publish the first full-length text on oil and gas law,¹⁸ composed almost entirely of analysis of the case-law engendered by the industry.

The answer to this puzzle seemed to lie in a conviction, on the part either of those operating in the industry or of the lawyers advising them, that the kind of drainage that was occurring from the very earliest days of the industry was not, in law or in practice, actionable. I found it impossible to obtain any direct evidence of lawyers’ views: while some local practitioners’ papers were available in regional archives, they were uninformative on this sort of point. By contrast, contemporary newspaper reports provided convincing evidence of what oil producers were thinking, in recording behaviour that was only consistent with belief that capture would not be actionable. Thus the owner of a high-yielding well was recorded as paying his neighbour to shut down his “interfering well”, which was preventing production from the owner’s. Had the interference been seen as illegal, he would surely have sued, not paid. Indeed, contemporary accounts of the early days of industry record a well-established, though strongly disapproved, practice by unscrupulous operators of drilling wells not for production but for the express purpose of damaging producing wells and then being paid to shut their wells down and go away. Early reports also record attempts to agree collective undertakings, by all producers in a given field, not to pull out the casings with which unsuccessful wells were lined, a practice which led to the migration of groundwater into hitherto productive wells. Again, one would have expected such agreements to be reinforced by threats of litigation if this had been thought possible, but the co-operating producers were unable to discern any force stronger than moral suasion to secure adhesion to the agreement.

These assumptions of legal powerlessness seem very strange in the light of our present understanding of conventional oil and gas deposits, securely held in reservoir rocks that may extend over considerable areas underlying different properties, each owner of which, in the words of the familiar maxim, owns everything above and below the relevant surface *usque ad coelum et ad inferos*. It ceases to be strange, however, when it is appreciated that the early producers’ understanding of

capture as it now obtains at common law to the end that the rights of operators to produce oil and gas shall be determined upon the relativity of reservoir conditions between and among the separate properties in a reservoir. (Legal Research Library 1941).

¹⁸ George Bryan, *The Law of Petroleum and Natural Gas, with Forms* (G.T. Bisel 1898).

how oil and gas were located underground was quite different from ours. Modern notions of reservoir geology and mechanics did not begin to emerge until the 1880s. Until that time, the prevailing belief was that oil and gas ran in “veins” from the deep underground caverns where they reposed up to points near the surface – not an unreasonable belief given that what led the first drillers to this part of Pennsylvania was the presence of numerous surface seepages of oil, which had for centuries been exploited by the local Indian tribes for medicinal purposes. “Interference” between wells was thus to be explained by the act that two or more wells were tapping into the same vein; but since the vein could have come from anywhere and could be leading anywhere, there could be no basis for saying that one producer had a better claim to the oil than its neighbour. That “vein theory” could take the hold it did and persist for some long may well be due to the particularities of the Pennsylvania oil fields, where the hydrocarbons are held in large numbers of small unconnected traps, rather than – as in Texas, for example – in extensive continuous areas of oil-bearing sands. Had the industry’s birthplace been Texas, perhaps an understanding of reservoirs would have come earlier, so that the assumption of the legitimacy of capture would not have rested unchallenged for more than thirty years.

As it was, by the time the assumption was challenged in 1897, by a combative small Ohio producer called Kelley, the notion of the inevitability of capture was too well ingrained in the minds of oilmen to be shaken. Not only that, but it must have been apparent to lawyers and the courts that to have applied traditional mineral law principles at any time after the first few years of the industry’s life would have produced dramatic and – in the short term at least - highly damaging results. Since the 1860s surface owners anxious to obtain maximum royalties had been subdividing their lands for the purposes of oil leasing, with the result that – at least in the heavily developed Ohio, Pennsylvania and New York fields - almost any producer would be exposed to some kind of action on grounds of drainage from a neighbouring producer if the rule of capture could not be relied upon. At best, there might have followed a tide of litigation and a chilling of productive activity; at worst, the kind of mayhem that occurred in the Texas oilfields in the 1930s when the State tried to shut down production to support prices.¹⁹ Small wonder, then, that when the Supreme Court of Ohio was finally faced with the issue in a form it could not ignore, it gave the plaintiff short shrift in an opinion which was as vigorous in expression as it was weak in reasoning.

What produced the silence documented in my research turned out to be a failure of understanding of hydrocarbon geology and mechanics. It was only in the light of later knowledge that that silence came to demand explanation. Clearly for other silences there may be other types of reason. Most often, perhaps, the root cause is to be found in major changes in technology or in social or economic circumstances whose significance for the operation of legal rules goes unnoticed, or untested, until some particularly enterprising or angry victim insists on litigation. Changes in the presentation of consumer goods eventually gave rise to the recalibration of liability effected by *Donoghue v Stevenson*,²⁰ thanks to a happy but unlikely combination of an enthusiastic litigant, unusual circumstances of consumption, and the procedural advantages offered by the Scottish origin of the case.²¹ Balances of economic power may change, as for example between governments and foreign investors, perhaps ending periods of non-use of arbitration procedures as in the *AIWarraq* case noted above. The increasing complexity of economic and financial organisation and the related interdependence of economic actors may be seen to have led, eventually, to the acknowledgment in

¹⁹ Described in Roger M. Olien and Diana Davids Olien, *Oil and Ideology: the Cultural Creation of the American Petroleum Industry* (University of North Carolina Press 2000), pp. 166-92.

²⁰ [1932] AC 562; (1932) SC (HL) 31.

²¹ On the background to the case, see A. Rodger, “Mrs Donoghue and Alfenus Varus,” [1988] *Current Legal Problems* 1.

in 1964 in *Hedley Byrne v Heller*²² - thanks to the persistence of an especially aggrieved advisee - that there could be liability for economic loss stemming from negligent professional advice, after decades in which the contrary was assumed.

Conclusion

The main purpose of this essay has been to explore, by means of this illustration, the challenges offered to the researcher by problematic gaps or silences in the case-law. But once a plausible explanation for such a silence is achieved, it may be just as interesting to speculate on how the silence came to be broken. Why did Mr Kelley, alone among victims of drainage, invest his effort, his time and his funds in a head-on attack on a rule which had governed industry thinking for thirty-odd years and had first been judicially acknowledged a decade earlier? This is the point at which the argument of this paper rejoins a perhaps more familiar topic, about leading cases of the sort represented by *Donoghue v Stevenson* and *Hedley Byrne v Heller*,²³ which, as the discussion above may suggest, may owe their existence to particularly determined litigants or other “accidental” circumstances. If we postulate that cases like this, by the very fact of “leading”, terminate a period of absence, it could be argued that the issues and research problems I am raising here may be of interest in any area of law that may be shaped by judicial decision.

Terence Daintith

*Professorial Research Fellow,
Institute of Advanced Legal Studies,
University of London,
United Kingdom*

²² [1964] AC 465; see The Rt Hon Lord Cooke of Thorndon, *Turning Points of the Common Law* (Sweet & Maxwell 1997), at 48-62.

²³ Other cases, we should notice, may be recognised as “leading” not because parties have dared to argue original points but because of particularly attractive judicial formulations or reformulations of principle: consider *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 and the principle of “*Wednesbury* unreasonableness”.