the law in England as being settled. He listed all the criticisms at great length and stated: "Their lordships do not find it necessary to record an opinion in regard to all these contentions. They might arise for consideration in some future case in England."[45] He then stated that the different, Australian view was not based on "faulty reasoning" or "misconceptions"[46]. Finally, he said: "There are doubtless advantages if, within those parts of the Commonwealth (or indeed of the English speaking world) where the law is built on common foundations, development proceeds along common lines; but development may gain its impetus from any one, and not from one only, of those parts. The law may be influenced from any one direction."[47] Little imagination is required here to detect a suggestion that Australian rejection of *Rookes v. Barnard*[43] might cause some rethinking at a later date by the House of Lords.

As a result of the articles written about Mr. Uren, it would seem that two sections of Australian law have been clarified. First, the law on exemplary damages is settled—they should be awarded where a defendant shows contumelious disregard for the rights of the plaintiff; and second, that Australian courts should follow clear principles of law set down by the High Court even where there is a contrary decision by the House of Lords and that decision has not been expressly disapproved by the High Court.

There would seem to be some grounds for arguing that exemplary damages are an anomaly and should be abandoned. But the law is sufficiently settled that only the legislature could bring about such a major change. While exemplary damages continue, however, the restrictions imposed by the House of Lords in *Rookes v. Barnard*[48] would appear to create far more problems than they solve — and there would seem to be a real possibility that the House of Lords may at some later date reconsider its views on this matter.

I. RENARD.

45. *Australian Consolidated Press v. Uren, op. cit.* at p. 1356 and p. 536.
46. *Ibid*, p. 1358 and p. 538.
47. *Ibid* at p. 1356 and p. 536.
48. (1964) A.C. 1129; (1964) 1 All E.R. 367.

THE QUEEN v. SCOTT[1]

Criminal Law — Escape — Necessity for Concurrence of Act and Intention — Automatism — Ryan and Walker Considered.

The Victorian Supreme Court recently had occasion to consider an argument that one would have thought had been left behind in the development of the Criminal Law. They rejected a submission by the Crown that essentially amounted to a rejection of the necessity for the concurrence of act and intention as the basis of criminal liability.

[1] (1967) V.R. 276; Supreme Court of Victoria, Barry, Smith and Gillard JJ.

Scott had applied to the Full Court for leave to appeal against a conviction under s.35 of the Gaols Act 1958 — escaping from legal custody. The appeal was on a question of law alone.[2] The facts, simply stated, were that the appellant had been found absent from a work party whilst serving a term of imprisonment at the Beechworth Training Prison. This version of the facts amounted to a classic case of automatism.[3] On oath at General Sessions he claimed that he had been attacked by a fellow prisoner; lost consciousness and regained his senses some days later. Realizing that he was no longer in his gaoler's custody he made his way to Sydney from whence he was subsequently extradited. The learned Chairman of General Sessions, in his charge to the Jury, failed to direct them that automatism could negate intent at the time of withdrawal from custody.[4] The Crown conceded this defect in the direction given to the Jury. However the Crown Prosecutor contended that no miscarriage of justice had taken place since, he claimed, escaping from custody was a continuing offence and, therefore, committed when the appellant became aware that he was at large and continued to absent himself from legal custody. This was firmly rejected by the Full Court, the appeal allowed and a new trial ordered.

The only implication to be drawn from the Crown submission was a rejection of the "Actus non facit reum, nisi mens sit rea" principle. Attracted by the decision in *The Queen v. Tommy Ryan*[5] and certain dicta in *The Queen v. Ryan and Walker*[6] the Senior Prosecutor for the Crown argued that the concurrence of act and intention principle did not apply to a continuing offence. That is to say the actus reus is treated as continuous and the crime is committed when the relevant intent is formed. However, the whole contention is subject to a most basic fallacy. If we admit the defence of automatism on these facts there can be no initial act which can be treated as continuing. Even if it was conceded that lack of contemporaneity was not relevant the prosecution was still faced with the problem that there has not been a voluntary act of withdrawal from custody to which we can attain liability. After quoting a number of authorities, Gillard J. made the striking observation:

> "Whatever differences they may entertain as to the precise nature of an 'act' the jurists would probably describe the movements of the applicant (if his story be true) from the prison working area to the Hume Highway as an event but not an act of the applicant."[7]

[2] Crimes Act 1958, s. 567 a.
[3] See *The Queen* v *Carter* (1959) V.R. 105; (1959) A.L.R. 335 *Brattey* v *Attorney-General for Northern Ireland* (1963) A.C. 386, (1961) 3 All E.R. 323.
[4] Essentially his direction amounted to an allegation that the defendant's defence was that he did not remember committing the crime. (1967) V.R. 276, 283.
[5] (1890) 11 L.R. (N.S.W.) 171.
[6] (1966) V.R. 553.
[7] (1967) V.R. 276, 289.

Smith J. was of the same opinion:

> ". . . for if the offence of escape was not committed by the appellant at Beachworth on 2nd May, could be regarded as still continuing at the time when he became conscious."[8]

It is on this point that any argument using *The Queen v. Tommy Ryan*[9] and *The Queen v. Ryan and Walker*[10] as a basis falls down.

Although the question of a voluntary withdrawal from custody was sufficient for the Court to order a new trial both Smith J. and Gillard J., dealt at length with the nature of the offence of escape and whether it was continuing. Their object seems to have been to clarify some issues left open by the Full Court in *The Queen v. Ryan and Walker*.[11] In that case the Crown in establishing a felony-murder charge had to establish that Ryan was committing a felony at the time the warder, Hodson, was shot. Since he had left the prison confines the offence could not have been committed unless the "escape" was still continuing.[12] Although the Court concluded that the offence could continue until recapture, Smith J., in the present case pointed out that this could mean that any person who aided a felon years after his escape would be a principal offender in the offence of escape then and there being committed.[13] The better position, and one which would not affect the decision in *The Queen v. Ryan and Walker*[14], seems to be that taken in the New Zealand cases of *The King v. Keane*,[15] *The King v Otto*[16] and *The Queen v. Kafka*[17] which were approved by Smith J. in his rejection of *The Queen v. Tommy Ryan.* In *The King v. Keane* it was said that "If a prisoner has regained his liberty by getting away from the precincts of the prison and also from the right and control of prison officials, he then has made his escape and is not in lawful custody".[18] Such a view avoids a collision with *The Queen v. Ryan and Walker* yet still allows for the extreme case where "escape" might continue until recapture. It also has the virtue of being in accord with commonsense.[19]

[8] (1967) V.R. 276, 285.
[9] (1890) 11 L.R. (N.S.W.) 171.
[10] (1966) V.R. 553.
[11] (1966) V.R. 553.
[12] The difference between those facts and the present case make them easily distinguishable. In the Ryan Case the Crown had to establish that the escape was continuing in order to prove another offence dependant on the defendant being in the act of escape. Here the offence was escape simpliciter.
[13] (1967) V.R. 276, 285.
[14] (1966) V.R. 533.
[15] (1921) N.Z.L.R. 581.
[16] (1951) N.Z.L.R. 602.
[17] (1962) N.Z.L.R. 351.
[18] (1921) N.Z.L.R. 581, 583.
[19] It might be noted, at this stage, that the Gaols Act 1958, in its wording tends to negotise the idea of a continuing escape. S.18 (5) provides that any person who escapes cannot count the time spent until recapture as part of his period of imprisonment. If the escape were a continuous offence the section could never be applied since a date on which the escape was made good must be identified: see per Gillard J. (1967) V.R. 276, 292.

Some concern might be expressed at some suggestions made by Barry J., in his discussion of the concepts of actual and legal custody in relation to the Gaols Act 1958.[20] His Honour felt that a statutory offence of general application be introduced whereby being absent from legal custody be made indictable. Such an offence would add to the ever-growing list of "status" offences and, would not only avoid the defence of automatism (since a "status" offence really has no actus reus in the strict sense) but if it were to put a duty upon the escapee to give himself up it would offend the defendant's right against self-incrimination. The offence would admit no defence other than a challenge to the legality of the custody, although Barry J. remarks may have been influenced by some disquiet at the appellant's success on appeal despite the rather fanciful nature of his story. However, the discretion of the jury should be relied on rather than creating another "status" offence.

T. D. O'CONNOR.

[20] (1967) V.R. 276, 280.

CARL ZEISS STIFTUNG v. RAYNER & KEELER LTD. and OTHERS[1]

International Law — Effect of Non-Recognition — Action Commenced by English Solicitors on Instructions from Governing Body of Organization — Governing Body of Organization Deriving Authority from Unrecognized Government — Whether Solicitors have Proper Authority to Act. Conflict of Laws — Whether Issue Estoppel can be Founded on Foreign Judgment.

The litigation before the House of Lords arose out of a summons, taken out by the respondents in 1956, to stay proceedings commenced by English solicitors purporting to act for the Carl Zeiss Stiftung of East Germany, in which the Stiftung sought to restrain the respondents, *inter alia,* from passing off optical instruments using the Stiftung's trade name. The summons, alleging that the action was commenced and was being maintained without the authority of the foundation, was dismissed by Cross J. who held that under the articles of the foundation the proper body to authorize such action was its "Special Board" and that the "Special Board" had in fact authorized it.

From this decision, an appeal was taken to the Court of Appeal[2] where, upon grounds first raised in that court, the judgment of Cross J. was reversed, the summons upheld, and the original action dismissed. The plaintiffs appealed to the House of Lords.

The Carl Zeiss Stiftung was established in 1896 as an organization

[1] (1966) 3 W.L.R. 125. (House of Lords: Lord Reid, Lord Hodson, Lord Guest, Lord Upjohn, Lord Wilberforce.)

[2] *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. and Others* 1965 Ch 525. (Court of Appeal: Harman, Danckwerts and Diplock L.JJ.)