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Legal history in court: lessons from *Mexfield* and *Southward*

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Introduction

Almost all commentators have believed the ratio of *Mexfield Housing Co-operative Ltd v Berrisford*¹ to be as follows:² Where an agreement attempts to grant to an individual a tenancy terminable only on the occurrence of an uncertain event, ordinary interpretation does not apply. Instead, the court must apply an allegedly ancient but long-forgotten rule, by which the agreement must be deemed to be a life tenancy, subject to earlier determination on the stated event, no matter what the parties could reasonably be held to have intended. This provides a crude and arbitrary exception to the crude and arbitrary rule in *Prudential Assurance Co Ltd v London Residuary Body*,³ by which a tenancy without a fixed maximum term, or a periodic tenancy with a fetter of uncertain duration, is void even where this plainly violates any reasonable assessment of the parties' intentions. The alleged ancient rule avoids violating the

* University of Manchester. For helpful discussions and comments, I am very grateful to Martin Dixon, Michael Haley, John Mee, Nick Isaac, Mark Wonnacott, and the anonymous referees; all faults remain my own.

¹ [2012] 1 AC 955.

² See eg C Hunter and D Cowan, 'The future of housing co-operatives: *Mexfield* and beyond' (2012) 15 JHL 26, 30; K Low, 'Certainty of terms and leases: curiouser and curiouser' (2012) 75 MLR 401, 404; S Bright, 'The uncertainty of certainty in leases' (2012) 128 LQR 337; P Butt, 'Leases and the principle of uncertainty: a legal exhumation in the UK Supreme Court' (2012) 86 *Australian Law Journal* 515; S Murdoch, 'A supremely unsatisfactory solution' (2012) 1202 EG 67. Contra, J Roche, 'Constitutional land law: *Mexfield* and the 40-shilling freehold' in W Barr (ed), *Modern Studies in Property Law: Vol 8* (Hart, 2015), ch 16, at 305.

³ [1992] 2 AC 386.

rule in *Prudential* only because s.149(6) Law of Property Act 1925 converts a tenancy for life, or an agreement for one, into a lease, or agreement for a lease, for 90 years terminable earlier on the tenant's death or the events specified in the agreement.

However, there have now been two High Court judgments—*Secretary of State for Transport v Blake*⁴ and *Southward Housing Co-operative v Walker*⁵—concluding that the alleged ancient rule is not part of the ratio of *Mexfield*. Burton J in *Blake* and Hildyard J in *Southward* are, with respect, essentially correct: what has been widely believed to be the ratio of *Mexfield* is not. Further, it will be shown that what was said obiter in *Mexfield* concerning the alleged ancient rule was incorrect, due to an incorrect historical account put forward by counsel for one side and not effectively challenged by the other. The result clarifies the law, and puts *Prudential* even further out on a limb. It also highlights the practical importance of doctrinal legal history of the nineteenth and twentieth centuries, especially for land law.

Secretary of State for Transport v Blake

In *Blake*, two conjoined cases were heard by Burton J; Mrs Blake's case was swiftly dismissed, and the second case takes up most of the judgment. In 2005, Squadron Leader Nicholas entered into what was on the face of it a licence, with the MOD as licensor, of a house near the RAF base to which he was at the time posted, as "Service Family Accommodation" for himself and his wife.⁶ In 2008, he informed the MOD that he had moved out of the property and divorce proceedings were underway. In May 2008, he and Mrs Nicholas were given notice terminating the licence and requiring them—meaning, in the circumstances, Mrs Nicholas—to vacate the property by August 2008. By the time of Burton

⁴ [2013] EWHC 2945 (Ch)

⁵ [2015] EWHC 1615 (Ch)

⁶ *Blake* (n 4) at [2], [19]

J's judgment, nearly five years later, Mrs Nicholas was still there, while in the meantime no payment had been made for the accommodation since August 2008.⁷

The judgment sets out the terms of the agreement at length.⁸ Mr Nicholas could end the licence simply by written notice. The MOD would end the licence in listed circumstances including Mr Nicholas "vacat[ing] the property on matrimonial breakdown". At the end was a recital saying, "I understand that this Licence is to be granted because my occupation of the Property is required for the better performance of my service with the Crown and that this Licence is not a tenancy." The limited and superficial similarities between this recital and the recital in *Street v Mountford*,⁹ and between the structure of this agreement and the structure of the agreement in *Mexfield*, led counsel for Mrs Nicholas to submit that the agreement "was in fact a lease, because it provided for exclusive possession"; "[a]s no term is specified for the lease, it is, by virtue of *Berrisford v Mexfield* ... a lease for life, which was converted into a term for 90 years by virtue of the Law of Property Act 1925 s.149"; and, "[a]s there is no forfeiture clause in the licence, that means the 'lease' is non-terminable for 90 years."¹⁰

Burton J's response was that this "product of [counsel's] fertile mind is just not viable", first of all because service occupancies were "expressly excluded from the ordinary exclusive possession test by Lord Templeman in *Street*".¹¹ That was enough to decide the case, but Burton J went on: "As for *Mexfield*, although on the facts of that case a tenancy without a term was held to be a lease for life, and hence for 90 years, that was because the House of Lords [sic] concluded that that was what the parties in fact intended", by "[a]pplying ordinary principles of contractual construction".¹²

⁷ *Secretary of State for Defence v Nicholas* [2015] 1 WLR 2116 at [2]; *Blake* (n 4) at [19], [22], [25]

⁸ *Blake* (n 4) at [19]

⁹ [1985] AC 809 at 815G.

¹⁰ *Blake* (n 4) at [20]-[20(i)]

¹¹ *Blake* (n 4) at [21]-[21(i)]

¹² *Blake* (n 4) at [21(ii)]

Counsel for Mrs Nicholas also raised public-law challenges, and it was for one of these that permission to appeal was granted by Lewison LJ, who however subsequently gave the leading judgment dismissing the appeal.¹³ The facts of this case were so unmeritorious that it is of limited use as authority, least of all for *Mexfield*. Nonetheless, it is striking that Burton J felt able, even as obiter, to state so pithily a view of *Mexfield*'s ratio which is so different from that of almost all commentators.

Southward Housing Co-operative v Walker

In *Southward*, much more extensive consideration had to be given to *Mexfield*, because some key facts were the same in both cases: the claimants were fully mutual housing co-operatives, the defendants were members of the co-operative and occupied their home under a "Tenancy Agreement" with it, and the agreements in both cases had a number of similar features.¹⁴ But whereas in *Mexfield* the landlord attempted to avoid the plain terms of the agreement by using the crude rule in *Prudential*, in *Southward* the tenant attempted to avoid the plain terms of the agreement using the crude alleged rule in *Mexfield*.

Clause 4(2) of the agreement stated that Southward "will only end this tenancy with a Notice to Quit on one of the grounds set out in clause 7", which included non-payment or persistent delay in payment of rent.¹⁵ The agreement was entered into in April 2011, and, from September 2011 on, the defendants had been in arrears; by the time of the hearing before Hildyard J, in January 2015, the defendants could still show no reason to believe that they would be able to pay the rent consistently in future and pay off the arrears within a reasonable time or at all.¹⁶ On the face of it, Southward was absolutely entitled to serve notice in August

¹³ *Nicholas* (n 7) 2118A and [25]-[28]

¹⁴ *Southward* (n 5) at [7]-[18] and [38]-[39]

¹⁵ *Southward* (n 5) at [11]-[13] and [17]

¹⁶ *Southward* (n 5) at [9], [19]-[25], [149]

2013 and then issue proceedings.¹⁷ The defendants however, as in *Blake*, ran both public-law defences and a defence based on the alleged ratio of *Mexfield*: if the alleged ancient rule plus s.149(6) automatically turned the agreement into a 90-year lease, the lease could only be terminated earlier on the death of the defendants or by forfeiture, and there was no express forfeiture provision.¹⁸

Hildyard J therefore had to decide, as ratio, what the ratio of *Mexfield* was. After noting that *Mexfield* made plain “that what is expressed to be a periodic tenancy with a fetter on the landlord’s right to determine falls to be treated in the same way as a tenancy for an indeterminate term”,¹⁹ Hildyard J defined the question as: “Does the uncertainty of term mean that a tenancy for life must have arisen by operation of law?”²⁰ More precisely, the question was whether *Mexfield* meant he had to apply an alleged ancient rule having “the inexorable effect” of turning this agreement into a 90-year lease; he repeatedly used the word “inexorable” to encapsulate what concerned him.²¹ He noted that, on the particular facts in *Mexfield*—the wording of that agreement and its context—“all the justices of the Supreme Court were agreed that ... the parties did in fact intend a lease for life determinable earlier by the tenant on one month’s notice and by the landlord on the happening of certain specified events.”²² Therefore, in *Mexfield* “[i]t was not necessary to decide the issue as to the relevance of intention”²³ to the applicable law. In the case before him, by contrast, Hildyard J held that there was no intention to create a life tenancy, primarily on the grounds that the agreement had not, as in *Mexfield*, been made as part of a mortgage-rescue scheme and, “[m]ost

¹⁷ *Southward* (n 5) at [26]-[30]

¹⁸ *Southward* (n 5) at [101]-[103]

¹⁹ *Southward* (n 5) at [51] and [52]-[65], citing *Mexfield* at [54]-[56]

²⁰ *Southward* (n 5), heading before [67]

²¹ *Southward* (n 5) at [67], [70], [94(5)], [98]

²² *Southward* (n 5) at [69]

²³ *Southward* (n 5) at [48(10)]

importantly”, the agreement used the terminology of “notice to quit” rather than, as in *Mexfield*, “a right of re-entry”.²⁴

There are a number of problems with Hildyard J’s interpretation of the agreement before him, but there is no space to consider those here.²⁵ Given his interpretation, Hildyard J did have to grapple with what was said in *Mexfield* concerning possible conflict between the alleged ancient rule and a Court of Appeal decision, *Zimbler v Abrahams*,²⁶ made purely on the basis of interpreting the agreement. Hildyard J quoted the whole of the key paragraph of Lord Neuberger’s judgment (considered further below), in which Lord Neuberger said that, if *Zimbler* was taken to mean “that an agreement which purported to create a tenancy for an uncertain term could not give rise to a tenancy for life unless it was the parties’ intention to do so”, this would in his view be “wrong” because it was “inconsistent with” the alleged ancient rule, but also said that, “even if an agreement which creates an uncertain term could only have resulted in a tenancy for the life of the tenant if that was the intention of the parties,” this was the case “on a true construction of the agreement” before him.²⁷ Hildyard J then notes that there was unanimous agreement with Lord Neuberger’s judgment but quotes in particular from Lord Dyson: “it is clear from the authorities that”, before 1926, it “was a rule of the common law that” a periodic tenancy terminable by the landlord only on the occurrence of an uncertain event “was automatically treated as a tenancy for life. It had nothing to do with the intention of the parties.”²⁸

Hildyard J concluded, “with diffidence and anxiety”, that he could interpret Lord Neuberger’s judgment as meaning only that the alleged ancient rule did not depend “for its

²⁴ *Southward* (n 5) at [48(10)] and [72]

²⁵ See e.g. the factors Lord Neuberger particularly relied on in interpreting the *Mexfield* agreement (described below), and clause 5 of the *Southward* agreement, not mentioned by Hildyard J when construing the agreement but mentioned 65 paragraphs later: *Southward* (n 5) at [137]-[138].

²⁶ [1903] 1 KB 577

²⁷ *Mexfield* (n 1) at [44], quoted in *Southward* (n 5) at [84]

²⁸ *Southward* (n 5) at [85], quoting *Mexfield* (n 1) at [117]

application on the intention of the parties” in the sense that it could apply “where the parties had no inkling or intention that it would”.²⁹ On this interpretation of *Mexfield*, it “leave[s] open the possibility” that “the rule might yield to contrary intention”, if such contrary intention was apparent on ordinary construction of the agreement.³⁰ Therefore, as Hildyard J had held that, on ordinary interpretation, the parties in this case had not intended a tenancy for life subject to earlier determination, the alleged rule did not apply; so *Prudential* did, and there was no tenancy at all. However, “[a]ll members of the Supreme Court [in *Mexfield*] appear to have been receptive to the analysis that, if an agreement could not take effect as a tenancy (for want of certainty of term), it could nevertheless subsist as a contractual licence”, and Hildyard J “adopted” this analysis, with the result that the licence had been validly terminated.³¹

Hildyard J went on to consider the position if he was wrong in his interpretation of *Mexfield*. The effect, if the alleged ancient rule did apply, is said to be that the agreement would be turned into “a 90 year lease”,³² so issues regarding forfeiture are discussed at length. But that is, with respect, a transmogrification too far. The defendants could not have a legal lease for 90 years unless it was made by deed and registered, which it doubtless was not; they could at best have, as was found in *Mexfield*, a valid contract for a lease. Therefore, the question was not whether, if it was a lease, it could be forfeited, but rather whether, if it was a valid contract for a lease, specific performance could be granted. In accordance with the general principles of specific performance and with authority concerning their application to an agreement to grant a lease, it is practically inconceivable that specific performance would be granted unless the defendants paid the arrears and the landlord’s costs.³³ Specific performance would be even less likely in this case given the defendants’ persistent, long-term

²⁹ *Southward* (n 5) at [87]-[88]

³⁰ *Southward* (n 5) at [91] and [88]

³¹ *Southward* (n 5) at [94]-[96]

³² *Southward* (n 5) at [97]

³³ See e.g. *Megarry & Wade* at [17-056], [18-078], [18-081], and the authorities there cited.

failure to perform their side of the contract. The result would therefore be that the defendants would merely have an implied periodic tenancy, which the claimant had validly terminated.

This point does not appear to have been put to Hildyard J, so he considered whether the lease could be and had been forfeited, concluded it could and had, and said he would not have been inclined to grant relief from forfeiture. However, he added that, if he was wrong in his “primary conclusion” that the agreement was merely a contractual licence, “it may be that the question of relief should be further considered at the relevant time.”³⁴ Finally, counsel for the defendants raised the same sort of public-law objections as in *Blake/Nicholas*, and lost as in *Blake/Nicholas*. However, the defendants in *Southward* have not pursued an appeal; the parties have settled.³⁵ Because Hildyard J did not express a concluded view in his alternative route, his interpretation of *Mexfield* is technically ratio, and therefore binding on lower courts—unless or insofar as it is incompatible with a proper interpretation of *Mexfield* itself.

The key problem with Hildyard J’s interpretation of *Mexfield* lies in his discussion of ‘intention’. When Hildyard J interprets the comments of Lord Neuberger and Lord Dyson as meaning only that the alleged rule could apply “where the parties had no inkling or intention that it would”,³⁶ he seems clearly, from the use of “inkling”, to be referring to subjective intention. But this cannot have been their Lordships’ meaning. Consideration of subjective intention may form an element or limb of some legal rules, but it is in the nature of legal rules that they apply whether or not individuals subjectively intend them to. When referring to the parties’ intentions in the context of discussing a written agreement, what judges and lawyers invariably mean is intention as ascertained under the normal rule for contractual interpretation: that the agreement means what a reasonable objective observer, considering the whole of the document in all of the relevant context—expressly excluding evidence of

³⁴ *Southward* (n 5) at [153]

³⁵ *Southward* (n 5) at [154]-[238]; A Lane, ‘Fully mutual housing co-operatives and possession claims’ [2015] JHL 91 at 94; personal communication.

³⁶ *Southward* (n 5) at [87]-[88]

subjective intention—would think that both parties must have intended.³⁷ This seems clearly to be what Lord Neuberger and Lord Dyson, and the other members of the constitution in *Mexfield*, intended when writing in their judgments about the parties’ intentions.

Hildyard J’s analysis would with respect have been easier to follow, in both senses, if he had stepped back from the details of the arguments and returned to first principles. From the beginning of his consideration of *Mexfield*, Hildyard J notes repeatedly that the facts were such that the alleged ancient rule “was not necessary” to reach the result, because Lord Neuberger expressly reached the same result by ordinary interpretation.³⁸ In that case, the alleged ancient rule was not part of the ratio in *Mexfield*, and Hildyard J was not bound by it. What it means to say that judges are not bound by obiter dicta, even of the highest court, is that, if judges are considering applying dicta as ratio in the case before them, they must apply their own minds to decide whether the dicta are right or wrong. And where what was said obiter consists of an assertion about the meaning of specified earlier authorities, judges must examine those authorities, and other relevant authorities if any, and decide for themselves whether the obiter interpretation was correct.

All of this however hinges on Hildyard J’s starting point: his stated belief that the alleged ancient rule was not necessary to reach the result in *Mexfield*. Is this correct? If so, do the sources relied on by Lord Neuberger actually demonstrate the existence of the alleged ancient rule, and are there any other relevant sources which need to be considered? To answer these questions, we must examine *Mexfield* in some detail, and not only the Supreme Court’s judgments but also the course of the proceedings; many of the difficulties with the judgments in *Mexfield* arise from the very peculiar way in which the two key issues came to be framed and argued before the court.

³⁷ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL), per Lord Hoffmann at 912F-913G; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (SC), per Lord Clarke at [14]-[30]; *Arnold v Britton* [2015] 2 WLR 1593 (SC), per Lord Neuberger at [14]-[23].

³⁸ *Southward* (n 5) at [48(10)], [62], [69]-[70]

Mexfield

Background

In 1993, Ms Berrisford owned her own home but had fallen into difficulties with the mortgage; so her building society devised a rescue scheme, in which she and others in the same situation formed a fully mutual housing co-operative, called Mexfield. Such co-operatives by statutory definition³⁹ must have rules requiring that only tenants of the co-operative can be members of it and only its members can be its tenants; and they are exempted from the Housing Acts 1985 and 1988. The building society then loaned Mexfield enough money to purchase all of its members' homes, secured by a new mortgage over those homes; and Mexfield rented their homes back to them, under agreements all in substantially the same terms.⁴⁰ Ms Berrisford's agreement stated the rent, provided a rent-review clause, and stated that she could not assign, sub-let, or part with possession or occupation of the property. There was no stated maximum term. By clause 5, Ms Berrisford could end the tenancy on one month's notice. By clause 6, Mexfield could end the tenancy "ONLY" if a) the rent were in arrears; b) Ms Berrisford breached any of the other terms of the agreement; c) she ceased to be a member of the co-operative; or d) the co-operative passed a resolution to dissolve itself.⁴¹

On an ordinary contractual interpretation, as the Supreme Court later held, this is an agreement for a life tenancy subject to earlier determination on the specified events. Clause 6(c), Mexfield's rules, and the covenant against parting with possession or occupation taken

³⁹ s.5(2) Housing Act 1985; s.45(1) Housing Act 1988 and s.1(2) Housing Associations Act 1985

⁴⁰ *Mexfield* (n 1) at [1]-[2], [6], [72]; cf *Mexfield Housing Co-operative Ltd v Berrisford* [2011] 2 WLR 423 (CA) at [2], [6]-[7].

⁴¹ *Mexfield* (n 1) [2]-[5].

together demonstrate, to the reasonable objective observer, that the parties intended the agreement to be unable to outlive Ms Berrisford; while clause 5 and the rest of clause 6 (including events falling under clause 6(c) other than Ms Berrisford's death) taken together demonstrate an intention that, if none of these events occurred, Ms Berrisford would have a right to stay in the property for the rest of her life. Further, a reasonable observer would conclude that the context supported this interpretation of both parties' intentions. The agreement was therefore caught by s.149(6) of the Law of Property Act 1925, converting any "lease ... at a rent ... for life ... or any contract therefor" into a lease or contract for a lease for 90 years determinable earlier on the lessee's death. As the relevant formalities requirements had been met,⁴² the agreement was a valid contract for a 90-year lease determinable on Ms Berrisford's death or the specified grounds.

Around 2007, the building society sold the mortgage to an individual; and, from 2008, the new mortgagee procured Mexfield's management to issue possession proceedings against tenants whether or not they had breached their agreements, in order to sell their homes.⁴³ In these proceedings, Mexfield relied on *Prudential* to claim that the agreements were void because they did not state a fixed maximum term and fettered the landlord's ability to give notice for an indefinite period.⁴⁴ This argument never had any merit because, as above, ordinary interpretation plus s.149(6) supplied a fixed maximum term. But, unfortunately, this simple and principled answer was never put before the court.

The judgments below

⁴² s.2 Law of Property (Miscellaneous Provisions) Act 1989; *Mexfield* (n 1) 958H-959A.

⁴³ *Mexfield* (n 1) at [8]; Appellant's Written Case in the Supreme Court (UKSC 2010/0167), at [1]. I thank Mark Wonnacott for making the latter, and other documents in the case, available.

⁴⁴ cf *Mexfield* CA (n 40) at [4]

Normally, the issues in a case before the Supreme Court have been progressively refined through argument before, and the judgments of, two lower courts. By contrast, *Mexfield* came before the court four times in total, and each time with different issues. In the county court, Ms Berrisford's counsel successfully argued that the Housing Act 1988 applied; in the High Court, Ms Berrisford was unrepresented, and there was effectively no issue, as *Mexfield*'s *Prudential* argument was simply accepted.⁴⁵

In the Court of Appeal, Ms Berrisford's new counsel submitted that the agreement could not be valid in law as a tenancy but that, where the dispute was between the original parties, *Prudential* was not incompatible with enforcing the agreement in equity and/or contract.⁴⁶ Wilson LJ, as he then was, accepted this argument, but Aikens and Mummery LJ rejected the argument in both its forms.⁴⁷ Both Aikens and Mummery LJ expressed dissatisfaction with this result and stated that *Prudential* should be "re-examined".⁴⁸ Significantly, though, Mummery LJ drew attention to the argument which had not been made: "it is not contended that the relevant provisions of the Law of Property Act 1925 (section 149(6)) apply to this case so as to convert Ms Berrisford's tenancy into a 90-year term subject to prior determination by notice in accordance with clause 6 of the ... agreement."⁴⁹

The Court of Appeal refused to grant permission to appeal to the Supreme Court but added: "The Supreme Court may take the view that ... it should take this opportunity to review the *Prudential* decision on the issue of uncertainty of term in landlord and tenant" law.⁵⁰ Counsel for Ms Berrisford then applied to the Supreme Court for permission to appeal

⁴⁵ *Mexfield Housing Co-operative Ltd v Berrisford* [2009] EWHC 2392 (Ch) at [7], [9], [15], [17], [19]-[24], [27].

⁴⁶ *Mexfield* CA (n 40) at [49], [11], [16]

⁴⁷ *Mexfield* CA (n 40) per Wilson LJ at [11] and [31]-[32]; per Aiken LJ at [49]-[50], [56], [70], and [72]-[73]; per Mummery LJ at [78]-[83] and [85].

⁴⁸ *Mexfield* CA (n 40) at [74], [76]-[77], and [79]

⁴⁹ *Mexfield* CA (n 40) at [84]

⁵⁰ Notice of Appeal, UKSC 2010/0167, box 5.

on three grounds. Two were those argued in the Court of Appeal, but “Ground 1” was “that the decision in *Prudential* that a grant for an uncertain term is void, was based on an incorrect historical premise, and ought to be reconsidered”:⁵¹

“An agreement to grant a tenancy to an individual for an uncertain term is not ‘void’. Before 1926, it was automatically an agreement to grant a defeasible tenancy for life; since 1926 [sic] it has automatically taken effect as an agreement to grant a defeasible term of 90 years.”⁵²

Permission was granted on these grounds, i.e. not including ordinary interpretation plus s.149(6).⁵³

The Supreme Court hearing

The constitution for the hearing was Lords Hope and Walker, Lady Hale, and Lords Mance, Neuberger, Clarke, and Dyson; naturally, they applied ordinary principles of contractual interpretation to the agreement and, of their own motion, expressed at the hearing the view that the agreement created a life tenancy subject to earlier determination, which was then saved from *Prudential* by s.149(6).⁵⁴

The court was however put in a bizarre and confusing position by the stances taken by counsel, which were through the looking glass. It was counsel for Mexfield who urged that the court rely on ordinary contractual interpretation—and argued that, on such interpretation, the agreement was a monthly periodic tenancy. This submission consisted of repeating, many

⁵¹ Notice of Appeal, box 5.

⁵² Grounds of Appeal, UKSC 2010/0167, at 1-2.

⁵³ Grounds at 3-4; *Mexfield* (n 1) at 957G.

⁵⁴ Author’s note of hearing.

times, that clause 1 said the agreement would run “from month to month until determined”, and that therefore the agreement must be a periodic tenancy. In response, the court pointed out, many times, “that is not how you construe contracts”; the whole of the document, and the relevant context, must be considered, and on such consideration this appeared to be a determinable life tenancy.⁵⁵ Yet counsel for Ms Berrisford not only did not put forward this obvious argument; he refused to adopt it even after hearing it put forward repeatedly by the court in dealing with his opponent, and even when he was expressly invited by the court to adopt it. When, toward the end of the hearing, the court pressed him as to why he did not want to adopt this reasoning and instead wanted to reach the same result by a different route, he had no answer other than that “at a personal level” he would not want to take the interpretative route.⁵⁶

Counsel for Ms Berrisford insisted on his preferred Ground 1, albeit that, at the hearing, he submitted it did not strictly speaking require departure from *Prudential*. Lord Templeman had stated that for “500 years ... the requirement that a term must be certain [had applied] to all leases and tenancy agreements”; counsel for Ms Berrisford submitted that this was “wrong as a matter of legal history”.⁵⁷ He claimed to provide evidence that there had always been an exception, in the form of a rule at least as old,

“that a lease granted to an individual, without any fixed end date, and which the landlord cannot determine before the happening of an uncertain event, is automatically a lease for the life of the tenant, defeasible by the landlord on the earlier happening of that uncertain event”.⁵⁸

⁵⁵ Author’s note of hearing; quotation per Lord Clarke.

⁵⁶ Author’s note of the hearing; I am grateful to Mark Wonnacott for confirming its accuracy.

⁵⁷ Appellant’s Written Case at [23], quoting *Prudential* (n 3) at 394F, and [25].

⁵⁸ Appellant’s Written Case at [25(3)].

Throughout his written and oral submissions, counsel for Ms Berrisford repeatedly stressed the word “automatically” and that this meant “no matter what the parties could be held to have intended”, in other words no matter what the ordinary interpretation of the agreement.⁵⁹

The Supreme Court’s ratio

Judgment was handed down in just over a month; the leading judgment was given by Lord Neuberger, with whom the rest agreed. After reciting the background, he began by considering and rejecting the argument of counsel for Mexfield that, as a matter of contractual interpretation, Mexfield could determine the agreement on one month’s notice.⁶⁰ Lord Neuberger then noted that counsel for Ms Berrisford had himself submitted that the agreement could not, unaided, be a valid tenancy due to the rule in *Prudential*. Lord Neuberger expressed disapproval of the rule but said he would not “jettison” it, “at any rate in this case”, because neither side had argued for this at the hearing, and it was not necessary to save the agreement.⁶¹

Then Lord Neuberger considered counsel for Ms Berrisford’s preferred argument. Lord Neuberger said, “There is much authority to support the proposition that, before the 1925 Act came into force, an agreement for an uncertain term was treated as a tenancy for the life of the tenant, determinable before the tenant’s death according to its terms.” The alleged rule was first made “clear ... in *Littleton on Tenures*”; it was made again in “Co Litt, vol 1, p 42a”, which in turn “was quoted and applied by North J in *In re Carne’s Settled Estates* [1899] 1 Ch 324 ... The same point was made in Sheppard’s *Touchstones on Common*

⁵⁹ Appellant’s Written Case at [37], [54], [62], [70(2)], [70(5)], and [71(1)]; author’s note of hearing; cf *Mexfield* (n 1) at 958F.

⁶⁰ *Mexfield* (n 1) at [22].

⁶¹ *Mexfield* (n 1) at [37].

Assurances, 7th ed (1821)”, and Lord Neuberger held it also supported by “*Doe v Browne* 8 East 165” and “*Williams’s Law of Real Property*, 23rd ed (1920)”.⁶²

It was counsel for Mexfield who argued that, before 1926, “an agreement for an uncertain term was only regarded as creating a tenancy for life if, on a fair reading of the agreement, that was what the parties to the agreement intended.”⁶³ Mexfield relied on *Zimbler*,⁶⁴ in 1903, in which none of the judges of the Court of Appeal mentioned the alleged ancient rule, relying instead on the “true construction of the document”.⁶⁵ Counsel for Mexfield then, however, had to try to argue that Ms Berrisford’s agreement was not on its true construction an agreement for a life tenancy. Lord Neuberger responded:

In my judgment, ... there are three answers to that contention. The first is that the reasoning in *Zimbler v Abrahams* is not strictly inconsistent with [counsel for Ms Berrisford’s] analysis: if, as a matter of interpretation, the agreement in that case did involve the grant of a tenancy for life, then there was no need to invoke [counsel for Ms Berrisford’s] analysis, but that does not mean that the analysis is wrong. Secondly, if *Zimbler v Abrahams* did proceed on the assumption that an agreement which purported to create a tenancy for an uncertain term could not give rise to a tenancy for life unless it was the parties’ intention to do so, it was wrong, as it would have been inconsistent with the authoritative dicta relied on by [counsel for Ms Berrisford], in particular the clear statement in *Littleton* ... Thirdly, even if an agreement which creates an uncertain term could only have resulted in a tenancy for the life of the tenant if that was the intention of the parties, I consider that, on a true construction of the agreement, it was intended that Ms Berrisford enjoy the premises for life—subject, of course, to determination pursuant to clauses 5 and 6.”⁶⁶

⁶² *Mexfield* (n 1) at [39]-[41] and [116]

⁶³ *Mexfield* (n 1) at [43].

⁶⁴ n 26.

⁶⁵ *ibid* at 583.

⁶⁶ *Mexfield* (n 1) at [44].

Only this third point is ratio; the second, accepting the alleged ancient rule, is, on Lord Neuberger's own analysis, not necessary to decide the case.

Then Mexfield purported to raise a final hurdle. Without departing from *Prudential*, the agreement could only be saved if s.149(6) applied to it, and Mexfield argued that "section 149(6) is concerned with tenancies which automatically end with the tenant's death, ... and, in this case, the effect of clause 6(c) is that the tenancy can be determined, not that it automatically determines, on the tenant's death."⁶⁷ Lord Neuberger replied:

I accept that section 149(6) only applies to tenancies which automatically determine on death, and I am prepared to assume that clause 6(c) can only be invoked by service of a notice. However, the argument misses the point, because the Agreement is (or would be in the absence of sections 1 and 149 of the 1925 Act) a tenancy for life, not because of the specific terms of, or circumstances described in, clause 6(c), but because it is treated as such by a well-established common law rule.⁶⁸

What is noteworthy is that Lord Neuberger does not actually decide whether counsel for Mexfield's assertion as to the effect of clause 6(c) is correct or not; he says only that he is "prepared to assume" it. Was that assertion correct? The answer is plainly no, given Lord Neuberger's interpretation of the agreement overall. What this last argument of counsel for Mexfield amounted to was saying that, if one looked at clause 6(c) in isolation, Ms Berrisford's death would appear to be merely an event making it possible for Mexfield to terminate the agreement; therefore the agreement must have been intended to be capable of surviving her; and therefore it was not a life tenancy. Counsel for Mexfield was thus adopting the same desperate, and legally hopeless, tactic as when asserting that the phrase "from month to month" could be taken in isolation and used to fix the meaning of the agreement as a whole. Lord Neuberger's response is that, even if the agreement had been, on a proper

⁶⁷ *ibid* at [49].

⁶⁸ *ibid* at [49].

construction, intended to be capable of outliving Ms Berrisford, it would not matter as in his view the alleged ancient rule would then take effect; but this is plainly obiter.

Finally, we must consider the other six judgments. If four or more of them had, despite expressly agreeing with Lord Neuberger, gone on to state the view that the agreement between Mexfield and Ms Berrisford could not properly be interpreted as a determinable life tenancy, such that the agreement could only be saved by the alleged ancient rule, then the alleged ancient rule would be the ratio of the court's decision as a whole; but none of them said any such thing. Therefore, with respect, Hildyard J in *Southward* was correct to say that the alleged ancient rule was not necessary to reach the result in *Mexfield*, and Burton J in *Blake* was correct in stating that the ratio of *Mexfield* was ordinary contractual interpretation of the agreement.

Evidence before the Supreme Court for and against the alleged ancient rule

This then raises the question of whether the obiter dicta in *Mexfield*, accepting the submission that this ancient rule had existed and remained good law, should be followed. To answer that question, we must examine the authority which Lord Neuberger was inclined to reject, namely *Zimbler*, and compare the sources on which he relied.

In *Zimbler*, the agreement was made in 1896 and evidenced in a letter signed by the landlord's agent, saying simply that he:

“let to Mr. Abrahams the house situate at 24, Morgan Street, Commercial Road, E., at a weekly rental of 23s., and I agree not to raise Mr. Abrahams ... rent as long as he lives in the house and pays rent regular [sic]. I shall not give him notice to quit.”⁶⁹

Five years later, the landlord asserted this was merely a weekly tenancy, served notice to quit, and brought proceedings. At first instance, the judge held in favour of the defendant, simply

⁶⁹ *Zimbler* (n 26) at 578

because the terms of the agreement had not been breached; and the landlord appealed.⁷⁰ Vaughan Williams, Stirling, and Mathew LJJ agreed “that [the judgment below] must be affirmed, but that the terms of it must be somewhat varied.”⁷¹ The agreement could not in law be a lease, because it was not made by deed. There was however no bar to it being valid in law as a contract for a lease if that was what it amounted to, on a proper interpretation. The court therefore had “to look at the document and ask [themselves] what interest was agreed to be granted by it.” On interpreting the letter, the parties plainly had not intended “merely a tenancy from week to week,” but rather “a lease of the house for [the defendant’s] life subject to two conditions, one that the lessor might turn him out if he did not pay his rent regularly, and the other that the defendant could determine his own life estate by moving out.”⁷² This agreement was capable of being enforced by an order for specific performance. The defendant had not actually counterclaimed for specific performance, and moreover it appears that, in the meantime, he had in fact fallen into arrears on the rent. So the Court of Appeal ordered that, if within 14 days the defendant had applied for specific performance “which would be granted upon condition of his paying all the arrears of rent now due”, the appeal would be dismissed.⁷³

The published report of *Zimbler* contains a report of the submissions of counsel, and counsel for the tenant was Edgar Foà. By the date of the hearing, Foà had already published three editions of his highly regarded textbook, *The Relationship of Landlord and Tenant*.⁷⁴ The ancient rule alleged in *Mexfield*, and said in *Mexfield* to have been settled law down to 1925, would of course have supported the tenant’s case; yet Foà as his counsel apparently mentioned no such rule. This might have been an omission by the reporter, but it raises a red

⁷⁰ *ibid* at 578

⁷¹ *ibid* at 580

⁷² *ibid* at 582

⁷³ *ibid* at 582

⁷⁴ E Foà, *The Relationship of Landlord and Tenant* (London: William Clowes & Sons, 1901); available online at <https://archive.org/details/relationshipplan01fogoog> (accessed 15 November 2015).

flag. Further, Foà made submissions concerning *Browne v Warner*⁷⁵—one of the cases, although not the particular judgment, relied on by Lord Neuberger as supporting the existence of the alleged ancient rule. Foà interpreted *Browne* as being purely about the formalities required for the grant of a lease to be valid in law, and thus irrelevant to the validity of an agreement for a lease; and the Court of Appeal in *Zimbler* accepted this.⁷⁶ So that is another red flag. Finally, Foà was plainly aware of the main source relied on in *Mexfield* as demonstrating the existence of the alleged rule, namely Coke on Littleton, because Foà cited two paragraphs of it in his submissions— but not paragraph 42a, which was asserted as central in *Mexfield*.⁷⁷

Lord Neuberger relied on only two judgments as allegedly contradicting *Zimbler*: *Doe d Warner v Browne*⁷⁸ and *In re Carne's Settled Estates*.⁷⁹ Lord Neuberger cannot have intended to place significant reliance on *Browne*, when discussing the authorities said to support the alleged ancient rule, because he had already earlier in his judgment cast doubt on the utility of this case.⁸⁰ There are three reported judgments in the *Browne* case, the latter two of which were relied on by Foà in *Zimbler* and the first of which was relied on by Lord Neuberger in *Mexfield*; in the Court of Appeal in *Mexfield*, Wilson LJ had helpfully discussed all three.⁸¹ In *Doe d Warner v Browne*, a judgment of the Court of King's Bench in 1807, there was an agreement in writing and signed, but not a deed, stating no fixed term and stating that the landlord “shall not raise the rent, nor turn out [the tenant] so long as the rent is duly paid quarterly, and he does not expose to sale or sell any article that may be injurious to [the

⁷⁵ (1807) 14 Ves 156 and (1808) 14 Ves 409.

⁷⁶ *Zimbler* (n 26) at 579-580 and 581.

⁷⁷ *Zimbler* (n 26) at 579.

⁷⁸ (1807) 8 East 165

⁷⁹ [1899] 1 Ch 324

⁸⁰ *Mexfield* (n 1) at [41] and [30]

⁸¹ *Mexfield* CA (n 40) at [19]-[20].

landlord] in his business.”⁸² The court noted that this agreement could amount to a grant of a tenancy for life but then mentions Co Litt 42a as authority that such a grant could only be valid in law if made with the necessary formalities.⁸³ The tenant’s case was therefore rejected on this basis.

This was of course before the ‘fusion of law and equity’: there was no point in the Court of King’s Bench deciding whether the document created a valid contract for a life tenancy, because that court could not make an order for specific performance. So the tenant naturally went to the court of equity, where he was granted an interim injunction preventing ejection. There is then no record of any final judgment: merely two reported judgments on applications brought by the landlord, for what would today be called summary judgment, in both of which the landlord failed.⁸⁴ In neither of these reports is there any mention of the alleged ancient rule; on the contrary, Lord Eldon emphasised the central importance of “interpreting the contract” and then enforcing it.⁸⁵

The only other judgment relied on by Lord Neuberger, *Re Carne’s*, was a dispute as to whether the plaintiff had the powers of a tenant for life as defined by the Settled Land Act 1882, and it was decided on the basis of the provisions of the Act. The settlement expressly granted the plaintiff a rentcharge over the property for her life, and also said that she was to be “allow[ed] ... to occupy” the property rent-free “for as long as she might wish”.⁸⁶ Counsel for the defendants argued that the plaintiff only had a personal right of occupation; counsel for the plaintiff pointed to the Act’s definition of a “tenant for life” as a “person ... beneficially entitled to possession of settled land, for his life” and of possession as “includ[ing] receipt of income”.⁸⁷ North J mentioned Co Litt 42a in passing, but it was plainly

⁸² *Doe d Warner* (n 78) at 165.

⁸³ *ibid* per Ellenborough LCJ at 166 and Lawrence J at 167.

⁸⁴ *Browne* (1807) and (1808) (n 75); *Mexfield CA* (n 40) at [20]

⁸⁵ *Browne* (1808) (n 75) at 415, cited by Wilson LJ in *Mexfield CA* (n 40) at [20].

⁸⁶ *Carne’s* (n 79) at 325

⁸⁷ *ibid* at 327-328; ss.2(5) and 2(10)(i) Settled Land Act 1882.

not ratio. He stated that he was bound by a decision of Romer J, *In re Eastman's Settled Estates*,⁸⁸ on the same point and with indistinguishable facts; and *Eastman's* had not mentioned Co Litt 42a. The result might be to give the plaintiff powers which were not intended by the settlor, but that was the effect, and whole point, of the statute; the question was simply “what does the Act say?”⁸⁹

The only other sources Lord Neuberger relied on are textbooks. He quoted Sheppard's *Touchstone* (1821) as saying that “uncertain leases ... *may* be good leases for life determinable on” the uncertain event;⁹⁰ but, with the greatest respect, this is the opposite of saying they “automatically” are. Second, Lord Neuberger relied on Williams's *Law of Real Property* (1920), which does appear to state the alleged ancient rule; but the only judgment Williams cited in support was *Carne's*.⁹¹ Finally, and centrally, Lord Neuberger relied on *Littleton on Tenures* and Co Litt 42a; the latter can be focused on, as there is no indication that Coke wrongly interpreted Littleton on this point. Lord Neuberger quoted Co Litt 42a as stating, “if an estate is granted to a person ... for an ‘incertaine term ... the lessee hath in judgment of law an estate for life determinable if [the formalities of creation are satisfied]”.⁹² The words in square brackets are Lord Neuberger's, and he went on to say that “the necessary formalities ... have now largely been done away with, and they normally only require a written, signed document.”⁹³ But, given that, by this point, Co Litt 42a is the only remaining

⁸⁸ (1898) WN 170

⁸⁹ *Carne's* (n 79) at 329-330; cf C Harpum et al, *Megarry & Wade: The Law of Real Property*, 8th ed (London: Sweet & Maxwell, 2012) at [10-005]-[10-006].

⁹⁰ *Mexfield* (n 1) at [40], emphasis added.

⁹¹ *Mexfield* (n 1) per Lord Neuberger at [41], cf Lord Dyson at [116]; J Williams and TC Williams, *Principles of the Law of Real Property*, 23rd ed (London: Sweet & Maxwell, 1920) at 135 fn (t). The last edition of Williams before *Carne's* simply relied on Coke and Blackstone: 17th ed (1892) at 124 fn (d).

⁹² *Mexfield* (n 1) at [40]

⁹³ *ibid* at [41]

support for the alleged ancient rule, we need to know exactly what it said and to set it in its context.

Starting again: from Co Litt 42a to *Mexfield*

What Co Litt 42a actually said was that, if someone was granted an estate “of lands or tenements” terminable only on an uncertain event, “the lessee hath in judgment of law an estate for life determinable if livery be made”.⁹⁴ What exactly was “livery”? In Littleton’s and Coke’s times, livery of seisin was required to grant or convey a corporeal freehold, and it was an “overt ceremony”—words and acts had to be said and done in particular types of place, to demonstrate publicly that a freehold had been granted.⁹⁵ But there was no fixed form of livery of seisin; if a dispute came to court, it was for the jury to decide whether what was said and done, in all the circumstances, demonstrated the intention to grant a freehold and therefore constituted livery.⁹⁶

But what about the leap—as it seems to us—from intention to grant a freehold to intention to grant a life tenancy? This would seem to us to require the intervention of some arbitrary rule, because we assume an absolute conceptual divide, expressed and reinforced by the Law of Property Act 1925, between freehold and any sort of tenancy. The context in Littleton’s and Coke’s times was entirely different. Tenancies for life existed before either the fee simple or the term of years, and they were for centuries common and normal; indeed the

⁹⁴ C Butler (ed), *The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton ... Authore Edwardo Coke*, 19th ed, vol 1 (London: J & WT Clarke, 1832), at para 42a. Of course there were many, many editions of Coke on Littleton; but this wording appears from other sources to be settled.

⁹⁵ AWB Simpson, *An Introduction to the History of the Land Law* (Oxford: Oxford University Press, 1961) at 66-70, 112-113; W Sheppard, *The Touchstone of Common Assurances*, 8th ed, vol 1 (London: Samuel Brooke, 1826) at 209.

⁹⁶ Sheppard (n 95) at 209.

life tenancy typified the freehold.⁹⁷ For juries, it will have been a straightforward matter: If A's words and actions, in all the circumstances, indicated that he intended to grant B a tenancy, and no fixed term was stated, it was reasonable to conclude that A intended the tenancy to end when B did. That was a freehold; and therefore A's words and actions constituted livery.

Interpretation of the words used by the parties, in all the circumstances, to decide what they intended was therefore an integral part of the rule described by Littleton and Coke. From the seventeenth century on, Co Litt 42a seems to have been forgotten, probably for two reasons: in the course of that century, livery of seisin was largely replaced by the device of 'lease and release', relying on use of a deed;⁹⁸ and equity developed the ability to enforce agreements even if a deed was not used—provided there was a clear agreement, which was ascertained (again) by interpretation to establish the parties' intentions.⁹⁹ Whatever the reasons, the fact that Co Litt 42a was largely forgotten for a long period has now become clear from research published since *Southward*.¹⁰⁰ In the mid-nineteenth century, a barrister who was also a legal historian promoted the same idea as counsel for Ms Berrisford nearly two centuries later: that there was an ancient common-law rule, expressed by Co Litt 42a, that a tenancy stated to determine only on the occurrence of an uncertain event must be deemed to be a life tenancy, no matter what the proper interpretation of the agreement. The historical background explains the purpose: freeholds even of very low value conferred voting rights. The courts, however, held as ratio that there was no special electoral version of land law, and

⁹⁷ AWB Simpson, *A History of the Land Law*, 2nd ed (Oxford: Clarendon Press, 1986) at 73, cf 49–51, 70–71; FW Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1908) at 35–36.

⁹⁸ J Baker, *An Introduction to English Legal History*, 4th ed (London: Butterworths, 2002) at 305–306.

⁹⁹ E.g. per Lord Eldon in *Browne* (1808) (n 85).

¹⁰⁰ Roche (n 2).

that the true meaning of “the rule laid down in Co Litt 42a” was that the document creating the interest must be interpreted in its context.¹⁰¹

This then is the reason why *Zimbler* does not mention Co Litt 42a—because, by 1903, ordinary contractual interpretation had long been established as the principled modern equivalent—and also the reason why *Zimbler* was viewed at the time and down to 1925 as merely expressing the previous law.¹⁰² And then, in the course of the twentieth century, the rules for ordinary contractual interpretation evolved, becoming both simpler and more open, or more expressly open, to consideration of context, until we arrived at the simple yet highly fact-sensitive rule of interpretation that we know today.

Conclusion

What is said obiter in *Mexfield* concerning the alleged ancient rule is therefore incorrect—it was said because the court accepted the historical account put forward by counsel for Ms Berrisford, which was incorrect—and, as a matter of law, we need never concern ourselves with it again. We should however reflect on what happened in *Mexfield*, and *Southward*, as a number of lessons may be learned; there is only space here to consider three.

First, *Mexfield* underlines the importance of the role of those judges on the constitution for a case in the Supreme Court who are not specialists in the most apparently relevant sub-division of the law. In their judgments, the other members of the constitution in

¹⁰¹ *Beeson v Burton* (1852) 12 CB 647, per Jervis CJ at 658-659; more broadly, Roche (n 2). Jervis was “one of the originators of, and a principal contributor to” *The Jurist*, in which the argument foreshadowing *Mexfield* had first been published: GFR Barker, ‘Jervis, John (1802-1856)’, *Dictionary of National Biography*, vol 29 (1892), 363-364.

¹⁰² See e.g. E Foà, *The Relationship of landlord and tenant*, 3rd ed (London: William Clowes, 1901) at 104-105 and 6th ed (London: Sweet & Maxwell, 1924) at 117 and 120-121; *Woodfall’s law of landlord and tenant*, 15th ed by JM Lely (London: Sweet & Maxwell, 1893) at 155 and 21st ed by AJ Spencer (London: Sweet & Maxwell, 1924) at 143 and 420.

Mexfield appear to have deferred to Lord Neuberger’s acceptance of the alleged ancient rule because “[i]t is notorious that the law of landlord and tenant is highly technical”.¹⁰³ But “[t]he tendency to lean on one specialist to write the leading speech is fraught with danger”.¹⁰⁴ Brilliant non-specialists may be able to see the wood for the trees more clearly than even the most brilliant of specialists— a fortiori in circumstances in which the two main issues before the court had never been put before the courts below, and in which both counsel adopted disorientating and unnatural positions.

Second, *Mexfield* and subsequent developments make even more clear the need for judicial reconsideration of *Prudential*. The majority in *Prudential* supported Lord Templeman only with great reluctance, the result being in their view “unsatisfactory” and “bizarre”, and only due to Lord Templeman’s assertion that there had been “500 years of judicial acceptance” of his rule¹⁰⁵—the same assertion he had made unsuccessfully twenty years earlier to the Court of Appeal in *In re Midland Railway Co’s Agreement*.¹⁰⁶ It is now clear that there is no justification, in history or principle or policy, for Lord Templeman’s rule.¹⁰⁷ This has been helpfully underlined by a recent consideration of whether the rule could be justified on a previously neglected ground, as being necessary to avoid conflict with the doctrine of escheat; the author ultimately finds that “the interaction of leases and escheat is ... doctrinally awkward” for all leases, no matter how *Prudential*-compliant.¹⁰⁸

¹⁰³ *Mexfield* (n1), per Lord Dyson at [114].

¹⁰⁴ N Andrews, ‘The United Kingdom’s Supreme Court: three skeptical reflections concerning the new court’ (2011) 1 *Utah LR* 9 at 18.

¹⁰⁵ *Prudential* (n 3) per Lord Templeman at 394F, Lord Browne-Wilkinson at 396G-397A, Lord Griffiths at 396B, and Lord Mustill at 397C.

¹⁰⁶ [1971] Ch 725.

¹⁰⁷ see e.g. J Roche (Editorial), ‘The madwoman in the attic: freeing landlord-tenant law’ [2011] 75 *Conv* 444 at 452-453.

¹⁰⁸ I Williams, ‘The certainty of term requirement for leases: nothing lasts forever’ [2015] *CLJ* 592 at 603.

Finally, what happened in *Mexfield* and in *Prudential* highlights the need to reflect on and avoid what is known to historians, in a famous phrase, as “the enormous condescension of posterity”.¹⁰⁹ We tend reflexively to assume that the people of the past were far less sophisticated, intellectually and ethically, than we are. Therefore, if something was (allegedly) said or done in the past which at first glance strikes us as crude or simplistic or bizarre, we are inclined to take our reaction at face value; the past is another country, and we all too readily view the people of the past in the same way as the stereotypical colonial administrator viewed ‘the natives’. By contrast, when an historian (or anthropologist) encounters something which strikes her at first as crude or simplistic or bizarre, her instinctive reaction is that this may well have made sense in its context, and therefore she must take care to explore the context. It may turn out that, even after thorough investigation of the context, what was said or done still seems crude or simplistic or bizarre; but we will be less likely to fall into error.

Lord Neuberger expressly recognised at the hearing of *Mexfield* in the Supreme Court that, although the alleged ancient rule was compatible with a just result on the facts of this case, it was so crude that it could lead to unjust results on different facts; and others recognised this in their judgments.¹¹⁰ Yet it seems all of their Lordships and her Ladyship were willing to assume that, for 600 years, either no judge had ever had this obvious thought, or that judges were aware of this problem but did not care about justice, or that they were aware of this problem and did care about justice but felt bound to apply the alleged ancient rule nonetheless. The first two assumptions would require and express enormous condescension toward either the intellectual or the ethical capabilities of our ancestors; while

¹⁰⁹ EP Thompson, *The making of the English working class* (New York: Vintage, 1966) at 12. As Stefan Collini has emphasised, this condescension is often directed at past elites just as much as other classes: ‘General introduction’, in S Collini, R Whatmore, and B Young (eds), *Economy, Polity, and Society: British Intellectual History 1750–1950* (CUP, 2000), 1.

¹¹⁰ Author’s note of hearing; cf *Mexfield* (n 1) per Lady Hale at [94].

the remaining option requires forgetting that, for most of the relevant period, there was no doctrine of binding precedent.

These assumptions do however fit the most common account of the history of land law.¹¹¹ In that account, land law has always consisted, characteristically, of crude and arcane rules; it has always assumed a dichotomy between ‘certainty’ and justice on the facts of the particular case, and always preferred the former; and, therefore, land law hardly changed for centuries. In this account, statute changed the rules to a significant extent in 1925, but the essential character or culture of land law remained the same. This account is deeply embedded in the history of legal history. It was famously and colourfully advocated by Maitland,¹¹² widely viewed as the father of legal history as an academic discipline in England; and, under Maitland and those who followed him, the discipline focused overwhelmingly on the medieval and early-modern periods.¹¹³ Legal history of the nineteenth and early twentieth centuries has in recent decades begun to thrive; but historiography of land law, especially doctrinal land law, in this period seems still to lag behind, in comparison with research on other areas of doctrinal law.¹¹⁴

¹¹¹ The history of other areas of law is often viewed very differently: compare *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, accepting that judicial development of rules for vicarious liability in tort has for centuries been driven “by the aim” of evolving an ever “fairer and more workable test”. (at [56])

¹¹² For example, describing English land law as “full of rules which no one would enact nowadays unless he were in a lunatic asylum” and consisting largely of “medieval doctrine”: FW Maitland, ‘The Making of the German Civil Code’, in HAL Fisher (ed), *The Collected Works of Frederick William Maitland*, vol 3 (CUP, 1911), at 486-487.

¹¹³ J Getzler, ‘Publication review: *Property and politics, 1870-1914. Land ownership, law, ideology and urban development in England*’ [1993] LQR 684 at 688.

¹¹⁴ As a rough measure, see the lists of “Further Reading” in W Cornish et al (eds), *The Oxford History of the Laws of England, Vol XII: 1820-1914, Private Law* (OUP, 2010): for “Property” at 1151-1152, “Contract” at 1152-1158, “Commercial law” at 1158-1164, and “Tort” at 1165-1170.

It is to be hoped that the trend toward more legal history of the nineteenth and twentieth centuries will continue and accelerate, especially with regard to doctrinal history of land law. In the meantime, when judges find themselves confronted with purported histories of a particular aspect of the law and without academic research to rely on, they should be conscious of the need to think like historians. This should be easy, as it merely requires thinking about the distant past in the same way judges habitually think about the very recent past, namely the case before them: being wary of assumptions and prejudices, including and above all their own; aware of the importance of context; and rigorous and sceptical with regard to evidence. Put another way, it merely requires judges to be as fair to the people of the past as to the parties before them.