to obtain re-finance to pay off the reduced debt to the bank, but Mr. Boggis told us that in April 1978 there was an equity of about £26,000 on the house, since when there has been some appreciation in value. He submits that it was wrong to decide the case summarily under R.S.C., Ord. 88, and that the bank's claim ought to proceed by way of writ and statement of claim so that there can be discovery and this matter can be fully investigated. There are obvious difficulties in the husband's way, especially in establishing that the sale was by the bank, but in my view he ought to be allowed to have this matter investigated.

I would therefore allow these appeals.

Appeals allowed with costs in Court of Appeal and below.

Leave to appeal granted on terms that the orders for costs in Court of Appeal were not disturbed and that the bank would not ask for costs if successful in the House of Lords.

Solicitors: *Hughmans; Kanter, Jules & Co.; Cobbetts, Manchester; Stephenson, Harwood.*

A. H. B.

MALONE *v.* METROPOLITAN POLICE COMMISSIONER

[1978 M. No. 3772]

1979 Jan. 22, 23, 24, 25, 26, 29, 30, 31; Feb. 28 — Sir Robert Megarry V.-C.

Police—Powers—Telephone tapping—Home Secretary's warrant for interception of calls on private telephone—Claim for declaration that interception unlawful—Claim based on right of property, privacy, confidentiality and breach of human rights—Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (*Cmd.* 8969), *arts.* 8, 13

In a Crown Court prosecution of the plaintiff, one of five defendants charged with handling stolen property, the prosecution admitted that there had been interception of the plaintiff's telephone conversations on the authority of the Secretary of State's warrant. The plaintiff issued a writ claiming inter alia that such interception had been, and was, unlawful, and he sought by motion an injunction against the Metropolitan Police Commissioner to restrain interception or monitoring of telephone conversations on his line. It was agreed to treat the motion as the trial of the action and, instead of the relief claimed in the writ, to seek relief in the form of declarations

which, as finally settled, were grouped under the following heads: (1) that interception, monitoring or recording of confidential conversations on the plaintiff's telephone lines without his consent, or disclosing them to third parties, or making use of them was unlawful, even if done pursuant to a warrant of the Home Secretary, and disclosing details of telephone calls was similarly unlawful; that, in the alternative, all such interception, monitoring or disclosure was unlawful, where made without the plaintiff's consent, to any officer in the Metropolitan Police, the Home Secretary or the Home Office or any officer thereof; (2) that the plaintiff had a right of property, privacy and confidentiality in respect of telephone conversations on his telephone lines, and that interceptions, recordings and disclosures as in (1) were in breach thereof; (3) that, in the alternative and in relation to human rights, there was no remedy under English law for interceptions, monitorings or recordings of conversations on his telephone lines or the disclosure of the contents thereof to third parties; (4) that interceptions and monitorings of his telephone lines violated article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (which entitled everyone to "respect for his private and family life, his home and his correspondence"); (5) that, in the alternative, there was no effective remedy in the United Kingdom for any such violation of his private and family life, his home and his correspondence.

On the question whether the declarations ought to be granted: —

Held, (1) that under R.S.C., Ord. 15, r. 16, the court's power to make declaratory judgments was confined to matters justiciable in the English courts, and the binding declarations which it could make under the rule were declarations as to legal or equitable rights and not moral, social or political matters; that, accordingly, since the Convention of Human Rights had the status of a treaty which was not justiciable in England, and the rights claimed under article 8 of the Convention were not legal or equitable rights, the court had no power to make any declaration as asked under head (4); and that the court in its discretion would make no formal declaration under heads (3) and (5) but would dismiss the claims (post, pp. 353C–D, 354C–E, 355C–D).

Guaranty Trust Co. of New York v. *Hannay & Co.* [1915] 2 K.B. 536, C.A. distinguished.

Hanson v. *Radcliffe Urban District Council* [1922] 2 Ch. 490, C.A. considered.

(2) That, in so far as telephone tapping meant recordings by the Post Office for use by the police in the prevention or detection of crime, no unlawful conduct had been established since there was no law against it and, although no statute authorised telephone tapping, there had been statutory recognition, by section 80 of the Post Office Act 1969, that tapping on the warrant of the Home Secretary had an effective function in law (post, pp. 366H—367A, 368G–H, 370E–G).

(3) That the plaintiff could have no immunity from telephone tapping based on a right of property for no property (apart from copyright) existed in words transmitted over the telephone (post, p. 357E–F).

(4) That because there was no general right of privacy recognised by English law and an offence under section 5 of the

Wireless Telegraphy Act 1949 related only to unauthorized information obtained by a wireless telegraphy apparatus the plaintiff's claim to have a particular right to telephonic privacy in his own home must fail (post, pp. 374G—375C).

Katz v. *United States* (1967) 389 U.S. 347 considered.

Rhodes v. *Graham* (1931) 37 S.W. (2d) 46 distinguished.

(5) That the plaintiff had no contractual right of confidentiality arising from the provision of telephone services by the Post Office nor was there a remedy against conversations casually overheard, particularly where iniquity was suspected; further, that so far as concerned actions by the police, a breach of any general right of confidentiality would be excused where (a) there was just cause for telephone tapping in detecting or preventing crime, (b) no use was made of material obtained except for those purposes, (c) knowledge of information not relevant for those purposes was confined to the minimum number reasonably required to be engaged in the tapping; and that, in the circumstances of the present case, if there had in fact been any breach of confidentiality on the part of the police, there was just cause and excuse for it (post, pp. 375E–G, 376G—377B, E–G, 378A–B).

Fraser v. *Evans* [1969] 1 Q.B. 349, C.A. and *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, C.A. considered.

(6) That, in any event, the claim for all the declarations against the defendant must fail, for interception of the plaintiff's telephone conversations was not by the defendant but by the Post Office and, accordingly, the plaintiff's claim failed in its entirety and would be dismissed (post, pp. 383G—384A).

Per curiam. Any regulation of so complex a matter as telephone tapping is essentially one for Parliament, not the courts. It is plain that telephone tapping is a subject which cries out for legislation. The difficulties in legislating ought not to prove insuperable and the requirements of the Convention should prove a spur to action (post, p. 380E–H).

The following cases are referred to in the judgment:

Adams v. *Adams* (*Attorney-General intervening*) [1971] P. 188; [1970] 3 W.L.R. 934; [1970] 3 All E.R. 572.

Albert (*Prince*) v. *Strange* (1848) 2 De G. & Sm. 652; (1849) 1 Mac. & G. 25.

American Cyanamid Co. v. *Ethicon Ltd.* [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.).

Anon. (1588) Goulds. 96.

Argyll (*Duchess*) v. *Argyll* (*Duke*) [1967] Ch. 302; [1965] 2 W.L.R. 790; [1965] 1 All E.R. 611.

Attorney-General v. *Edison Telephone Co. of London Ltd.* (1880) 6 Q.B.D. 244, D.C.

Attorney-General v. *Jonathan Cape Ltd.* [1976] Q.B. 752; [1975] 3 W.L.R. 606; [1975] 3 All E.R. 484.

Coco v. *A. N. Clark* (*Engineers*) *Ltd.* [1969] R.P.C. 41.

Entick v. *Carrington* (1765) 19 St.Tr. 1029.

Fraser v. *Evans* [1969] 1 Q.B. 349; [1968] 3 W.L.R. 1172; [1969] 1 All E.R. 8, C.A.

Gartside v. *Outram* (1856) 26 L.J.Ch. 113.

Gouriet v. *Union of Post Office Workers* [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. 70, H.L.(E.).

Guaranty Trust Co. of New York v. *Hannay & Co.* [1915] 2 K.B. 536, C.A.

Hanson v. *Radcliffe Urban District Council* [1922] 2 Ch. 490, C.A.

Hill v. *C. A. Parsons & Co. Ltd.* [1972] Ch. 305; [1971] 3 W.L.R. 995; [1971] 3 All E.R. 1345, C.A.

Initial Services Ltd. v. *Putterill* [1968] 1 Q.B. 396; [1967] 3 W.L.R. 1032; [1967] 3 All E.R. 145, C.A.

International General Electric Co. of New York Ltd. v. *Customs and Excise Commissioners* [1962] Ch. 784; [1962] 3 W.L.R. 20; [1962] 2 All E.R. 398, C.A.

Italy (Republic of) v. *Hambros Bank Ltd.* [1950] Ch. 314; [1950] 1 All E.R. 430.

Katz v. *United States* (1967) 389 U.S. 347.

Klass and Others (European Court of Human Rights, July 4, 1978).

Kynaston v. *Attorney-General* (1932) 49 T.L.R. 114; (1933) 49 T.L.R. 300, C.A.

Metcalfe v. *Gilmore* (1879) 59 N.H. 417.

National Provincial Bank Ltd. v. *Hastings Car Mart Ltd.* [1965] A.C. 1175; [1965] 3 W.L.R. 1; [1965] 2 All E.R. 472, H.L.(E.).

Nixon v. *Attorney-General* [1930] 1 Ch. 566, C.A.; [1931] A.C. 184, H.L.(E.).

Pan-American World Airways Inc. v. *Department of Trade* [1976] 1 Lloyd's Rep. 257, C.A.

Printers & Finishers Ltd. v. *Holloway* [1965] 1 W.L.R. 1; [1964] 3 All E.R. 731.

Proctor v. *Bayley* (1889) 42 Ch.D. 390, C.A.

Reg. v. *Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L.R. 979; [1976] 3 All E.R. 843, C.A.

Rhodes v. *Graham* (1931) 37 S.W. (2d) 46.

Saltman Engineering Co. Ltd. v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, C.A.

Southern Pacific Co. v. *Jensen* (1917) 244 U.S. 205.

Thorne Rural District Council v. *Bunting* [1972] Ch. 470; [1972] 2 W.L.R. 517; [1972] 1 All E.R. 439.

Uppal v. *Home Office*, The Times, October 21, 1978.

The following additional cases were cited in argument:

Hubbard v. *Vosper* [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.

Hunter v. *Mann* [1974] Q.B. 767; [1974] 2 W.L.R. 742; [1974] 2 All E.R. 414, D.C.

Lewis v. *Cattle* [1938] 2 K.B. 454; [1938] 2 All E.R. 368, D.C.

Musgrove v. *Chun Teeong Toy* [1891] A.C. 272, P.C.

Rumping v. *Director of Public Prosecutions* [1964] A.C. 814; [1962] 3 W.L.R. 763; [1962] 2 All E.R. 233; [1962] 3 All E.R. 256, C.C.A. and H.L.(E.).

Triefus & Co. Ltd. v. *Post Office* [1957] 2 Q.B. 352; [1957] 3 W.L.R. 1; [1957] 2 All E.R. 387, C.A.

Zamora, The [1916] 2 A.C. 77, P.C.

MOTION

By writ dated October 17, 1978, the plaintiff, James Malone, claimed as against the defendant, the Commissioner of Police for the Metropolis

(1) an injunction restraining him, his servants or agents from intercepting and/or monitoring telephone conversations on the plaintiff's telephone line, stating the number; (2) an order that he deliver up on oath all transcripts, recordings and extracts from recordings now in his possession of telephone conversations of the plaintiff monitored and/or intercepted by him, his servants or agents and now in his or their custody or control; (3) an order that he should destroy on oath all other documents or records compiled partly or wholly from transcripts and recordings of telephone conversations of the plaintiff monitored and/or intercepted by the defendant, his servants or agents and now in his or their custody or control; (4) damages; (5) further or other relief; (6) costs.

By a notice of motion of the same date as the writ, the plaintiff sought part of the relief in the form of an interlocutory injunction that the defendant be restrained by himself his servants or agents from intercepting and/or monitoring telephone conversations on the plaintiff's telephone line.

On January 11, 1979, a statement of claim was served seeking relief as claimed in the writ. On the second day of the hearing, it was agreed by the parties that the motion should be treated as the trial of the action; and in lieu of the relief sought by the statement of claim, various declarations were asked for relating to the legality of telephone tapping, all being in substitution for the relief sought by the notice of motion.

The several declarations in their final form are set out in the judgment, post, pp. 350F—351C.

Colin Ross-Munro Q.C. and *Daniel Serota* for the plaintiff.

Donald Rattee Q.C., John Lindsay and *Leonard Gerber* for the defendant.

Peter Archer Q.C., S.-G., Peter Gibson and *Harry Woolf* for the Solicitor-General, intervening on behalf of the Home Secretary.

The main submissions of counsel are sufficiently indicated in the judgment, post, pp. 356A–D, 357B–D, F–H, 358F, 359B–C, 360A, G—361E, 362E–F, 365D–F, 366E–F, 370B–E.

Cur. adv. vult.

February 28. SIR ROBERT MEGARRY V.-C. read the following judgment. This hard-fought motion took some eight days to hear, nearly all devoted to arguments of law. It raises questions of some general importance as to the lawfulness of what is commonly known as "telephone tapping"; but before I can turn to these I must dispose of a number of preliminary matters. By a writ issued on October 17, 1978, the plaintiff claimed an injunction, an order for delivery up, an order for destruction, and an award of general damages, in relation to the alleged interception and monitoring of telephone conversations on his present telephone line, and recordings, transcripts and other records of these conversations. By a notice of motion of the same date, the plaintiff sought part of that relief, in the form of an interlocutory

injunction to restrain the defendant, the Commissioner of Police for the Metropolis, from intercepting or monitoring telephone conversations on that telephone line. A statement of claim seeking the relief claimed by the writ was served on January 11, 1979, but this was drastically amended on Day 2 of the hearing of the motion, January 23, 1979, for reasons which I will turn to in due course. There have been no further pleadings. Mr. Ross-Munro appeared for the plaintiff, and Mr. Rattee for the defendant; and the Solicitor-General sought leave to intervene on behalf of the Home Secretary. The parties made no objection to his taking part in the argument; and after considering *Adams* v. *Adams* (*Attorney-General intervening*) [1971] P. 188, 197, 198, I reached the conclusion that the most appropriate course was for the court to invite the Solicitor-General to intervene, without making him or the Home Secretary a party to the proceedings. This I did with the assent of all concerned. I may say that the Solicitor-General proffered the encouraging observation that he would not ask for any costs against anyone in any event.

In the forefront of the motion is a statement made by leading counsel for the Crown in a prosecution in the Crown Court at Newington Causeway on July 18, 1978. The plaintiff, who is an antique dealer, was one of five defendants charged with various offences relating to handling stolen property. The trial took place in July and August, and resulted in the plaintiff being acquitted on certain counts, and the jury disagreeing on the rest. He is now awaiting a further trial on those remaining counts, and I understand that this trial is likely to take place next April. In the absence of the jury there was some discussion at the original trial about a page in the notebook of Detective Sergeant Ware. That page showed a note of a telephone conversation which took place prior to March 22, 1977; and the note indicated that there had been an interception, or tapping, of a telephone line. It was common ground that this telephone line was the plaintiff's former telephone line, with a different number and a different address, and not his present telephone line, with his present number and present address, to which he moved in 1977. What leading counsel for the Crown said, in the absence of the jury but with the object of repeating it before the jury, was that " in the circumstances I am authorised to say that there was such an interception carried out on the authority of the Secretary of State's warrant."

This plain admission of tapping is supplemented by a series of allegations in affidavits sworn by the plaintiff from which it may be inferred that both his former telephone line and his present telephone line have been tapped. Very little was said about whether this inference was in fact correct. Nor, for that matter, was there any discussion of a number of the plaintiff's allegations of harassment by the police, and repeated searches, or of his unsatisfied complaints to the police, though I should say that Mr. Rattee emphatically denied any allegation of harassment. On all hands anxiety was shown to have the motion decided not on the basis of whether in fact there has been or still is any tapping of the plaintiff's telephone, but on the basis of whether such tapping, if it takes place, is unlawful.

Now a motion for an interlocutory injunction seemed to me to be an inappropriate means of obtaining a determination of this point of principle. In *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396, 407, Lord Diplock said that on a motion for such an injunction:

> " it is no part of the court's function at this stage of the litigation . . . to decide difficult questions of law which call for detailed argument and mature consideration."

(I delete the " s " at the end of the last word, which I think must be a slip). In the course of Mr. Ross-Munro's opening it became apparent that what I was being invited to decide was indeed a difficult question of law which called for both detailed argument and mature consideration. In the event, counsel gave it the one and I have been giving it the other.

When I pointed out to Mr. Ross-Munro that on motion he was unlikely to get more decided on the point of law than whether or not there was a serious question to be tried, and that this was not a case in which the motion was being treated as the trial of the action, he thereupon sought an adjournment in order to discuss matters with Mr. Rattee. The upshot was that on Day 2, by consent, the motion was transformed. It was agreed that the motion should be treated as the trial of the action and heard on the existing affidavit evidence, without more. The statement of claim was heavily amended in relation to the relief sought. All claims to any injunction, order for delivery up, order for destruction and damages were deleted. Further, all allegations that there had been a conspiracy between the Post Office employees and police officers (for which the defendant was liable under section 48 of the Police Act 1964) were withdrawn; and no allegations of criminal conduct were made. In lieu of the relief sought by the statement of claim, various declarations were claimed, relating to the legality of telephone tapping; and these were substituted for the relief sought by the notice of motion. The declarations appeared in their final form on Day 3, subject to certain minor amendments that were made subsequently.

With the substitution of the word " and," or the word " or," as appropriate, for the " and/ors " with which the declarations are bespattered (creatures which will never find a place in any declaration that I shall willingly make), I think the declarations may be summarised as follows. First, that any interception, monitoring or recording of conversations on the plaintiff's telephone lines without his consent, or disclosing the contents thereof to third parties, is unlawful, even if done pursuant to a warrant of the Home Secretary. Second, that it is unlawful to disclose to third parties, without the plaintiff's consent, details of calls made on his telephone. The third and fourth declarations, claimed in the alternative, are the same as the first and second respectively, save that they relate to disclosures not to any third party, but to the defendant, any officer in the Metropolitan Police, the Home Secretary or the Home Office or any officer thereof. These four declarations all form part of paragraph 1 of the relief claimed. Paragraph 2 is a declaration that the plaintiff has a right of property, privacy and

confidentiality in respect of telephone conversations on his telephone lines, and that the interception, monitoring, recordings and disclosures referred to in paragraph 1 are in breach thereof. Paragraph 3 is a claim in the alternative which may seem a little mysterious until the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (1953) (Cmnd. 8969) is considered. The declaration claimed is that the plaintiff has no remedy under English law for the interception, monitoring or recording of conversations on his telephone lines or the disclosure of the contents thereof to third parties. Paragraph 4 is a declaration that the interception and monitoring of the plaintiff's telephone lines violates article 8 of the Convention. Finally, paragraph 5 claims in the alternative a declaration that the plaintiff has no effective remedy before a national authority within the United Kingdom for the alleged violation of his right to respect for his private and family life, home and correspondence guaranteed by article 8 of the Convention, by reason of the interception and monitoring of his telephone conversations.

It will be seen that the declarations are framed in wide terms; and during the argument questions arose as to whether it might not be that some of the difficulties inherent in them could be avoided by seeking declarations in somewhat narrower terms. Accordingly, on Day 7 Mr. Ross-Munro tendered certain forms of declaration as an alternative to those under paragraph 1, not by way of formal amendment but to provide assistance to counsel and the court in shaping and evaluating the rival contentions. I do not think I need set these out. The main new elements that they introduced were that the declarations should relate not to all telephone conversations but only to those where there was a reasonable possibility that the conversations, or parts thereof, might be confidential, and that the declarations should be extended from mere disclosure to making use of the contents of the conversations.

I can now turn to a matter which occupied a good deal of Days 3 and 4, that of a subpoena which the plaintiff had issued to the Post Office for the production of all warrants relating to the tapping of the plaintiff's two telephone lines, the old and the new. Both Mr. Rattee and the Solicitor-General opposed the enforcement of this subpoena, Mr. Rattee primarily on the ground that any such warrants were irrelevant to the proceedings as they then stood constituted, and the Solicitor-General primarily on the ground that production of the warrants would be contrary to the public interest. The Solicitor-General stated that the Post Office had a copy of the warrant which authorised the particular tapping referred to in the Crown Court, and that a representative of the Post Office was in court. Mr. Rattee's objection on the ground of relevance also included a contention that paragraph 4 of the relief claimed, seeking a declaration that the intercepting and monitoring of the plaintiff's telephone lines violated article 8 of the Convention, was a declaration which this court had no power to make. This objection was argued at some length. In the end I held that it was sound, and said that I would in due course give reasons for my ruling. This I now proceed to do.

It was common ground that the status of the Convention was that of

a treaty, and that it did not have the force of law in England. R.S.C., Ord. 15, r. 16, runs as follows: A

> "No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed."

Mr. Ross-Munro's contention was that this wording was very wide, and B enabled the court to make declarations not only as to legal rights, but also as to moral or international obligations. Further, the Convention was unlike an ordinary treaty, since it gave individuals the right to petition the Commission established under the Convention in respect of alleged breaches of the terms of the Convention. He relied on certain passages in *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K.B. 536, and especially the judgment of Bankes L.J. at p. 571. This C emphasised that rule 16 had two limbs, the first stating that the proceedings should not be open to objection on the ground that "a merely declaratory judgment or order is sought thereby," and the second providing that the court may make "binding declarations of right," whether or not any consequential relief is or could be claimed. Even though the second limb might be confined to cases of legally enforceable rights (as D opposed to moral obligations and so on), said Mr. Ross-Munro, the first limb, which did not contain the word "right," was not thus circumscribed. Bankes L.J. had held at p. 571 that the rule contemplated making "declaratory judgments and orders which may not be declarations of right"; and although he held that the plaintiff must be claiming some "relief," he also held that the relief was not confined to relief in respect of a cause of action. Provided it would not be unlawful, unconstitutional or E inequitable for the court to grant the relief claimed, or contrary to the accepted principles on which the court exercises its jurisdiction, the jurisdiction was unfettered, and "the rule should receive as liberal a construction as possible": see at p. 572.

This, I think, is the high water mark of the authority relied on by Mr. Ross-Munro in support of his contention. *Hanson* v. *Radcliffe* F *Urban District Council* [1922] 2 Ch. 490, 507 did not seem to me to help him so much. True, Lord Sterndale M.R. said that the power of the court to make a declaration under the rule was "almost unlimited," and "only limited by its own discretion": but these words were qualified by the phrase "where it is a question of defining the rights of two parties," and so, being confined to rights, they do not extend to matters of morality and the like which fall short of being rights in G the law.

The language of Bankes L.J. in the *Guaranty* case is indeed wide, and in some respects a little puzzling; but I do not think that it supports Mr. Ross-Munro's contention. That case was concerned with a claim to a declaration that the plaintiffs were not subject to certain obligations. What Bankes L.J. was pointing out (and I put it in my own words) was H that in addition to making declarations of right the court can make declarations of non-liability. True, a plaintiff who seeks such a declaration may have no cause of action; but it suffices if he is claiming

"relief." This, I think, means relief from "[some] real liability or disadvantage or difficulty" which affects him (see *Thorne Rural District Council* v. *Bunting* [1972] Ch. 470, 477, 478), and not mere matters of interest or curiosity or the like. The illustrations which Bankes L.J. gives ([1915] 2 K.B. 536, 573) make it plain, I think, that he is throughout referring to rights and liabilities that are enforceable in the courts, and not merely moral, social or political rights or liabilities that are not. It would indeed be remarkable if by seeking a declaration instead of other relief a litigant could require the court to adjudicate on matters that otherwise would be outside its jurisdiction. It would be even more remarkable if it were to be held that although the second limb of the rule is confined to legal rights, the first limb extends to all liabilities, whether legal, moral, social or otherwise. (I use the word "legal" to include "equitable," of course.)

In my judgment, the power to make declarations is confined to making declarations on matters that are justiciable in the courts. This is emphasised by the contrast in drafting in the rule. The second limb is cast in the form of conferring a positive power of making declarations of right. The first limb, on the other hand, is expressed in terms not of conferring any positive power but only of removing one possible objection to proceedings, namely, that a merely declaratory judgment is sought. Every other objection remains open, and so if the proceedings are brought in respect of moral, social or political matters in which no legal or equitable rights arise, the objection to the court deciding such matters remains.

This view seems to me to be supported by ample authority. In *Republic of Italy* v. *Hambros Bank Ltd.* [1950] Ch. 314, 329, Vaisey J. refused to make any declaration relating to a financial agreement made between the governments of the United Kingdom and Italy on the ground that the agreement was "not cognizable or justiciable in this court." In *Uppal* v. *Home Office* (unreported), October 20, 1978, I held that "Obligations in international law which are not enforceable as part of English law cannot, in my judgment, be the subject of declaratory judgments or orders." On this ground, inter alia, I refused to make any declaration under the European Convention of Human Rights, the very Convention that is in issue in the present case, in a case where the dispute was about deportation. There was an appeal, but on November 2, 1978, leading counsel for the appellant, in the words of Roskill L.J., "found himself faced with overwhelming difficulties in proceeding with the appeal," and abandoned it. My decision was in terms based on *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435, 483, 495, 501, 508, 522; and the Solicitor-General relied on these passages, with one or two others.

Other instances which might be cited include *Nixon* v. *Attorney-General* [1930] 1 Ch. 566, 574. There, Clauson J. said that he had no power under the rule to make any declaration save a declaration of a legal right; and he held that as the rights of the civil servants in question were not legal rights, their claim failed. This decision was affirmed on appeal: see [1930] 1 Ch. 581; [1931] A.C. 184. Again, in *Kynaston* v. *Attorney-General* (1932) 49 T.L.R. 114, in which the authorities cited

included *Hanson* v. *Radcliffe Urban District Council* [1922] 2 Ch. 490, Farwell J. held that no declaration could be made that the Army Council had not properly dealt with complaints that an officer had laid before it. No engagement between an Army or Navy Officer and the Crown was enforceable in the courts, and so the action failed in limine. The Court of Appeal agreed: (1933) 49 T.L.R. 300.

In the end, Mr. Ross-Munro was forced to accept that his argument involved him in contending that both *Republic of Italy* v. *Hambros Bank Ltd.* and what I said in *Uppal* v. *Home Office* were wrong; and I think there is much else, too, that would have to be rejected if he is right, including what was said in *Gouriet* v. *Union of Post Office Workers.* As I have indicated, I can see nothing in Ord. 15, r. 16, to open the doors to the making of declarations on a wide range of extra-legal issues. I shall not discuss the engaging examples which emerged in argument, ranging from moral obligations to the decisions of referees in football matches. I shall only say that I cannot believe that the court could, or should, grant a declaration that, for instance, a referee was right (or wrong) in awarding a penalty kick. The short answer to Mr. Ross-Munro on the present point is that declarations will be made only in respect of matters justiciable in the courts; treaties are not justiciable in this way; the Convention is a treaty with nothing in it that takes it out of that category for this purpose; and I therefore have no power to make the declaration claimed under paragraph 4 of the prayer for relief in the statement of claim. Even if I had jurisdiction, I think that in my discretion I would refuse to make the declaration, and would leave it to the bodies set up under the Convention to decide the matter. Accordingly, I refuse to make that declaration, and dismiss the claim to it.

That brings me to the declarations sought under paragraphs 3 and 5 of the prayer for relief. These in essence are both declarations that the plaintiff has no remedy in this country for the tapping of his telephone lines. They both plainly have the Convention in mind: indeed, paragraph 5 in terms refers to article 8 of the Convention, and borrows from the language of article 13. I think that I had better set out these two articles. Article 8 states:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13 runs:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A Mr. Rattee contended that it would be wrong to make a declaration at the suit of the plaintiff (as distinct from the defendant) that the plaintiff had no right, though I was not very clear why. It may be that in at least some circumstances a plaintiff who claims a declaration of "no right" could not be said to be claiming "relief." Mr. Rattee also contended that my decision on paragraph 4 must also cover paragraph 5.

B I do not think that I need explore this. When I inquired of Mr. Ross-Munro what good a formal declaration would do him before the Commission of Human Rights and the court established under the Convention that would not be done by a reasoned judgment on the main issues (which might, indeed, be more illuminating than a formal declaration), he was unable to point to anything. In the end, without abandoning his claim to declarations under paragraphs 3 and 5, he C advanced no further argument to support them, and accepted that a reasoned judgment would do just as well, or better. In those circumstances, and bearing in mind that declarations are discretionary remedies, I shall make no formal declarations under paragraphs 3 and 5. Even if I have jurisdiction to make them (and I very much doubt this as to paragraph 5), I do not think that the court should make use- D less declarations, especially when the object in seeking them seems to be to support some contention under a treaty over which the court has no jurisdiction. I accordingly dismiss the claims under paragraphs 3 and 5. In the result, the claims are reduced to those under paragraphs 1 and 2.

Before I turn to these, I must return to the subpoena. As I have said, Mr. Rattee contended that this should be set aside on the ground E that the warrants that it sought were irrelevant to the proceedings as they stood in their revised form. The relief claimed was in purely general terms, and the plaintiff contended that, even if authorised by warrant, any tapping was illegal. What, then, could be the relevance of producing particular warrants authorising any particular tapping? Furthermore, part of the agreement between counsel that the motion F should be treated as the trial of the action was that, apart from the warrant mentioned in the Crown Court, no further discovery would be sought, and no further evidence would be put in. In the circumstances it seemed to me difficult to support the subpoena, and Mr. Ross-Munro promptly and very properly accepted that it should be set aside. I accordingly did that.

With those matters disposed of, I can at last turn to the central G issue in the case. For brevity, and without prejudice to the greater elaboration of the various declarations claimed, the question may be expressed in the simple form "Is telephone tapping in aid of the police in their functions relating to crime illegal?" However, I think that I should make it clear that the only form of telephone tapping that has been debated is tapping which consists of the making of recordings by H Post Office officials in some part of the existing telephone system, and the making of those recordings available to police officers for the purposes of transcription and use. I am not concerned with any form of tapping that involved electronic devices which make wireless

transmissions, nor with any process whereby anyone trespasses on to the premises of the subscriber or anyone else to affix tapping devices or the like. All that I am concerned with is the legality of tapping effected by means of recording telephone conversations from wires which, though connected to the premises of the subscriber, are not on them.

Mr. Ross-Munro advanced a number of broad propositions. I do not propose to set them out verbatim, especially as they were to some extent modified during argument. Further, although the royal prerogative was mentioned from time to time, no claim was made that there was any prerogative power to tap telephones, and so I need say nothing of that. As they finally emerged, I think Mr. Ross-Munro's three main submissions may be summarised as follows. First, he said that it was unlawful for anyone to intercept or monitor the telephone conversations of another without the consent of that other. He rested this contention on the right of property, on the right of privacy, and on the right of confidentiality. Second, he relied on article 8 of the Convention, as construed by the European Court of Human Rights, especially in *Klass and Others*, July 4, 1978. He relied on this in two respects. First, he said that it conferred a direct right on all citizens of the United Kingdom. Second, he said that it aided the courts of this country. It guided those courts in interpreting and applying English law so as to make it accord as far as possible with the Convention; and it provided a guide in cases of ambiguity or a lack of clarity in English law. Mr. Ross-Munro's third main contention was based on the absence of any grant of powers to the executive to tap telephones, either by statute or by the common law.

It was common ground that there was no English authority that in any way directly bore on the point. The only English authorities that could be adduced related to arguments for and against the right not to be tapped that the plaintiff claimed for his telephone lines, but did not decide it. The absence of any authority on the point is something that has to be borne in mind; but it certainly does not establish that no such right exists. This is the centenary of the telephone system in England; for the first telephone exchange was established in 1879, with a mere seven or eight subscribers. It is perhaps surprising that the question now raised has taken a hundred years to come before the courts; but there may be many explanations of that, and I certainly do not infer that a necessary or even probable explanation is that there is no right to immunity from telephone tapping. If the true view is that such a right exists, then the court must say so, despite the absence of any prior authority.

This year, in addition to being the centenary of the telephone system in England, is also the centenary of a celebrated dictum of Doe C.J. of New Hampshire which I mentioned during the argument. As slightly varied, it is: "As there was a time when there were no precedents, anything that could be done with them can be done without them": *Metcalfe* v. *Gilmore* (1879) 59 N.H. 417, 433. If authority on a point is lacking, neither equity nor common law is incapable of filling the gap in a proper case. Such an approach may be traced back at least to the 16th century. In *Anon.* (1588) Goulds. 96, it was said in argument

A that there were no cases in the books on the point in issue. But Anderson C.J. said:

> "What of that? shall not we give judgment because it is not adjudged in the bookes before? wee will give judgment according to reason, and if there bee no reason in the bookes, I will not regard them."

B Before I examine Mr. Ross-Munro's contentions, I should indicate the basic thesis of the contentions of Mr. Rattee and the Solicitor-General to the contrary. This was that apart from certain limited statutory provisions, there was nothing to make governmental telephone tapping illegal; and the statutory provisions of themselves assume that such tapping is not in other respects illegal. That being so, there is no general right to immunity from such tapping. England, it may C be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.

As the plaintiff's contentions overlap to some extent, I shall set them all out first, and in most cases postpone my consideration of their force and effect until after I have deployed them all. Mr. Ross-D Munro's first proposition rested in the first place on a right of property. To tap a person's telephone conversation without his consent, he said, was unlawful because that person had rights of property in his words as transmitted by the electrical impulses of the telephone system, and so the tapping constituted an interference with his property rights. An analogy that he suggested was that the important part of a letter was the words that it contained rather than the paper that it was written E on. I regret to say that Mr. Ross-Munro found it difficult to persuade me that there was any reality in this contention, and he did not struggle long. I do not see how words being transmitted by electrical impulses could themselves (as distinct from any copyright in them) fairly be said to be the subject matter of property. At all events, no argument which even began to support such a proposition was put before me.

F The second ground on which Mr. Ross-Munro sought to support his first proposition was that of the right of privacy. He accepted that the books assert that in English law there is no general right to privacy, and he referred me to a passage in *Halsbury's Laws of England*, 4th ed., vol. 8 (1974), p. 557 to this effect. But he contended that there was a particular right of privacy which the books did not mention, namely, the right to hold a telephone conversation in the privacy of one's home G without molestation. In support of his contention, Mr. Ross-Munro relied to a large extent on the common law offence of eavesdropping, the celebrated article on "The Right to Privacy" by Samuel D. Warren and the future Brandeis J. in (1890) 4 *Harvard Law Review* 193, the Fourth Amendment to the Constitution of the United States of America, *Katz* v. *United States* (1967) 389 U.S. 347 and *Rhodes* v. *Graham* (1931) H 37 S.W. (2d) 46. I shall mention these in turn.

The offence of eavesdropping is described in *Blackstone's Commentaries*, 15th ed., (1809), vol. 4, p. 168 as being committed by those who listen under walls or windows or the eaves of a house, and frame

slanderous and mischievous tales. The offence constituted a common nuisance, punishable by fine and finding sureties for good behaviour. This offence fell under the same broad head, dealt with on the same page of *Blackstone*, as being a common scold, which was punishable by immersion in the trebucket or ducking stool. Section 13 of the Criminal Law Act 1967 abolished these and a number of other offences, so that eavesdropping can now speak in support of Mr. Ross-Munro with only a muted voice.

The article in the *Harvard Law Review* is, as Mr. Ross-Munro emphasised, to a large extent founded on English authorities. No summary can do it justice; but some indication of its general effect may be given by saying that decisions based on property, on implied terms in a contract or on trust or confidence, are said to be instances of a broad principle giving individuals a right to privacy. A number of limitations of this right are suggested. These include a provision that the right to privacy does not prohibit the publication of any matter which is of public or general interest. The detection of crime is not mentioned in this context. The article could be urged in support of the general right of privacy which Mr. Ross-Munro accepts does not exist in English law, but provides little or no support for the particular right of privacy for telephone conversations in the home for which he contends.

The Fourth Amendment to the Constitution of the United States, which dates from the 18th century, runs:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This, it is said in *Halsbury's Laws of England*, 4th ed., vol. 8 (1974), p. 557, para 843, was "mainly based on the English cases on general warrants, especially *Entick* v. *Carrington* (1765) 19 St.Tr. 1029." Mr. Ross-Munro read me extensive passages from this case, and contended that this supported the contention that, unless authorised by statute, the Secretary of State had no power to issue a warrant authorising any telephone tapping, whether general or specific. Although the language of the Fourth Amendment, chosen before telephones were known, does not seem very apt for telephone tapping, various decisions of the Supreme Court of the United States have applied it to telephone tapping effected without a proper warrant from a magistrate. In *Katz* v. *United States*, 389 U.S. 347 the majority of the Supreme Court held that a tapping effected by attaching a device to the exterior of a public telephone booth was contrary to the Fourth Amendment, and that a conviction obtained by means of the evidence of what the accused had said in telephone conversations recorded by these means must be reversed, even though the circumstances of the tapping were such that a magistrate could properly have authorised it. The court rejected previous authority which held that the Fourth Amendment was not violated by telephone tapping which was effected without any act of

trespass or any seizure of any material object. In his dissent, Black J. said, at p. 366, that "wire-tapping is nothing more than eavesdropping by telephone."

This decision, of course, is merely a decision reversing a conviction for wrongful admission of evidence. It was no decision that the Fourth Amendment conferred any general right to privacy. It protects individuals against various kinds of governmental intrusions, and many other acts which have nothing to do with privacy. Any protection of a general right to privacy (or a man's right to be let alone by others) is largely left to the law of the various States: see at p. 350.

It was no doubt with that in mind that Mr. Ross-Munro cited the decision of the Kentucky Court of Appeals in *Rhodes* v. *Graham*, 37 S.W. (2d) 46. That was a case of private wire-tapping. The plaintiff sued seven defendants for damages for attaching wires which connected the plaintiff's telephone line to the telephone line of one of the defendants, for listening to conversations on his telephone line, and for employing a stenographer to listen to these conversations, make shorthand notes of them, and transcribe them. The claim was based on trespass to the telephone company's wires and equipment, in which the plaintiff claimed property rights, and also on a violation of the plaintiff's right of privacy. The trial court sustained a demurrer, but the Court of Appeals held that the action would lie, and overruled the demurrer. The court put the decision squarely on unwarranted violation of the right of privacy being a tort. Wire-tapping, it was said, was akin to eavesdropping, which, though not a statutory offence in Kentucky, was indictable at common law. Although I propose to postpone any general discussion of the case until I have considered the other contentions put before me, I cannot refrain from saying that if such a case as *Rhodes* v. *Graham* occurred in England, it would be deplorable if English law gave the plaintiff no remedy.

I pause at that point. The American authorities that I have mentioned are few indeed, and there are many, many others. In 1972 the Committee on Privacy, under the chairmanship of the Right Honourable Kenneth Younger, produced a valuable report on the whole subject: Cmnd. 5012. I shall call this the "Younger Report." Among many other things, the report contains a convenient summary of the development of the right of privacy in the United States of America, with many variations between the different States, and with statutes covering part of the ground: see pp. 314–317. The Younger Report as a whole demonstrates the great complexity of the subject, and the difficulty of framing legislation to regulate it in a satisfactory manner. I should also mention another report, specifically concerned with telephone tapping under the authority of the Home Secretary. This is commonly called the "Birkett Report," since Sir Norman Birkett headed the three Privy Councillors who constituted the committee: Report of the Committee of Privy Councillors appointed to inquire into the interception of communications (1957) (Cmnd. 283). Much of this was read to me, and although the report is not authority in any technical sense, it is plainly of much value. In particular, it sets out much material on the process of telephone tapping and its authorisation. In view of

the paucity of any such evidence in the case before me, this is particularly useful.

I now turn to the third ground on which Mr. Ross-Munro supports his first proposition, the right of confidentiality. This is an equitable right which is still in course of development, and is usually protected by the grant of an injunction to prevent disclosure of the confidence. Under Lord Cairns' Act 1858 damages may be granted in substitution for an injunction; yet if there is no case for the grant of an injunction, as when the disclosure has already been made, the unsatisfactory result seems to be that no damages can be awarded under this head: see *Proctor* v. *Bayley* (1889) 42 Ch.D. 390. In such a case, where there is no breach of contract or other orthodox foundation for damages at common law, it seems doubtful whether there is any right to damages, as distinct from an account of profits. It may be, however, that a new tort is emerging (see *Goff and Jones, The Law of Restitution,* 2nd ed. (1978), pp. 518, 519, and Gareth Jones (1970) 86 L.Q.R. 463, 491), though this has been doubted: see *Street, The Law of Torts,* 6th ed. (1976), p. 377. Certainly the subject raises many questions that are so far unresolved, some of which are discussed in the Younger Report at pp. 296–299.

The application of the doctrine of confidentiality to the tapping of private telephone lines is that in using a telephone a person is likely to do it in the belief that it is probable (though by no means certain) that his words will be heard only by the person he is speaking to. I do not think that it can be put higher than that. As the Younger Report points out at p. 168, those who use the telephone are

> "aware that there are several well understood possibilities of being overheard. A realistic person would not therefore rely on the telephone system to protect the confidence of what he says because, by using the telephone, he would have discarded a large measure of security for his private speech."

Extension lines, private switchboards and so-called "crossed lines," for example, all offer possibilities of being overheard. The report then pointed out that what would not be taken into account would be an unauthorised tap by induction coil or infinity transmitter. The report, which was dealing only with incursions into privacy by individuals and companies, and not the public sector, said nothing about tapping authorised by the Home Secretary. However, the substantial publicity attending the Birkett Report, and the general interest in films, television and affairs of notoriety in other countries, must mean that few telephone users can be ignorant of the real possibility that telephones are subject to the risk (which most people will probably regard as being very small in their own cases) of being tapped by some governmental body with access to the telephone system.

It is against that background that I must consider Mr. Ross-Munro's submissions. He contended that the categories of confidentiality were not closed, and that they should be extended. The leading case in this branch of the law is *Prince Albert* v. *Strange* (1849) 1 Mac. & G. 25 (affirming (1848) 2 De G. & Sm. 652), as applied in *Duchess of Argyll* v.

Duke of Argyll [1967] Ch. 302; and without citing the former, Mr. Ross-Munro read me passages from the latter. If A makes a confidential communication to B, then A may not only restrain B from divulging or using the confidence, but also may restrain C from divulging or using it if C has acquired it from B, even if he acquired it without notice of any impropriety: see the authorities cited in *Snell's Principles of Equity*, 27th ed. (1973), p. 651, one of which, *Printers & Finishers Ltd.* v. *Holloway* [1965] 1 W.L.R. 1, 7, was put before me. In such cases it seems plain that however innocent the acquisition of the knowledge, what will be restrained is the use or disclosure of it after notice of the impropriety. In the case of a telephone conversation, said Mr. Ross-Munro, any conversation that was "reasonably intended to be private" (in the words of Harlan J. in *Katz* v. *United States*, 389 U.S. 347, 362) should be treated as a confidential communication. Even if the using of the telephone must be taken as implying some sort of consent to some risk of being overheard, that could not be taken to be any kind of consent to any publication to any third party.

Mr. Ross-Munro agreed that there were limits to the doctrine of confidentiality. He accepted the dictum of Page Wood V.-C. in *Gartside* v. *Outram* (1856) 26 L.J.Ch. 113, 114, that "there is no confidence as to the disclosure of iniquity." This view was applied in *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, 405, where Lord Denning M.R. held that it extended "to any misconduct of such a nature that it ought in the public interest to be disclosed to others," and was not confined to cases of crime or fraud. Mr. Ross-Munro agreed that if through what are often called "crossed lines" a person overhears what is plainly a confidential conversation, and this discloses plans to commit a crime, that person should inform the police, and he could not be said to have committed any breach of the obligation of confidentiality. But that, he contended, was very different from tapping a telephone in the hope of obtaining information about some crime, whether already committed or being planned.

In *Fraser* v. *Evans* [1969] 1 Q.B. 349, 362, Lord Denning M.R. stated that he did not look upon the dictum of Page Wood V.-C. as expressing a principle, and said:

> "It is merely an instance of just cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret."

In a judgment a mere four sentences long, Davies L.J. agreed with Lord Denning on one ground of his decision, but expressly refrained from saying anything about two other points, of which the exegesis of iniquity was one. The judgment of the third member of the court, Widgery L.J., consisted of a single sentence. He said, at p. 364, "I entirely agree," and went on to state that he would not take time "in an endeavour to repeat the reasons given by my lord." This might be read as being a complete agreement with what Davies L.J. had said, or with what the other two members of the court were agreed upon (which comes to the same thing), or it might be read as an agreement with all

that Lord Denning M.R. had said, including that part of it on which Davies L.J. had refrained from expressing any view.

I do not think that I need explore the problem, which often arises, of the significance and effect of the simple words "I agree," when uttered in the Court of Appeal. Russell L.J. did this in his Presidential Address to the Holdsworth Club in 1969 (see *The Lawyer and Justice*, ed. B. W. Harvey (1978), pp. 251–262), and I could add little. I readily accept and adopt what Lord Denning M.R. said, whether or not it expresses a majority view. I also accept the other formulation by Lord Denning M.R. that I have mentioned, that in *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, 405, based on whether disclosure is in the public interest. Lord Denning M.R. extended this to all crimes, frauds and misdeeds, whether actually committed or in contemplation, but limited it to cases where the disclosure was to someone who had a proper interest to receive the information, as where the disclosure is to the police in relation to a crime. As in the case before me this is the only kind of disclosure in question, I need say no more on this limitation. Winn L.J. expressly concurred in Lord Denning's judgment, and I do not think Salmon L.J. disagreed. As between the two formulations, I think I would prefer *Fraser* v. *Evans* [1969] 1 Q.B. 349, since that is not confined to misconduct or misdeeds. There may be cases where there is no misconduct or misdeed but yet there is a just cause or excuse for breaking confidence. The confidential information may relate to some apprehension of an impending chemical or other disaster, arising without misconduct, of which the authorities are not aware, but which ought in the public interest to be disclosed to them. However, I need not pursue this, since in the circumstances of the present case the two formulations produce no significant difference.

With that, I turn to Mr. Ross-Munro's second main contention, based on the Convention. As I have mentioned, there were two limbs: first, that the Convention conferred direct rights on citizens of the United Kingdom, and, second, that the Convention should be applied as a guide in interpreting and applying English law in so far as it is ambiguous or lacking in clarity. I have already read articles 8 and 13 of the Convention, but although I have mentioned the *Klass* case, I have not discussed it. It was a case referred to the European Court of Human Rights by the Commission of Human Rights in respect of an application by five German citizens against the Federal Republic of Germany under the Convention. The decision was by the court in plenary session. Fifteen judges joined in the main judgment, and one judge delivered a separate judgment, concurring in the result but giving different reasons. The complaint was that a statute of the Republic, which was called "the G.10," was contrary to the Convention in that, in permitting governmental surveillance of the post and telecommunications, (a) it did so without obliging the authorities in every case to notify those concerned after the event, and (b) it excluded any remedy in the courts against ordering and executing the surveillance. There was no challenge to the right of the state to carry out the surveillance; the challenge was as to the absence of these safeguards.

The government stated flatly that none of the applicants had in fact been subject to any surveillance. The case was thus argued as a matter of principle on the validity of the G.10 in the light of the Convention, rather than on the legality of any acts done. The G.10, as construed by the German courts, lays down a series of limitations and restrictions on the use of the power of surveillance. These are set out in the judgment at some length; I shall do no more than summarise them. The powers may be used only in the following circumstances. (1) There must be some imminent danger in certain fields of security, or there must be factual indications for suspecting a person of planning, committing or having committed certain crimes. Other persons who provide a means of communication for the suspect are included only if clear facts point to this. (2) No surveillance is permitted unless other methods of detection have no prospects of success, or are considerably more difficult. (3) An application for surveillance may be made only by the head of certain specified services, or his deputy; and the application must be in writing, and give reasons. (4) The order for surveillance must be made either by the supreme authority of one of the Länder or by a Federal Minister authorised by the Chancellor. (5) Surveillance must cease when it is no longer necessary, or the requisite conditions have ceased to exist. An order remains in force for a maximum of three months, and can be renewed only on a fresh application. (6) The person subjected to surveillance must be notified of it as soon as this will not jeopardise its purpose.

(7) The process of surveillance is subject to supervision. The process, which the judgment of the European Court appears to describe for the Federal authorities, has, it was said, an appropriate counterpart in each of the Länder. The process is as follows. (a) An official qualified for judicial office considers the information obtained to see whether it is within the safeguards, and transmits only information that satisfies these requirements, destroying the rest. What is transmitted must not be used for purposes other than those for which it was obtained, and documents must be destroyed when they are no longer needed for those purposes. (b) There is a board consisting of five M.P.s, to which the appropriate Minister must report at least once every six months on the operation of the G.10. The M.P.s are appointed by the Bundestag in proportion to the parliamentary representation of the parties, so that the opposition is represented on the board. (c) There is a Commission consisting of a chairman, who must be qualified to hold judicial office, and two assessors. This is appointed by the board after consultation with the government. As soon as any surveillance ceases, the appropriate Minister considers whether the person who has been subjected to it ought to be notified that it has taken place; and if necessary the Minister reconsiders this at regular intervals. His decision is submitted to the Commission, and the Commission may direct him to notify the person concerned. The Minister must give the Commission a monthly account of the surveillances that he has ordered; and in practice he seeks the Commission's prior consent. The Commission may also, either on its own motion or on application by anyone believing himself to be under surveillance, order the Minister to terminate

forthwith any surveillance that the Commission considers to be illegal or unnecessary.

(8) Although the G.10 in terms excludes any legal remedy before the courts against ordering and executing any surveillance, there is not a total exclusion of all relief. First, a person who suspects that he is under surveillance may apply to the Commission, as I have just mentioned; and thence he may apply to the Constitutional Court. That court may require the authorities to supply information or produce documents, even if secret; and the court may then decide whether the information or documents may be used. Second, once notified of a surveillance, the person concerned may have the legality and conformity of the surveillance reviewed in an action for a declaration; he may sue for damages if he has been prejudiced; he may sue for the destruction or restitution of documents; and if these proceedings fail, he may seek a ruling in the Constitutional Court that there has been a breach of the Basic Law of the Republic.

Those, then, are the safeguards of the system of surveillance operating in West Germany which the European Court of Human Rights had to consider. Certain other provisions authorising surveillance in criminal cases were not in issue before the court. The court first considered whether the applicants had any locus standi. Article 25 (1) gives the right of access to the Commission of Human Rights to anyone "claiming to be the victim of a violation" of rights under the Convention by any of the contracting parties. Even though there had been no actual surveillance of any of the applicants, it was held that they could each claim to be "the victim of a violation" in that they were exposed to the risk of surveillance without their knowledge, and that this risk of surveillance, by restricting free communication, constituted a direct violation of article 8. It was also held that although article 8 (1) did not in terms mention telephone conversations, the notions of "private life" and "correspondence" extended to them. Secret surveillance by telephone was thus a breach of article 8 (1), and could be justified only if it fell within article 8 (2).

The court then examined the safeguards in the German legislation in some detail to see whether they provided "adequate and effective guarantees against abuse" (paragraph 50). The court accepted that the national legislature enjoyed a certain discretion in the provisions that it made. In principle, said the court, it was desirable to entrust supervisory control to a judge, since this would offer the best guarantee of independence, impartiality and a proper procedure. Nevertheless, the German system, while not providing for judicial control, had established a board and a commission with adequate powers of control which were independent of the authorities carrying out the surveillance, not least having regard to the representation of the opposition on the board. The exclusion of any subsequent notification of surveillance until this could be given without jeopardising its purpose (instead of as soon as surveillance has ceased) could not carry the case outside article 8 (2), since ex hypothesi to require an earlier notification would jeopardise the surveillance. In the result, the court held that there was no breach of article 8.

The court then turned to article 13, dealing with the right to an effective remedy before "a national authority" if the rights and freedoms in the Convention "are violated." Not surprisingly, it was held that this must mean that there must be an effective remedy for everyone who claims that his rights or freedoms have been violated. It should not be read literally as being confined to cases where it has already been established that a violation has in fact occurred. On this footing, the court held, first, that the term "national authority" need not always mean "a judicial authority" in the strict sense. Other bodies might have sufficient "powers and procedural guarantees" to provide an effective remedy. Second, the Convention had to be construed as a whole; and as article 8 permitted the authorities to refrain in some cases from giving the person concerned a prompt notification of surveillance that had been carried out, such a withholding of notification could not be treated as a deprivation of an effective remedy under article 13, even though it made it practically impossible in such cases to pursue a remedy. The "effective remedy" under article 13 must be a remedy that is consistent with article 8. Third, when the notification could be given without jeopardising the object of the surveillance, German law required it to be given, and thereupon the person concerned would be able effectively to pursue the remedies that German law provided; and the aggregate of these remedies satisfied article 13. For these reasons the court held that there had been no breach of articles 8 or 13, so that the claim failed. There was a further point, based on article 6, but I need not consider that.

I have devoted some space to setting out a summary of the *Klass* decision because Mr. Ross-Munro placed so much weight on it, and because of the background that it provides for the present case. The main thrust of his argument, which had a number of facets to it, was that although a treaty forms no part of the law of this country, it might nevertheless have some effect in English law. In this case, he said, the Convention, as construed in the *Klass* case, could and should have a significant effect in determining what the law was on a point which, like this, was devoid of any direct authority. On this, he put before me a number of recent authorities in the Court of Appeal. In these, the high water mark for his purpose was, I think, the judgment of Scarman L.J. in *Pan-American World Airways Inc.* v. *Department of Trade* [1976] 1 Lloyd's Rep. 257, 261. After stating that the treaty there in question was "no part of the law of England," Scarman L.J. referred to a situation where it would be proper for the courts to take note of an international convention. That arose when two courses were reasonably open to the court, but

> "one would lead to a decision inconsistent with Her Majesty's international obligations under the convention while the other would lead to a result consistent with those obligations. If statutory words have to be construed or a legal principle formulated in an area of the law where Her Majesty has accepted international obligations, our courts—who, of course, take notice of the acts of Her Majesty done in the exercise of her sovereign power—will have

regard to the convention as part of the full content or background of the law. Such a convention, especially a multilateral one, should then be considered by courts even though no statute expressly or impliedly incorporates it into our law."

There was then a reference to two of the cases which were cited to me, both of which concerned the Convention now before me. See also the subsequent case of *Reg.* v. *Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi* [1976] 1 W.L..R 979, especially at p. 984, *per* Lord Denning M.R., and contrast p. 986, *per* Roskill L.J., questioning the dictum of Scarman L.J.

It is not for me, sitting at first instance, to resolve the variant shades of meaning in the dicta, and I do not attempt to do so. For the present, all that I say is that I take note of the Convention, as construed in the *Klass* case, and I shall give it due consideration in discussing English law on the point. As for the direct right which the Convention confers, it seems to me to be plain that this is a direct right in relation to the European Commission of Human Rights and the European Court of Human Rights, the bodies established by the Convention, but not in relation to the courts of this country. The Convention is plainly not of itself law in this country, however much it may fall to be considered as indicating what the law of this country should be, or should be construed as being.

Finally, there is the contention that as no power to tap telephones has been given by either statute or common law, the tapping is necessarily unlawful. The underlying assumption of this contention, of course, is that nothing is lawful that is not positively authorised by law. As I have indicated, England is not a country where everything is forbidden except what is expressly permitted. One possible illustration is smoking. I inquired what positive authority was given by the law to permit people to smoke. Mr. Ross-Munro accepted that there was none; but tapping, he said, was different. It was in general disfavour, and it offended against usual and proper standards of behaviour, in that it was an invasion of privacy and an interference with the liberty of the individual and his right to be let alone when lawfully engaged on his own affairs.

I did not find this argument convincing. A stalwart non-smoker, whether life-long or redeemed, might consider that most or all of what Mr. Ross-Munro said applied with equal force to the not inconsiderable numbers of non-smokers. In leading an ordinary life they often find themselves unable to avoid inhaling in an enclosed space the products of a combustion deliberately caused by a smoker who knows that the fumes that he is creating will spread, and will affect other people. But in any case the answer destroys the underlying assumption and mutilates the proposition. The notion that some express authorisation of law is required for acts which meet with " general disfavour," and " offend against proper standards of behaviour," and so on, would make the state of the law dependent on subjective views on indefinite concepts, and would be likely to produce some remarkable and contentious results. Neither in principle nor in authority can I see any justification for this

A view, and I reject it. If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful. The question, of course, is whether tapping can be carried out without infringing the law.

Those, then, are Mr. Ross-Munro's three main contentions. Before B I consider them further I must say something about the process of tapping in question. The plaintiff has understandably produced no evidence on this, for he is in the dark. All that he has been able to do is put forward reasons for thinking that his telephone has been tapped, in addition, of course, to the admission by leading counsel for the Crown at his trial. Thus he speaks of clicking noises on his telephone, and of various events which he thinks would not have happened if his C telephone had not been tapped at the time. All the evidence of the process of tapping comes from the defendant, in an affidavit by the head of the Criminal Investigation Department of the Metropolitan Police, Mr. G. J. Kelland, who is Assistant Commissioner (Crime). His affidavit refers to the Birkett Report, and certain conclusions in that report. He speaks of the value of tapping in the detection of major D crimes, including the receiving of stolen property, and he then turns to the safeguards, which he says are still rigorously observed by the Metropolitan Police. They are as follows. (1) No warrant to tap a telephone is sought unless "strict conditions" laid down by the Home Office are satisfied. What those conditions are is not stated. (2) All applications are considered carefully by the Home Office and by the Secretary of State personally. (3) No tapping is authorised save by a E warrant under the Secretary of State's own hand. (4) Every warrant is limited to a defined period not exceeding two months, though in a proper case this may be extended from time to time. The affidavit, however, says nothing about the recommendation in paragraph 74 of the Birkett Report that every warrant should be reviewed at least once a month by the police and the Home Office. (5) Tapping is discontinued F when it is no longer needed. (6) The only material transcribed from the recording is the part that the police consider to be relevant to the inquiry in hand; the record of the rest is destroyed.

As appears from the Birkett Report (see paragraph 115 et seq.), the process of tapping is that the Home Secretary's warrant is sent directly to the Post Office, which alone can put it into effect. The recording is a purely mechanical process: the Post Office officials do not listen to G the conversations save occasionally and briefly to see whether the machines are working properly. The police merely receive the recordings which the Post Office makes available to them in obedience to the warrant. A small number of selected police officers then listen to the recordings and transcribe the passages considered to be relevant to the inquiry; the rest are destroyed. The police thus seek the tap H and receive its fruits, but do not do any tapping themselves: that is done by the Post Office on the authority of the Home Secretary. Furthermore, the information obtained by tapping is not put in evidence (unless it gets in by some form of inadvertence, as may have occurred in the

criminal trial in this case), though it is used in the process of detection, and is valuable for this purpose.

It may be convenient if I mention at this stage a cousin of what is generally regarded as telephone tapping. It does not arise in any direct way in this case, and I mention it only to dispose of it. This process involves no recording of conversations, but merely the recording of the numbers of any telephones called from the telephone in question. In other words, when an outgoing call is made, the number called is recorded; but no record is made of the numbers from which incoming calls are made. The Post Office employs an apparatus for this purpose which is designed for use in cases where there is some dispute about telephone charges or the like; and this apparatus, duly connected to the telephone line in question, can be used for recording the numbers dialled, and this record can then be passed on to the police. There is no evidence on this process of recording numbers, apart from the plaintiff's complaint in his affidavit; but by the end of the hearing it seems to have been generally accepted that this process is carried out without a warrant and without the administrative safeguards laid down for telephone tapping proper. However, in his concluding speech Mr. Ross-Munro realistically conceded that if his case on tapping failed, he did not see how he could succeed on the recording of numbers. I shall therefore not consider this point separately.

I may also dispose of one further point. It could be said that the claim against the defendant was misconceived since neither he nor any of his officers have done anything save to ask for information and receive it when obtained. All the work of tapping was done by the Post Office, which is not a party to these proceedings. However, Mr. Rattee was concerned to uphold the legality of tapping as practised on behalf of the Metropolitan Police, and expressly disclaimed any contention that the proceedings were misconceived. On the footing that the police knew full well the circumstances in which what they were seeking would be obtained, and had in fact been obtained, it seems to me that I can accept that the defendant is sufficiently responsible for any tapping that has occurred to make it possible for me to do what all concerned wish, and deal with the case on its merits.

Now that I have dealt with these matters, I can consider the contentions of Mr. Ross-Munro that I have attempted to summarise. I propose to take his three main contentions by stages. His first main contention was that by reason of the right of privacy and the right of confidentiality it was unlawful to tap a telephone, even under the authority of a warrant of the Home Secretary. I need not mention the argument based on property as I have already rejected it.

First, I do not think that any assistance is obtained from the general warrant cases, or other authorities dealing with warrants. At common law, the only power to search premises under a search warrant issued by a justice of the peace is to search for stolen goods: see *Entick* v. *Carrington*, 19 St.Tr. 1029, 1067. However, many statutes authorise searches under search warrants for many different purposes; and there is admittedly no statute which in terms authorises the tapping of telephones, with or without a warrant. Nevertheless, any conclusion

that the tapping of telephones is therefore illegal would plainly be superficial in the extreme. The reason why a search of premises which is not authorised by law is illegal is that it involves the tort of trespass to those premises: and any trespass, whether to land or goods or the person, that is made without legal authority is prima facie illegal. Telephone tapping by the Post Office, on the other hand, involves no act of trespass. The subscriber speaks into his telephone, and the process of tapping appears to be carried out by Post Office officials making recordings, with Post Office apparatus on Post Office premises, of the electrical impulses on Post Office wires provided by Post Office electricity. There is no question of there being any trespass on the plaintiff's premises for the purpose of attaching anything either to the premises themselves or to anything on them: all that is done is done within the Post Office's own domain. As Lord Camden C.J. said in *Entick* v. *Carrington,* 19 St.Tr. 1029, 1066, "the eye cannot by the laws of England be guilty of a trespass"; and, I would add, nor can the ear.

Second, I turn to the warrant of the Home Secretary. This contrasts with search warrants in that it is issued by one of the great officers of state as such, and not by a justice of the peace acting as such. Furthermore, it does not purport to be issued under the authority of any statute or of the common law. From the Birkett Report (see paragraph 40 et seq.) it appears that the power to tap telephones has been exercised "from time to time since the introduction of the telephone," but that not until 1937 were any warrants issued. Until then, the Post Office took the view that any operator of telephones had a power to tap conversations without infringing any rule of law. The police authorities accordingly made arrangements directly with the Director-General of the Post Office for any tapping of telephones that might be required. In 1937, however, the Home Secretary and Postmaster General decided, as a matter of policy, that thenceforward records of telephone conversations should be made by the Post Office and disclosed to the police only on the authority of the Home Secretary. The view was taken that certain statutes which permitted the interception of letters and telegrams on the authority of a Secretary of State were wide enough to cover telephone tapping. The decision seems to have been based partly on what was desirable as a matter of policy, and partly on an application of the statutory power of interception, or some analogy to it. At all events, the decision seems plainly to have been an administrative decision not dictated or required by statute.

At that stage, the Home Secretary and the Postmaster General were both officers of state under the Crown, and the Post Office was a department of state. The Post Office Act 1969, which came into force on October 1, 1969, changed that. The office of Postmaster General was abolished, a new corporate public authority was established under the name of the Post Office, governed by a chairman and a number of members, and the office of Minister of Posts and Telecommunications was created, with certain supervisory functions in relation to the Post Office. In 1974 all these functions were transferred to the Home Secretary, and the Ministry of Posts and Telecommunications was

dissolved: Ministry of Posts and Telecommunications (Dissolution) Order 1974 (S.I. 1974 No. 691).

One result of the change in the status of the Post Office in 1969 was that as it was no longer under the direct control of a Minister of the Crown, but had become a corporation with a large measure of independence from the Crown, no assumption could any longer be made that the Post Office would act upon a warrant of the Home Secretary to tap telephones. If previously the Postmaster General had wished not to obey such a warrant, there would have been a disagreement between two Ministers of the Crown which, in default of some other means of resolution, would presumably have been determined by the Cabinet. That, however, ceased to be the position in 1969; and one aspect of the change was dealt with by section 80 of the Act. This provision, on which the Solicitor-General placed great weight, runs as follows:

> "A requirement to do what is necessary to inform designated persons holding office under the Crown concerning matters and things transmitted or in course of transmission by means of postal or telecommunication services provided by the Post Office may be laid on the Post Office for the like purposes and in the like manner as, at the passing of this Act, a requirement may be laid on the Postmaster General to do what is necessary to inform such persons concerning matters and things transmitted or in course of transmission by means of such services provided by him."

This, said the Solicitor-General, plainly showed that Parliament intended to provide lawful authority in the changed circumstances for what had previously been done in the old circumstances. The Home Secretary's warrant, which had previously been given under administrative arrangements, now had a statutory function as being a "requirement" under section 80, and, what is more, as a requirement that statute authorised to be "laid" on the Post Office. Although the previous arrangements had been merely administrative, they had been set out in the Birkett Report a dozen years earlier, and the section plainly referred to these arrangements; if not, it was difficult to see what the section had in view, and certainly nothing intelligible has been suggested. A warrant was not needed to make the tapping lawful: it was lawful without any warrant. But where the tapping was done under warrant (and that is the only matter before me) the section afforded statutory recognition of the lawfulness of the tapping. In their essentials, these contentions seem to me to be sound.

Section 80 of the Post Office Act 1969 does not stand alone, however; there is also paragraph 1 (1) of Schedule 5 to that Act. To explain the purport of this it is necessary to refer to three statutes which on the face of them appear to refer to telegrams rather than telephone conversations. Section 45 of the Telegraph Act 1863 made it an offence if any person employed by a telegraph company "improperly divulges to any person the purport of any message." Section 20 of the Telegraph Act 1868 made it an offence if any Post Office official:

A "shall, contrary to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic messages or any message intrusted to the Postmaster General for the purpose of transmission . . ."

These provisions were both enacted before section 4 of the Telegraph Act 1869 had given the Postmaster General his monopoly of B transmitting telegrams, and of course long before the telephone service came into being in 1879. Finally, there is section 11 of the Post Office (Protection) Act 1884. This made it an offence if any employee of a telegraph company (as defined) "improperly divulges to any person the purport of any telegram." These provisions all thus give rise to possible questions of the meaning of "improperly" divulging, or disclosing "contrary to his duty": if an instruction to divulge or disclose were C to be given by an official superior who appeared to be acting within the scope of his duty, would an employee who obeyed the instruction be guilty of an offence? At the same time, there is the question whether this had anything to do with telephone conversations as opposed to telegrams.

Now this latter point is subject to some authority. In *Attorney-*D *General* v. *Edison Telephone Co. of London Ltd.* (1880) 6 Q.B.D. 244, a case in which the Crown had the opulent representation of both law officers and four other counsel, the question was whether the monopoly rights which section 4 of the Act of 1869 had given the Postmaster General for telegraphs was infringed by the operations of a telephone company. A Divisional Court of the Exchequer Division held that it was, and granted declarations, an injunction and an account against the E company. As the patents for the telephone had not been granted until 1877 and 1878, and the system did not exist in this country until 1879, this construction of the Act of 1869 was striking. A "telephone" was held to be a "telegraph" within the meaning of the Acts of 1863 and 1869, and a telephone conversation was held to be a "message," or at all events "a communication transmitted by a telegraph" within the F meaning of those Acts.

With that in mind I return to the offences created by the Acts of 1863, 1868 and 1884. These are the subject of paragraph 1 (1) of Schedule 5 to the Post Office Act 1969, a Schedule which bears the title "Repair of minor Deficiencies in certain Acts." This sub-paragraph provides that in proceedings against any person for an offence under these provisions, "it shall be a defence for him to prove that the act G constituting the offence was done in obedience to a warrant under the hand of a Secretary of State." If no more, this at least appears to recognise that the changed position of the Post Office and its employees made desirable some statutory provision giving some effect to a warrant of the Home Secretary in relation to the statutory offences in question. Whatever may be the position of an employee who makes a disclosure H on the orders of a superior who appears to be acting within the scope of his duty (and it is difficult to see how such a disclosure could be said to be an "improper" act by the employee, or "contrary to his duty"), such an employee has the protection of statute if he acts under a warrant

of the Home Secretary. It is true, as Mr. Ross-Munro pointed out, that Schedule 5 does not in terms empower the Home Secretary to issue a warrant in the way that is done by section 4 (1) of the Official Secrets Act 1920, which is expressed in very wide terms; and see the power given to the Governor by section 33 of the Hong Kong Telecommunication Ordinance 1963. That, however, does not alter the fact that by the Post Office Act 1969 Parliamentary recognition to such warrants was given. Accordingly, I leave this part of the case on the footing that by that Act Parliament has provided a clear recognition of the warrant of the Home Secretary as having an effective function in law, both as providing a defence to certain criminal charges, and also as amounting to an effective requirement for the Post Office to do certain acts.

I may add one comment. I do not think that the Telephone Regulations 1951 (S.I. 1951 No. 2075), regulation 55 (2), affects this case. That regulation gives the Post Office power to interrupt and terminate telephone conversations that are indecent or offensive, and so on; but I do not see how the fact that this power is given for limited purposes can negate any general power to tap telephones for police purposes in relation to crime.

Third, there is the right of privacy. Here the contention is that although at present no general right of privacy has been recognised by English law, there is a particular right of privacy, namely, the right to hold a telephone conversation in the privacy of one's home without molestation. This, it was said, ought to be recognised and declared to be part of English law, despite the absence of any English authority to this effect. As I have indicated, I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right.

On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times judges must, and do, legislate; but as Holmes J. once said, they do so only interstitially, and with molecular rather than molar motions: see *Southern Pacific Co.* v. *Jensen* (1917) 244 U.S. 205, 221, in a dissenting judgment. Anything beyond that must be left for legislation. No new right in the law, fully-fledged with all the appropriate safeguards, can spring from the head of a judge deciding a particular case: only Parliament can create such a right. The most obvious recent example of this is the so-called deserted wife's equity to occupy the matrimonial home. There was much uncertainty as to the ambit and operation of this right, and whether it arose from desertion alone, or whether there was also a betrayed wife's equity, a battered wife's equity, and so on, or, for that matter, a deserted husband's equity. After some 15 years of controversy and litigation, with its accompanying burden of costs, in *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1965] A.C. 1175 it was held that the equity had never existed. Parliament then enacted the Matrimonial Homes Act 1967, laying down a complete code which the

courts could not possibly have laid down by way of judicial decision. The fact that the code has its difficulties does not affect the matter: the point is that the Act dealt with a wide variety of circumstances, and provided a number of safeguards, in a way that no court could properly have done. Where there is some major gap in the law, no doubt a judge would be capable of framing what he considered to be a proper code to fill it; and sometimes he may be tempted. But he has to remember that his function is judicial, not legislative, and that he ought not to use his office to legislate in the guise of exercising his judicial powers.

One of the factors that must be relevant in such a case is the degree of particularity in the right that is claimed. The wider and more indefinite the right claimed, the greater the undesirability of holding that such a right exists. Wide and indefinite rights, while conferring an advantage on those who have them, may well gravely impair the position of those who are subject to the rights. To create a right for one person, you have to impose a corresponding duty on another. In the present case, the alleged right to hold a telephone conversation in the privacy of one's own home without molestation is wide and indefinite in its scope, and in any case does not seem to be very apt for covering the plaintiff's grievance. He was not "molested" in holding his telephone conversations: he held them without "molestation," but without their retaining the privacy that he desired. If a man telephones from his own home, but an open window makes it possible for a near neighbour to overhear what is said, and the neighbour, remaining throughout on his own property, listens to the conversation, is he to be a tortfeasor? Is a person who overhears a telephone conversation by reason of a so-called "crossed line" to be liable in damages? What of an operator of a private switchboard who listens in? Why is the right that is claimed confined to a man's own home, so that it would not apply to private telephone conversations from offices, call boxes or the houses of others? If they were to be included, what of the greater opportunities for deliberate overhearing that they offer? In any case, why is the telephone to be subject to this special right of privacy when there is no general right?

That is not all. Suppose that there is what for brevity I may call a right to telephonic privacy, sounding in tort. What exceptions to it, if any, would there be? Would it be a breach of the right if anyone listened to a telephone conversation in which some act of criminal violence or dishonesty was being planned? Should a listener be restrained by injunction from disclosing to the authorities a conversation that would lead to the release of someone who has been kidnapped? There are many, many questions that can, and should, be asked.

Without attempting to answer these questions, let me turn to the authorities on which Mr. Ross-Munro relied. I do not think that the common law offence of eavesdropping, abolished over ten years ago, gives him much help today. The gist of the offence was listening just outside a house with the object of spreading slanderous and mischievous tales; and this hardly seems apt if the listener tells nobody save the police. Telephone tapping for police purposes, too, does not involve any listening in proximity to any house, nor, of course, is it done with

any object of spreading any tales, whether slanderous and mischievous or otherwise: indeed, a close confidence within official circles surrounds information obtained by tapping. I cannot see how such telephone tapping could possibly be said to be within the mischief of eavesdropping, even if eavesdropping were tortious.

As for the Warren and Brandeis article in the *Harvard Law Review*, this argues for the existence of a general right to privacy, which Mr. Ross-Munro accepts does not exist in England, and does nothing to support the specialised right to telephonic privacy for which he does contend. The Fourth Amendment to the Constitution of the United States is different, of course. It has the especial force of being a part of the Constitution of that country; but there is no statute in this country which in any way corresponds to it. If there were such a statute here, it might indeed be that it would be construed in something like the same way: but there is not. Though mainly based on the English cases on general warrants, the Fourth Amendment goes far beyond anything to be found in those cases; and *Katz* v. *United States* 389 U.S. 347 is explicitly based on the Fourth Amendment. I do not think that either the Fourth Amendment or the decision gives any real assistance to Mr. Ross-Munro's contentions about the law of England.

I turn to *Rhodes* v. *Graham*, 37 S.W. (2d) 46, the case on private wire-tapping. As I have said, it would be deplorable if English law gave no remedy to the plaintiff in such a case. As the case was argued on demurrer, there were no findings of fact, and in particular no finding whether there had been any trespass. It is not easy to see what remedy there would be in English law. If instead of tapping a wire a person uses some form of wireless transmitter in order to obtain information as to the contents, sender or addressee of any message, whether sent by wireless or otherwise, then unless he is duly authorised, he would in England be guilty of an offence under section 5 (*b*) of the Wireless Telegraphy Act 1949; and similarly as to disclosing any information so obtained, except in the course of legal proceedings or for the purpose of any report thereof. In short, what is often called "bugging" appears to be caught by this provision: for a description of the devices available in 1972, see the Younger Report at p. 155. I have not been referred to any corresponding provision for cases where no wireless is used. If some wire or other tapping device is attached to a telephone wire in the airspace over the plaintiff's land, no doubt there would be some remedy in trespass. But if the connection is made to the wire after it has left the plaintiff's land, then whatever remedy the Post Office may have, it is difficult to see how the plaintiff could succeed in trespass. The Younger Report contains a substantial discussion of possible remedies: pp. 287–301. The tort of breach of statutory duty is not discussed, doubtless because section 5 of the Act of 1949, for instance, is framed in terms of simply creating an offence rather than imposing a duty.

Unless and until there is legislation on the point, the difficulty is likely to remain. If a case such as *Rhodes* v. *Graham* were to arise in England before Parliament has spoken, the court might well be

A confronted with the question whether the unauthorised tapping of a telephone without good cause, effected by attaching a wire to the property of the Post Office without consent, is actionable in tort by the person whose conversation is tapped. Under the pressure of a strong case for the intervention of the law, the court might find it possible in some way to hold such an act tortious: how, I cannot say. But no such case is before me. Unlike *Rhodes* v. *Graham,* there is here no B question of any wires being attached by anyone to the property of another, nor is there a total absence of any good cause for the tapping. In my judgment, neither *Rhodes* v. *Graham* itself, nor any principle that has been distilled from it in argument, supports the plaintiff's claim.

In the result, therefore, I can find nothing in the authorities or contentions that have been put before me to support the plaintiff's claim C based on the right of privacy. I therefore hold that the claim, so far as thus based, must fail.

Fourth, there is the right of confidentiality. Let me at the outset dispose of one point. If telephone services were provided under a contract between the telephone subscriber and the Post Office, then it might be contended that there was some implied term in that contract that telephone conversations should remain confidential and be free from D tapping. To meet such a possible contention, the Solicitor-General took me through a series of statutes and cases on the point, ending with certain sections of the Post Office Act 1969. The combined effect of sections 9 and 28 is that the Post Office is under a duty to provide certain services, including telephone services (though this duty is not enforceable by proceedings in court), and that the Post Office has power to make a scheme of charges and other terms and conditions for those E services, the charges being recoverable " as if " they were simple contract debts. Under section 28, the Post Office Telecommunication Scheme 1976 was duly made, bearing the name Scheme T1/1976: this was published as a supplement to the " London Gazette " of May 25, 1976. By paragraph 6 of the scheme, neither the scheme, nor anything done under it, nor any request for any service for which the scheme fixes or F determines any charges, terms or conditions, is to " constitute or lead to the formation of a contract between the Post Office and any other person; . . . " At the end of the Solicitor-General's submissions on the point Mr. Ross-Munro conceded that there was no contract as such between the plaintiff and the Post Office; and that, I think, is the end of any contention based on implied terms.

The right of confidentiality accordingly falls to be considered apart G from any contractual right. In such a case, it has been said that three elements are normally required if a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, 215, " must 'have the necessary quality of confidence about it.' Secondly, that information must have been H imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it ": see *Coco* v. *A. N. Clark (Engineers) Ltd.* [1969] R.P.C. 41, 47, cited by Lord Widgery C.J. in

Attorney-General v. *Jonathan Cape Ltd.* [1976] Q.B. 752, 769. Of the second requirement, it was said in the *Coco* case, at pp. 47–48: A

> "However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential."

What was in issue in the *Coco* case was a communication by an inventor or designer to a manufacturer, and the alleged misuse of that information by the manufacturer. In the present case, the alleged misuse is not by the person to whom the information was intended to be communicated, but by someone to whom the plaintiff had no intention of communicating anything: and that, of course, introduces a somewhat different element, that of the unknown overhearer. B C

It seems to me that a person who utters confidential information must accept the risk of any unknown overhearing that is inherent in the circumstances of communication. Those who exchange confidences on a bus or a train run the risk of a nearby passenger with acute hearing or a more distant passenger who is adept at lip-reading. Those who speak over garden walls run the risk of the unseen neighbour in a toolshed nearby. Office cleaners who discuss secrets in the office when they think everyone else has gone run the risk of speaking within earshot of an unseen member of the staff who is working late. Those who give confidential information over an office intercommunication system run the risk of some third party being connected to the conversation. I do not see why someone who has overheard some secret in such a way should be exposed to legal proceedings if he uses or divulges what he has heard. No doubt an honourable man would give some warning when he realises that what he is hearing is not intended for his ears; but I have to concern myself with the law, and not with moral standards. There are, of course, many moral precepts which are not legally enforceable. D E

When this is applied to telephone conversations, it appears to me that the speaker is taking such risks of being overheard as are inherent in the system. As I have mentioned, the Younger Report referred to users of the telephone being aware that there were several well-understood possibilities of being overheard, and stated that a realistic person would not rely on the telephone system to protect the confidence of what he says. That comment seems unanswerable. In addition, so much publicity in recent years has been given to instances (real or fictional) of the deliberate tapping of telephones that it is difficult to envisage telephone users who are genuinely unaware of this possibility. No doubt a person who uses a telephone to give confidential information to another may do so in such a way as to impose an obligation of confidence on that other: but I do not see how it could be said that any such obligation is imposed on those who overhear the conversation, whether by means of tapping or otherwise. F G H

Even if any duty of confidentiality were, contrary to my judgment, to be held to bind those who overhear a telephone conversation, there remains the question of the limits to that duty. I have already discussed

A and accepted the formulation of Lord Denning M.R. in *Fraser* v. *Evans* [1969] 1 Q.B. 349, 362, namely, that of "just cause or excuse for breaking confidence," as well as his formulation in *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, based on whether the disclosure is in the public interest. I shall not repeat these alternative formulations; I treat the former as including the latter. If what is overheard, though confidential, is itself iniquity, it is plain that it is subject to no duty of B confidence. But if there is merely a suspicion of iniquity, does that justify a deliberate overhearing by means of a tap? Even if from time to time the tap provides information about iniquity, does that justify a process of recording entire conversations, and listening to those recordings, when much of the conversations may be highly confidential and untainted by any iniquity? Further, if there is a reasonable suspicion of iniquity, can C that suspicion justify tapping in order to find out whether the suspicion is well founded, if in fact the conversations are wholly innocent?

I think that one has to approach these matters with some measure of balance and common sense. The rights and liberties of a telephone subscriber are indeed important; but so also are the desires of the great bulk of the population not to be the victims of assault, theft or other crimes. The detection and prosecution of criminals, and the discovery D of projected crimes, are important weapons in protecting the public. In the nature of things it will be virtually impossible to know beforehand whether any particular telephone conversation will be criminal in nature. The question is not whether there is a certainty that the conversation tapped will be iniquitous, but whether there is just cause or excuse for the tapping and for the use made of the material obtained by the tapping.

E If certain requirements are satisfied, then I think that there will plainly be just cause or excuse for what is done by or on behalf of the police. These requirements are, first, that there should be grounds for suspecting that the tapping of the particular telephone will be of material assistance in detecting or preventing crime, or discovering the criminals, or otherwise assisting in the discharge of the functions of F the police in relation to crime. Second, no use should be made of any material obtained except for these purposes. Third, any knowledge of information which is not relevant to those purposes should be confined to the minimum number of persons reasonably required to carry out the process of tapping. If those requirements are satisfied, then it seems to me that there will be just cause or excuse for carrying out the tapping, and using information obtained for those limited G purposes. I am not, of course, saying that nothing else can constitute a just cause or excuse: what I am saying is that if these requirements are satisfied, then in my judgment there will be a just cause or excuse. I am not, for instance, saying anything about matters of national security: I speak only of what is before me in the present case, concerning tapping for police purposes in relation to crime.

H So far as the evidence goes, it seems to me that the process of tapping, as carried out on behalf of the police in relation to crime, fully conforms with these requirements: indeed, there are restrictions on tapping, and safeguards, which go beyond these requirements. The

only possible difficulty is in relation to the "strict conditions" laid down by the Home Office which have to be satisfied before the warrant of the Home Office is sought; for I do not know what these conditions are. However, Mr. Kelland's affidavit states in relation to the plaintiff that if a warrant had been sought by the Metropolitan Police (and he says nothing as to whether in fact it was) "the sole purpose in seeking such a warrant would have been to obtain information of value in the detection and prevention of serious crime." This, coupled with the other evidence, makes it clear enough, I think, that the first of the three requirements that I have stated would be satisfied. Accordingly, in my judgment, if, contrary to my opinion, telephone tapping on behalf of the police is a breach of any duty of confidentiality, there is just cause or excuse for that tapping in the circumstances of this case.

I would add one comment. I have already mentioned section 5 (*b*) of the Wireless Telegraphy Act 1949. Under this, there is no offence if the information is obtained by a Crown servant in the course of his duty or under the authority of the Postmaster General (now the Home Secretary). This, said Mr. Rattee, made it improbable that there was any general law against telephone tapping; for Parliament would hardly empower the Postmaster General to authorise such tapping as regards the criminal law if all the time it was tortious. This contention seems to me to have some force.

Fifth, there is Mr. Ross-Munro's second main head, based on the European Convention for the Protection of Human Rights and Fundamental Freedoms and the *Klass* case. The first limb of this relates to the direct rights conferred by the Convention. Any such right is, as I have said, a direct right in relation to the European Commission of Human Rights and the European Court of Human Rights, and not in relation to the courts of this country; for the Convention is not law here. Article 1 of the Convention provides that the High Contracting Parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"; and those rights and freedoms are those which are set out in articles 1 to 18 inclusive. The United Kingdom, as a High Contracting Party which ratified the Convention on March 8, 1951, has thus long been under an obligation to secure these rights and freedoms to everyone. That obligation, however, is an obligation under a treaty which is not justiciable in the courts of this country. Whether that obligation has been carried out is not for me to say. It is, I suppose, possible to contend that the de facto practice in this country sufficiently secures these rights and freedoms, without legislation for the purpose being needed. It is also plainly possible to contend that, among other things, the existing safeguards against unbridled telephone tapping, being merely administrative in nature and not imposed by law, fall far short of making any rights and freedoms "secure" to anyone. However, as I have said, that is not for me to decide. All that I do is to hold that the Convention does not, as a matter of English law, confer any direct rights on the plaintiff that he can enforce in the English courts.

Sixth, there is the second limb of Mr. Ross-Munro's contentions, based on the Convention and the *Klass* case as assisting the court to

A determine what English law is on a point on which authority is lacking or uncertain. Can it be said that in this case two courses are reasonably open to the court, one of which is inconsistent with the Convention and the other consonant with it? I refer, of course, to the words of Scarman L.J. in the *Pan-American* case [1976] 1 Lloyd's Rep. 257 that I have already quoted. I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the Convention, the court would readily seek to construe the legislation in a way that would effectuate the Convention rather than frustrate it. However, no relevant legislation of that sort is in existence. It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed.

Now the West German system that came under scrutiny in the *Klass* case was laid down by statute, and it contained a number of statutory safeguards. There must be imminent danger: other methods of surveillance must be at least considerably more difficult; both the person making the request for surveillance and the method of making it are limited; the period of surveillance is limited in time, and in any case must cease when the need has passed; the person subjected to surveillance must be notified as soon as this will not jeopardise the purpose of surveillance; no information is made available to the police unless an official qualified for judicial office is satisfied that it is within the safeguards; all other information obtained must be destroyed; the process is supervised by a Parliamentary board on which the opposition is represented; and there is also a supervising commission which may order that surveillance is to cease, or that notification of it is to be given to the person who has been subjected to it. Not a single one of these safeguards is to be found as a matter of established law in England, and only a few corresponding provisions exist as a matter of administrative procedure.

It does not, of course, follow that a system with fewer or different safeguards will fail to satisfy article 8 in the eyes of the European Court of Human Rights. At the same time, it is impossible to read the judgment in the *Klass* case without its becoming abundantly clear that a system which has no legal safeguards whatever has small chance of satisfying the requirements of that court, whatever administrative provisions there may be. Broadly, the court was concerned to see whether the German legislation provided "adequate and effective safeguards against abuse." Though in principle it was desirable that there should be judicial control of tapping, the court was satisfied that the German system provided an adequate substitute in the independence of the board and Commission from the authorities carrying out the surveillance. Further, the provisions for the subsequent notification of the surveillance when this would not frustrate its purpose were also considered to be adequate. In England, on the other hand, the system in operation provides no such independence, and contains no provision whatever for subsequent notification. Even if the system were to be

considered adequate in its conditions, it is laid down merely as a matter of administrative procedure, so that it is unenforceable in law, and as a matter of law could at any time be altered without warning or subsequent notification. Certainly in law any "adequate and effective safeguards against abuse" are wanting. In this respect English law compares most unfavourably with West German law: this is not a subject on which it is possible to feel any pride in English law.

I therefore find it impossible to see how English law could be said to satisfy the requirements of the Convention, as interpreted in the *Klass* case, unless that law not only prohibited all telephone tapping save in suitably limited classes of case, but also laid down detailed restrictions on the exercise of the power in those limited classes. It may perhaps be that the common law is sufficiently fertile to achieve what is required by the first limb of this; possible ways of expressing such a rule may be seen in what I have already said. But I see the greatest difficulty in the common law framing the safeguards required by the second limb. Various institutions or offices would have to be brought into being to exercise various defined functions. The more complex and indefinite the subject matter, the greater the difficulty in the court doing what it is really appropriate, and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts to struggle with such a problem. Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision.

It appears to me that to decide this case in the way that Mr. Ross-Munro seeks would carry me far beyond any possible function of the Convention as influencing English law that has ever been suggested; and it would be most undesirable. Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the Convention nor the *Klass* case can, I think, play any proper part in deciding the issue before me. Accordingly, the second limb of Mr. Ross-Munro's second main contention also fails.

I would only add that, even if it was not clear before, this case seems to me to make it plain that telephone tapping is a subject which cries out for legislation. Privacy and confidentiality are, of course, subjects of considerable complexity. Yet however desirable it may be that they should at least to some extent be defined and regulated by statute, rather than being left for slow and expensive evolution in individual cases brought at the expense of litigants and the legal aid fund, the difficulty of the subject matter is liable to discourage legislative zeal. Telephone tapping lies in a much narrower compass; the difficulties in legislating on the subject ought not to prove insuperable; and the requirements of the Convention should provide a spur to action, even if belated. This, however, is not for me to decide. I can do no more than express a hope, and offer a proleptic welcome to any statute on the

A subject. However much the protection of the public against crime demands that in proper cases the police should have the assistance of telephone tapping, I would have thought that in any civilised system of law the claims of liberty and justice would require that telephone users should have effective and independent safeguards against possible abuses. The fact that a telephone user is suspected of crime increases rather than diminishes this requirement: suspicions, however reasonably held, B may sometimes prove to be wholly unfounded. If there were effective and independent safeguards, these would not only exclude some cases of excessive zeal but also, by their mere existence, provide some degree of reassurance for those who are resentful of the police or believe themselves to be persecuted. I may perhaps add that it would be wrong to allow my decision in this case to be influenced by the consideration C that if the courts were to hold that all telephone tapping was illegal, this might well offer a strong and prompt inducement to the government to persuade Parliament to legislate on the subject.

Seventh, there is Mr. Ross-Munro's third main contention, based on the absence of any grant of powers to the executive to tap telephones. I have already held that if such tapping can be carried out without committing any breach of the law, it requires no authorisation D by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful. Now that I have held that such tapping can indeed be carried out without committing any breach of the law, the contention necessarily fails. I may also say that the statutory recognition given to the Home Secretary's warrant seems to me to point clearly to the same conclusion.

E I have now dealt fully, I hope, with the main issues that were put before me. I regret the length of this judgment, perhaps more than anyone else; but it seemed desirable to consider the issues in full, both in the interests of the litigants and in the public interest. A number of subsidiary matters arose which do not, I think, call for specific mention. But there are two points on which I must say something. First, there are the learned contentions which I found, long after I had reserved F judgment, in *Street, The Law of Torts*, 6th ed. (1976), pp. 448–451. These were not discussed in argument, either on property or on privacy or on confidentiality. I have given them such consideration as I have been able, and I shall say no more than that however cogent they may be on the general questions, they did not change my conclusions on the particular issues before me in this case. I mention them in case they might be of some help to others. Second, I must say something more G about the series of declarations that have been claimed. The remedy of a declaration is, of course, discretionary. A declaration will normally not be granted on abstract questions or hypothetical facts. It is no use asking the court to make a general declaration stating what the law is on such-and-such a topic. A declaration will usually be made only on the specific facts of a specific case, and after proper evidence and H argument has been put before the court. The court cannot make an interlocutory declaration (see *Hill* v. *C. A. Parsons & Co. Ltd.* [1972] Ch. 305, 324); and apart from the bare possibility of the court making a final declaration in interlocutory proceedings (see *International*

General Electric Company of New York Ltd. v. *Commissioners of Customs and Excise* [1962] Ch. 784, 789), no declaration will be made on motion. It is a solemn matter for the court to make a declaration of rights, especially in a case which is of concern to many people; and the court should do so only after the full process of law has been employed to acertain the complete facts and the contentions.

Now as I have explained, the proceedings now before me began life as an interlocutory motion for an injunction. Apart from the amended statement of claim, there have been no pleadings. There is some affidavit evidence, but that is all; there has been no discovery and there has been no viva voce evidence. By consent, the motion has been treated as the trial of the action, with the series of declarations sought by the amendments to the statement of claim replacing the injunction claimed by the notice of motion. Those declarations are in a wide form and raise matters of public concern. They relate to the plaintiff's "telephone lines" in general, and, unlike the motion, they are not confined to the plaintiff's present telephone number. Apart from the admission by the Crown at the criminal trial that the plaintiff's former telephone number had been tapped, there is no direct evidence of any tapping. There are only the inferences which can be drawn from the events which the plaintiff describes in his affidavit evidence, inferences which would have to be drawn without the advantage of hearing oral testimony in chief and under cross-examination. The result is that the case falls for determination in an atmosphere of incomplete investigation which leaves me uncertain how far the facts are hypothetical and how far further investigation might have revealed more. There has, of course, been no lack of argument by counsel; my doubts are as to the foundations for those arguments.

For these reasons, I felt some concern from time to time whether it was right to permit the hearing to continue. However, all concerned were anxious to proceed on the footing agreed on Day 2, and in the end I refrained from intervening on this point. In this restraint I was encouraged by my growing suspicion that ultimately my conclusion would be that none of the declarations ought to be granted. In the event, if I was wrong not to intervene, I do not think any harm has been done. I refer to the point, however, by way of warning for other cases. I certainly do not say that no declaration will ever be granted on a motion which, by consent, is treated as the trial of the action. What I do say is that those who seek a declaration in this way should realise that where the declaration rests on a foundation of facts (rather than, for instance, the construction of some document or statute), the absence of a full process of trial, and the presence of some element of hypothesis, may make the court reluctant to grant relief by way of declaration, especially if the declarations sought are wide in their terms and their possible application.

That said, I turn to the declarations claimed in the present case. I put them shortly. The first is that any interception, monitoring or recording of conversations on the plaintiff's telephone lines without his consent, or disclosing the contents thereof to third parties, is unlawful, even if effected pursuant to the Home Secretary's warrant. This seems

wholly inappropriate to a case where, so far as the evidence goes, it is neither the defendant nor his officers who have done any intercepting, monitoring or recording, or any disclosing, but the Post Office. There is no suggestion that the defendant's officers did anything more than seek the Home Secretary's warrant, and receive and use what the Post Office obtained for them in obedience to that warrant. If the declaration is treated as meaning that any intercepting, monitoring or recording by anyone is illegal, then it is far too wide: if it is narrowed by inserting the words " by the defendant," then there is nothing in the evidence to support it; and if instead it is narrowed by inserting the the words " by the Post Office," then it is plainly inappropriate in proceedings which are brought against the Commissioner of Police and not the Post Office. Similar comments apply to the second, third and fourth declarations that are sought in the remaining parts of paragraph 1 of the prayer for relief. Of course, the precise terms of the declaration sought in an action are often modified by the court. I am not saying that these declarations are beyond redemption, though some fairly heroic surgery would be needed. But I need not pursue the matter because, for the reasons that I have given, I hold that no unlawful conduct has been established; and this goes to the heart of the matter. What I have said also applies to the alternative versions introduced on Day 7, confining these declarations to cases in which there is a reasonable possibility of the telephone conversations being confidential, and extending them to making use of the contents of the conversations. Accordingly, I dismiss the claims to these declarations whatever their form.

The fifth declaration, claimed by paragraph 2 of the prayer for relief, is somewhat different. It is, first, that the plaintiff has a right of property, privacy and confidentiality in respect of telephone conversations made on his telephone lines, and, second, that the interception, monitoring, recordings and disclosures referred to in paragraph 1 of the prayer are in breach thereof. The first limb of this is perfectly general in its terms. There is nothing to confine it to anything for which the defendant is responsible, and it would plainly be wrong to make a declaration of that width. The second limb is, of course, confined to the stated interception, monitoring, recordings and disclosures; but these are open to the objections that I have already stated. I doubt if this declaration is really more than a way of stating that the plaintiff's claim is based on rights of property, privacy and confidentiality; and of course I have already rejected these claims, for the reasons that I have given. Accordingly, the claim to the declaration set out in paragraph 2 of the prayer for relief fails and will be dismissed. As for the claims for declarations under paragraphs 3, 4 and 5 of the prayer, I have already given my reasons for dismissing them.

In the result, the plaintiff's claim fails in its entirety, and will be dismissed. In saying that I think I should add a word to avoid possible misunderstandings as to the ambit of what I am deciding. Though of necessity I have discussed much, my actual decision is closely limited. It is confined to the tapping of the telephone lines of a particular person which is effected by the Post Office on Post Office premises in pursuance

of a warrant of the Home Secretary in a case in which the police have just cause or excuse for requesting the tapping, in that it will assist them in performing their functions in relation to crime, whether in prevention, detection, discovering the criminals or otherwise, and in which the material obtained is used only by the police, and only for those purposes. In particular, I decide nothing on tapping effected for other purposes, or by other persons, or by other means; nothing on tapping when the information is supplied to persons other than the police; and nothing on tapping when the police use the material for purposes other than those I have mentioned. The principles involved in my decision may or may not be of some assistance in such other cases, whether by analogy or otherwise: but my actual decision is limited in the way that I have just stated.

Plaintiff's claim dismissed with costs.

Solicitors: *Davis Hanson; R. E. T. Birch; Treasury Solicitor.*

K. N. B.

MIDLAND BANK TRUST CO. LTD. AND ANOTHER *v.* HETT, STUBBS & KEMP (A FIRM)

[1972 G. No. 2267]

1977 Oct. 25, 26, 27; Nov. 1, 2, 3; 21 — Oliver J.

Solicitor—Negligence—Tort, whether liable in—Option to purchase farm—Solicitor's omission to register option as land charge—Option defeated by sale of land to third party—Whether right of action against solicitors statute-barred—Whether solicitors liable both in tort and contract

Limitation of Action—Contract, breach of—Negligence—Solicitor's failure to register option to purchase farm — Land sold to defeat option—Whether solicitor's duty continuing one—Whether action statute-barred

In March 1961 W agreed to grant his son, G, an option to purchase from him a 300-acre farm which at that time was let to G at a rent of £900 per annum. They went to the defendant firm of solicitors, and S, the senior partner, drew up a document which W signed and which was dated March 24, 1961, whereby in consideration of £1 paid by G, W thereby granted to G the option of purchasing the farm at £75 per acre. The option was expressed to remain effective for 10 years. G duly paid the consideration of £1 but, unfortunately, S omitted to register the option as an estate contract under the Land Charges Act 1925. On a number of occasions, G consulted the defendant firm on the question whether he should exercise the option. On August 17, 1967, W, with