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The good old rule, the catspaw and a two-headed baby

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The good old rule, the catspaw and a two-headed baby

Abstract

It is not hard to think of the legal fable, or fables of the law, in the realms of the metaphorical or the allusory, whose relationship with forms and conduct of law might seem decidedly fabulous. Earlier in this collection, in tracing the ways in which law might fable, I left a crumb or two behind, presaging a case which illustrates just how law fables, in which fabling and the fabular feature. I now pick up those crumbs, and bring this fabled case that is fabled and fabulous into the realm of the legal fable, to reveal law fabled and fabular, in which the law's *savoir faire* might just be revealed as the "faire" *savoir*.¹ And so to fable, and in doing so, to reveal *fabulose* law that is far more fabulous than might ever be imagined.

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Marett Leiboff

The Good Old Rule, the Catspaw and a Two-Headed Baby

It is not hard to think of the legal fable, or fables of the law, in the realms of the metaphorical or the allusory, whose relationship with forms and conduct of law might seem decidedly fabulous. Earlier in this collection, in tracing the ways in which law might fable, I left a crumb or two behind, presaging a case which illustrates just how law *fables*, in which fabling and the fabular feature. I now pick up those crumbs, and bring this fabled case that is fabled and fabulous into the realm of the legal fable, to reveal law fabled and fabular, in which the law's *savoir faire* might just be revealed as the “*faire*” *savoir*.¹ And so to fable, and in doing so, to reveal fabulose law that is far more fabulous than might ever be imagined.

1. A monstrous birth

In 1908, only seven years after Australia became a nation, and a short five years after it was itself established, the High Court of Australia reached its decision in the case of *Doodeward v Spence*,² that went on to become a foundational case throughout the common law world.³ It has been used as good authority in areas of law ranging from new technologies in medicine, to the ownership of human remains. Before I speak much more of the case, I start by taking you to the way the case is read through the eyes of a common lawyer, as standing for the principle that there can be *no property in a body – except if skill and labour are exerted*, in a classical Lockean conception of property. I have intentionally left out anything to explain the case, the words in italics forming the principle that the case is said to represent, in much the same way that the moral of a fable exists without its narrative. This theatricalization is to *meant* to leave you bewildered, to enact the experience of law as bare principle in order to appreciate how easily legal fabling occurs when lawyers rely on principle alone, and ignore the case and its circumstances, through three entirely random, contempo-

¹ Marett Leiboff, “Fabulous Law: Legal Fables,” introduction to this volume.

² *Doodeward v Spence* (1908) 6 C.L.R. 406.

³ Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law* (Oxford: Oxford University Press, 2015).

rary examples. Firstly, a piece of scholarship. Prue Vines (correctly) makes the point that the case is often incorrectly described as standing for principle that there is no property in a body, that: “in fact the High Court of Australia held that this particular baby could be regarded as property because it had been preserved with care and skill.”⁴ In fact, one judge said that if there had been a “lawful exercise of work or skill,”⁵ then the body acquires attributes that differentiate it from a mere corpse, which would then be subject to a right of possession.⁶ But care and skill? Not so much: “some-perhaps not much-work and skill had been bestowed [...] upon it.”⁷ Secondly a policy document. The Australian Law Reform Commission, in a 2003 report on the protection of human genetic information, included the following as a set of rules that are used in practice, based on the case:⁸

Under existing law, two elements are required for a sample to become property under this rule. First, the organisation or person using the tissue must have lawful authority to do so, such as a hospital has in relation to tissue taken for therapeutic purposes. Second, that organisation must apply some work or skill to the preservation of the sample. If both requirements are satisfied, the sample may be treated as property of the organisation.⁹

This is an accurate account of the law, revealing how principles adapt to new and different circumstances, but in this scenario, the law has been expanded based on contemporary meanings of the words “specimen” and “body.”¹⁰ But these are fabled, for “sample” (in the sense of a “specimen” used to test for illness, or genes and so on) was not contemplated in the case. It concerned a corpse,¹¹ meaning any reference to a specimen related to “anatomical and pathological specimens or preparations formed and maintained by scientific bodies.”¹² And finally a set of crib notes, available for sale on the internet to law students.

4 Prue Vines, “The Sacred and the Profane: The Role of Property Concepts in Disputes about Post-mortem Examination,” 29 (2007) *The Sydney Law Review*: 235–261, 238.

5 *Doodeward v Spence* (1908), 414.

6 *Doodeward v Spence* (1908), 414.

7 *Doodeward v Spence* (1908), 414–415.

8 Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC Report 96, 30 May 2003): 20.14, referring to *Doodeward v Spence* (1908), 414.

9 ALRC, *Essentially Yours*, 20.14

10 ALRC, *Essentially Yours*, 20.14

11 “body, n.”**2**.A corpse [Perhaps originally a euphemistic shortening of “dead body”] *OED Online*. Oxford University Press, June 2015. (last access June 17, 2015).

12 Griffith C.J., *Doodeward v Spence* (1908), 413.

They do not start well, referring to “M,” meaning mother. No mother was involved in this case. I have underlined parts of the notes and the reason will become clear presently:

M gave birth to stillborn dual headed baby. A surgeon took the body and preserved it, later selling it at an auction. M then brought an action for recovery.

- Griffith CJ: Just because cannot own a corpse at death does not mean that it can never be owned. A human body or portion of it is capable of becoming property; it is not necessary to give an exhaustive account of the circumstances in which this is the case but where a person has by lawful exercise of skill or work dealt with the human body so that it is different he may own it.
- Barton J: Agreed with above but noted the gross indecency; also describes the baby as a monster.
- Higgins J: Dissented on basis that he thought that human being cannot be owned, whether alive or dead.¹³

The crib notes are replete with errors. But they also include a fabling of a remark made by Barton J. He did not *describe* “the baby” as a monster. He instead characterized “it” in *law* as a “dead-born foetal monster,”¹⁴ and as such not entitled to Christian burial. That there was ever a legal concept of monster is fabulous,¹⁵ obscured by the monster of popular culture. Monster is reframed as a description without recourse to the legal concepts Barton J. relied upon, as is characterization of the baby as a “thing,”¹⁶ also a legal concept of property.

If these three examples represent how the case is understood some 100 years after it was decided, how was it understood in 1908?¹⁷ I turn to the first lines of the headnote of the case that appears with the judgment. Headnotes, which are written by selected lawyers, digest the key principles of a judgment, which then end up being abstracted as the law itself:

A dead human body may under some circumstances become the subject of property. A corpse may possess such peculiar attributes as to justify its preservation on scientific or other

13 “Organ Donation and Tissue Research Notes *Oxbridge Notes the United Kingdom*, available at <http://www.oxbridgenotes.co.uk/notes/oxbridge/2013/medical-law-notes/samples/organ-donation-and-tissue-research> (last access April 4, 2015).

14 Barton J., *Doodeward v Spence* (1908), 416.

15 Maret Leibold, “Of the Monstrous Regiment and the Family Jewels,” *Australian Feminist Law Journal* 23 (2005): 33–59, 49–57.

16 Barton J., *Doodeward v Spence* (1908), 416.

17 For techniques of reading in time see: Ann Genovese and Shaun McVeigh, “Nineteen eighty three: A jurisgraphic report on *Commonwealth v Tasmania*,” *Griffith Law Review* 24.1 (2015): 1–21.

grounds, and, if a person has by the lawful exercise of work or skill so dealt with such a body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it [...].¹⁸ (My emphases).

The headnote most closely represents the thinking and reasoning contained in the majority judgment of Griffith C.J. Barton J. had “read the judgment of the Chief Justice, and I entirely agree with the reasons it embodies, which I hold it unnecessary to amplify.”¹⁹ And the italicized words? They barely appear in later accounts of the case, while those underlined have been abstracted as its principle, inevitably fabling the case and the law it is said to embody. But there is much, much more fabling to come concerning this case, and about it.

2. A two-headed baby

It is not hard to see how cases can be divorced from their time and space, or their founding story. The facts are a narrative of their founding story and are an important part of the law in the case. But the facts themselves also fable. In this High Court case, as is standard at the highest appellate level, the facts are limited to the matters of law under consideration. Headnotes also recount the facts, briefly. Those in the 1908 headnote are *very* brief:

The subject matter of the action was the corpse of a still-born two-headed child, which the appellant had had in his possession for some years, and which had been taken from him by the respondent, an Inspector of Police, on the occasion of a prosecution of the appellant for exhibiting the body in public. The facts sufficiently appear in the judgments hereunder.²⁰

Griffith C.J.’s account of the facts narrates what is needed to make sense of the legal claim, in order to establish the right of possession of the property in the hands of Doodeward:

The subject matter of the action was the preserved body of what has been spoken of in the case as “a two-headed baby.” It appears from the evidence that the mother of the baby gave birth to it in New Zealand forty years ago, that it was still-born (by which I understand that it never had an independent existence), that the mother’s medical attendant, a Dr. Dona-

18 *Doodeward v Spence* [1908] N.S.W. St. Rp. 60, 107. This was replicated from the C.L.R. headnote at 407.

19 Barton J., *Doodeward v Spence* (1908), 417.

20 *Doodeward v Spence* (1908), 407.

hoe, who arrived after the birth, took the body away with him, preserved it with spirits in a bottle, and kept it in his surgery as a curiosity, that at his death in 1870 it was sold by auction with his other personal effects and realized between £30 and £40, and that it afterwards came into the possession of the appellant. It must be assumed that Dr. Donahoe's possession of the body was lawful, so far as the possession of such an object can be lawful.²¹

Barton J.'s account consumed more than a page, a tirade about the "object," "thing," "dead-born foetal monster," "curiosity," one of "nature's freaks," as an encounter with an imaginary interlocutor who is asked to form a mental picture negating any possibility that the "object" might be human:

How far would the critic consider his surprise justified or his law applicable, upon further knowledge; upon learning what kind of "corpse" or "dead body" it is that his informant has been describing, and how far the object when seen conforms to the mental picture he had formed of a corpse awaiting burial? [...] It has been preserved in a jar or bottle with spirits since the day of its birth, now forty years ago. Add to these facts that it is an aberration of nature, having two heads. Can such a thing be, without shock to the mind, associated with the notion of the process that we know as Christian burial? Does it not almost seem indecent to associate that notion with such facts?²²

These two accounts could not be further apart, but their narratives are not random or accidental, with the Chief Justice establishing the basis under which the possessory rights of the appellant will be established, while Barton J. wants any later appellate court to know that he confines his reasoning to exceptional situations.²³ It is unlikely that the facts in the dissenting judgment of Higgins J. will be read, but if we do read his account, we read something very different, with very different nouns and verbs in play: a *baby* was *born*, the *corpse* of a still-born two-headed *child*, the *birth* took place in New Zealand in 1868; the "medical man in attendance took the *body* away, and kept it in a bottle till his death in 1870."²⁴ He alone notes that: "The medical man in this case got possession of the corpse, and there is no evidence that the parents consented. But even the parents could not give him any right to the corpse. It was not theirs to give."²⁵ While Griffith C.J. accepted the legality of Dr. Donahoe's possession, Higgins J. questioned the fundamental basis on which the majority decision rested, and there might have been good reason for his disquiet.

²¹ Griffith C.J., *Doodeward v Spence* (1908), 410–411.

²² Barton J., *Doodeward v Spence* (1908), 415–416.

²³ Barton J., *Doodeward v Spence* (1908), 417.

²⁴ Higgins J., *Doodeward v Spence* (1908), 417.

²⁵ Higgins J., *Doodeward v Spence* (1908), 424.

3. Obnoxious exhibitions

We have to go outside the judgment to find out why. No different from La Fontaine's target in his fable "The Wolf and the Lamb,"²⁶ the facts omit matters notorious to a 1908 public. On April 6, 1884, in the then colony of New South Wales, a Mr. Abraham Doodeward was prosecuted for exposing to public view an indecent exhibition at a sideshow at the Bathurst Show. These shows are held throughout Australia even now, a mix of agricultural display and funfare, where Abraham had displayed an "obnoxious exhibition [...] of the nude body of a two-headed female infant, preserved in spirits. The defendant said he had exhibited it for many years in Sydney and New Zealand,²⁷ making a charge for admission, and had never been interfered with before."²⁸ He was found guilty by the police magistrate under the vagrants act, and sentenced to three day's imprisonment (the act did not permit a "pecuniary penalty").²⁹ Nothing more was heard of Abraham until October 17, 1900 when "while addressing the Grand Lodge session of Druids at the Oddfellows' Temple [...] he] fell forward and expired."³⁰ His tragic demise was reported throughout the Australian colonies; a few years later, the name "Doodeward" would captivate a new Australian nation for three years, all to do with the baby and its display.

In 1906, Reuben Doodeward faced his own criminal charges when he displayed the baby,³¹ twenty-two years after his father's prosecution. In his appearances before the magistrate and trial judge, the salacious and scandalous nature of the evidence meant that hundreds of reports of the case appeared throughout the country and in vast amounts of detail. The complaint on its own was enough to whet their interest, that Reuben had "unlawfully, wickedly and scandalously

26 Marett Leiboff "Fabulous Law" Introduction to this volume.

27 In 1869, an Abraham Doodeward was convicted of stealing 120 yards of silk from the premises of S and J.R. Vaile in New Zealand and sentenced to 3 years penal servitude: *R v Abraham Doodeward* [1869] NZLostC 66 (4 March 1869). It is likely this is the same Abraham Doodeward.

28 "An Indecent Exhibition." *Newcastle Morning Herald and Miners' Advocate* Monday 7 April 1884: 2.

29 "An Indecent Exhibition."

30 "NSW Sydney October 17: Mr. A. Doodeward," *Adelaide Observer* Saturday 20 October 1900: 26. Adelaide in South Australia is 1500 km from Sydney.

31 "1900 October 17 at Sydney: Abraham Doodeward, husband of Betsy Doodeward, and father of Reuben, Lewis, Hannah, Leah, Harry, Rosetta, Mabel and Albert Doodeward," "Family Notices: Deaths," *The Sydney Morning Herald* Friday 19 October 1900: 1.; "Mrs. Betsy Doodeward, relict of the late Mr. Abraham Doodeward, died on June 1, at her son's residence, aged 71 years," *The Hebrew Standard of Australasia* Friday 7 June 1929: 7.

exhibited to the sight and view of persons the naked dead body of a child with two heads.”³² No wonder the case was notorious.

Reuben Isaac Doodeward was born in 1877. Some newspaper reports said he was a young man, but he was nearly thirty at the time of the proceedings. He would have been nearly ten at the time of his father’s prosecution, but the evidence in the committal and criminal trial revealed some odd and startling inconsistencies. This 1906 prosecution was triggered by the display of the baby at the Sydney Cricket Ground, during a public schools’ sports carnival. In the tradition of the travelling show, the baby was displayed in a tent, and people were tempted to enter the tent through the inducements of a tout, and a placard showing the baby. There were two moral panics on display: Reuben was inducing children away from a healthy activity, sport, and the effect of the display on children. The children happily lined up oblivious to their moral welfare, paying a penny to enter the tent.³³

We have to remember that until the early 1970s, one only became an adult at twenty one; a twenty-year old was a child in law, as were young children. A police officer entered the tent and saw a body of a child suspended by the arms by means of a tape in some liquid in a glass case. He said to Reuben: “This is a very improper show to have here on the occasion of children’s sports, and if you continue to exhibit it probably proceedings – will be taken against you.”³⁴ He asked Reuben where he got it: “My father bought it in New Zealand from a doctor 20 years ago. He made a living out of it, and I intend to do the same.”³⁵ In the committal proceedings, Reuben was pressed on these dates by the magistrate hearing the committal, Mr Macfarlane. The timeframes had shifted. Reuben *now* said that he had known it to be exhibited for a number of years in Bathurst, about twenty-three years before. The magistrate said: “Do you state that of your own knowledge? Reuben replied: “Well, not exactly of my own knowledge, but my father exhibited it in Bathurst. There was never any objection raised to my exhibiting it before the present case.”³⁶ One of his brothers supported Reuben’s statements.³⁷ The Bathurst newspaper that had reported on Abraham’s prosecution was not going to let this stand, adding this to their report:

32 “The Two-Headed Baby: Doodeward Bound Over, Sydney, Thursday,” *National Advocate* Bathurst, Friday 16 November 1906: 2.

33 “The Two-Headed Child. Shocking Exhibition,” *Singleton Argus* NSW, Thursday 18 October 1906: 4.

34 “Shocking Exhibition.”

35 “Shocking Exhibition.”

36 “Shocking Exhibition.”

37 “Shocking Exhibition.”

It might be stated that in April, 1884, a man named Abraham Doodeward was proceeded against by Sub Inspector Morris the Bathurst Police Court on a charge of exhibiting an indecent representation. The offence consisted of exhibiting in a tent on Bathurst Show-ground a two-headed baby enclosed in a jar, and Doodeward was sentenced to three days' imprisonment³⁸

There were other discrepancies. Dr. Paton, the Government medical officer, stated that the body was that of a male (not a female) child which: "Had evidently been kept in spirit for many, probably 20 years."³⁹ But by the time the civil case commenced in the New South Wales courts in 1907, the Doodeward's possession had doubled. A narrative based in science was also starting to take hold, with Reuben remarking: "I have heard people say that it was well worth looking at. In hearing children speaking of it I noticed that not one believed it was a child at all. One child passed the remark that it was made of putty."⁴⁰

Reuben was committed but at the trial changed his not guilty plea almost immediately, and was bound over to appear for sentence if called upon, triggering the civil proceedings. Dr. Paton suggested that the baby should be handed to the Museum, and Sub-Inspector Spence agreed and took possession of it. Reuben objected to both courses of action, and then applied for the baby's return, but Spence refused to return it without instructions. The baby was temporarily placed in the museum at Sydney University, and Reuben immediately took proceedings "with a view to recovering the monstrosity."⁴¹ The civil case that ended up in the High Court began on June, 20, 1907 as an action against Spence in conversion and detainment; it was Spence in name only, for the case was proceeding under the auspices of the state Attorney-General. The statement of claim demanded the return of "a certain jar, containing a certain amount of chemical fluid, as a scientific exhibit, representing a baby with two heads," and damages of £400 in the District Court,⁴² where Rogers, D.C.J., non-suited him on the basis that there could be no property in a body. The case was appealed immediately to the New South Wales Supreme Court, but was dismissed on November 7, 1907. No facts were recorded in any of the three judgments. The only facts appeared in the

³⁸ "A Prosecution In Bathurst," *National Advocate* Bathurst, NSW Wednesday 17 October 1906: 2.

³⁹ "Shocking Exhibition."

⁴⁰ "Shocking Exhibition."

⁴¹ "Doodeward Bound Over."

⁴² *Doodeward v Spence* (1907) 7 S.R. (N.S.W.) 727, 727; "Two-Head Baby. Action for Detention" *Singleton Argus*, Thursday 20 June 1907: 1.

headnote in the defence's argument, which more or less are followed by Griffith C.J.⁴³

We also find something else in the New South Wales report: "Appeal dismissed with costs up to the time of the appellant being allowed to proceed in *forma pauperis*."⁴⁴ Reuben was indigent and had costs waived.⁴⁵ Without the baby, he inevitably was unable to earn an income.⁴⁶ He was granted leave to appeal to the High Court on 20 December 1907; in January 1908: "The Chief Justice regarded the application as being in *forma pauperis*, and reduced the security for costs to £1."⁴⁷ The appeal was heard in May 1908, and the judgment delivered on July 31, 1908. It was allowed with costs and remitted to the District Court for trial. That seemed to be the end of it, but in September 1908 questions were asked of the Attorney-General in the New South Wales Parliament: "Is it a fact that the Crown is appealing from the decision of the High Court of Australia to the Privy Council and, if so, what will be the probable cost of such appeal? Of what particular value, if any, is Doodeward's two-headed baby to the State of New South Wales?"⁴⁸ The state did appeal to the Judicial Committee of the Privy Council, the final appellate court for Australia until the 1980s. It was based in London and was effectively a version of the House of Lords, but Griffith C.J. and Barton J. were also members. In December 1908, it refused special leave to appeal in *Spence v Doodeward*.⁴⁹

This decision also meant that the remitted District Court decision stood. In November 1908,⁵⁰ a month before the Privy Council decision, Reuben again sought damages or the return of the baby. New South Wales persisted. No law required the return of a corpse, the object had no scientific value, the duty to bury the child now fell on the person in whose possession it happened to be, Spence. Judge Docker held that as the specimen was the subject of an appeal

⁴³ *Doodeward v Spence* (1907), 727.

⁴⁴ *Doodeward v Spence* (1907), 729.

⁴⁵ The losing side has to pay the costs the other side incurred in running the case. Not all costs are paid.

⁴⁶ His name appears in connection with completely different business ventures from inventing badges to advertising.

⁴⁷ "The Two-Headed Baby High Court Application Reduction of Security Allowed," *The Sydney Morning Herald*, Friday 17 January 1908: 5. A payment into court to cover any potential costs awards against the appellant.

⁴⁸ "The Two-Headed Baby," *Evening News*, Sydney, Wednesday 23 September 1908: 6.

⁴⁹ "Two-Headed Baby. Right of Possession Upheld By Privy Council London Dec 16." *The Argus*, Melbourne Thursday 17 December 1908: 7.

⁵⁰ "Two-Headed Baby Again. Return or £10 10 s Damages Awarded." *The Sydney Morning Herald*, Friday 6 November 1908: 3.

to the Privy Council, the Crown should agree to a verdict against it, subject to a stay until the Privy Council decision. It did not accept this. Regardless, Docker J. applied the law in the High Court decision and awarded damages. He rejected a quantum of £37, the price paid forty years earlier, and a value based on its potential exhibition value of £137. Professor Welsh of Sydney University valued it at about £2. His Honor instead “fixed a liberal amount, £10 10s.” The Crown demurred. “His Honor: You want time to pay the judgment? Mr. Piddington: No; we want time to know whether we ought to pay the judgment.” The stay was granted for a fortnight.⁵¹ It seems as if Reuben took the money even though it was a lot less than the £400 he wanted. That was the last time the baby was heard of in the newspapers, at least in connection with Reuben Doodeward.

4. Fabulous Judges

Most lawyers would have no idea about these postscripts to the High Court decision. That these oddities are lost is a measure of the fabling of law that occurs over time. There is more to be come about the High Court decision, but the Justices and their judging practices are also fabled by lawyers who imagine these founding justices of the High Court to be black-letter lawyers who draw on nothing but narrow forms of legal reasoning when reaching their decisions. In 1910, a wag calling himself “A Barrister” wrote a scandalous piece that rather scuppers this image:

The High Court does love to utter strange axioms, apothegms, dark sayings up on the harp, and the reports are studded with such ... plums in a dough of Law. Consider some preciosities, drawn at random [...]. Nor is the tribunal destitute of humor, of the “big wow wow” order, as when it (3) observed in the classic Two Headed Baby case: “If the plaintiff is entitled to recover possession of this corpse, there is nothing to hinder anyone from snatching the corpse of some eminent man, such as Napoleon, and keeping it in a bottle, or using it for degrading purposes. As Hamlet says, “Why may not imagination trace the noble dust of Alexander till he find it stopping a bung-hole.” The Court will not stop at Shakespere [sic], is indeed (4) amorous of the classics [...] when Griffith, C.J., makes his lambent sword play with learning’s tools it is (5) nothing unusual for the great Queenslander (discussing what “lawful possession” is) to quote with gusto such ancient piffle as —

“The good old rule, the simple plan,
That he should take who has the power,
And he should keep, who can.” (— Doodeward v. Spence.)⁵²

⁵¹ “Return or £10 10 s Damages Awarded.”

⁵² “The Law and the Profits. Notes On Mercantile And General Legalities. Specially written for the “Evening News” by A Barrister,” *Evening News*, Sydney, Tuesday 26 April 1910: 6.

If there is any image had of Sir Samuel Griffith G.C.M.G., Q.C., the founding Chief Justice of the High Court who served between 1903–1919, it is not that of someone fond of “piffle”. Born in Wales, he came to Australia in 1853 as a nine year old, settling in Queensland. He was dux of his school, and at the University of Sydney (the University of Queensland only opened in 1910), he was awarded a B.A. with first-class honours in classics, mathematics and natural science in 1863.⁵³ In 1862 he won the Cooper scholarship in classics (assessed as one of the four best students of his decade), and the Barker scholarship in mathematics. He also took general jurisprudence. In 1865, he was awarded a Travelling Fellowship, spending some of his time in Italy, later translating *The Inferno of Dante Alighieri*, published in 1908, the same year this case was decided. He returned to Brisbane where he became a solicitor and then barrister, before entering politics, including periods as Attorney-General and Premier of Queensland, before becoming Chief Justice from 1893 until his appointment to the High Court. Appointed to the Privy Council in 1901, he drafted the legislation inaugurating the High Court of Australia. Griffith died in 1920.⁵⁴

He might have been on the harp, but Sir Edmond Barton (1849–1920) the first Prime Minister of Australia, resigned to become one of the three founding High Court Justices. He remained on the bench until his death. A colonial politician, he was also New South Wales Attorney-General. Sydney-born, Barton was a brilliant student, winning the £50 Lithgow scholarship and the Cooper scholarship. He graduated B.A. in 1868, and was a solicitor before being admitted to the Bar in 1871. He was appointed to the Privy Councillor in 1901.⁵⁵ One thing may not be immediately apparent. Neither of these men had law degrees. Both undertook their law studies through articles of clerkship, because law was not taught at universities at the time. Articles were an apprenticeship and exams sat on set areas of law as approved by the courts. The University of Sydney Law School opened in 1859 to undertake these examinations; it only began teaching law thirty years later.⁵⁶ Articles were the only option in Queensland. The University of

53 Sir Samuel W Griffith GCMG., BA (Hons), MA., Hon LL.D (Qld), Hon LL.D (Wales), QC available at <http://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/swgriffith> (last access July 2, 2015).

54 R. B. Joyce, “Griffith, Sir Samuel Walker (1845–1920),” *Australian Dictionary of Biography* Vol. 9, (MUP), 1983. available at <http://adb.anu.edu.au/biography/griffith-sir-samuel-walker-445> (last access July 2, 2015).

55 Martha Rutledge, “Barton, Sir Edmund (Toby) (1849–1920)” *Australian Dictionary of Biography* Vol. 7, (MUP), 1979. Available at <http://adb.anu.edu.au/biography/barton-sir-edmund-toby-71> (last access July 2, 2015).

56 Sydney Law School: History. Available at <http://sydney.edu.au/law/about/history.shtml> (last access July 2, 2015).

Melbourne opened Australia's first law school in 1857. By 1872, completing part of its law course was compulsory for new lawyers.⁵⁷

Higgins J. was one of these new lawyers, and it was his words from the so-called Two Headed Baby case that "A Barrister" quoted at length at (3). Born in Ireland in 1851, Higgins arrived in Victoria in 1870, obtaining a common schools teacher's certificate and supporting himself tutoring the children of the Melbourne elite. He had been schooled in Ireland in the classics, and at the University of Melbourne "had an outstanding record [...] in languages, logic, history, political economy and in Shakespeare."⁵⁸ Awarded his LL.B. in 1874, he was admitted to the Victorian Bar in 1876. Also a colonial politician, he served in both the Victorian colonial and the new Commonwealth Parliaments. Left-wing and progressive, he became Federal Attorney-General in 1904, and was appointed to the High Court in 1906. Higgins died in 1929 while still a serving Justice of the High Court.⁵⁹

None of these brief pen portraits can do justice to any of these men, but one thing stands out: all three were schooled in the humanities before studying law. They shared a greater or lesser expertise in the classics, and with Griffith's mathematics and natural science, and languages, and Higgins' logic, history and politics, languages and literature, they inevitably share foundational concepts and ideas, key texts and concepts. It is also hard to imagine that were not affected in some way by the 1662 *Logic of Port-Royal*,⁶⁰ for its influence remained widespread until the end of the nineteenth century, appearing in ten English editions, with the 1818 edition serving as a text at Cambridge and Oxford.⁶¹ A popular 1850 translation by T.S. Baynes, *Logic, or, The art of thinking: being the Port-Royal Logic*,⁶² was written with students in mind and found its way to the colonies, turning up in the list of items auctioned when a Mr. Johnson's library of philosophy, theology and politics was put on sale in 1869 in advance of his return to

57 Melbourne Law School: Beginnings. Available at <http://www.law.unimelb.edu.au/melbourne-law-school/community/history/beginnings> (last access July 2, 2015).

58 John Rickard, "Higgins, Henry Bournes (1851–1929)" *Australian Dictionary of Biography* Vol. 9, (MUP), 1983 Available at <http://adb.anu.edu.au/biography/higgins-henry-bournes-6662> (last access July 2, 2015).

59 "Higgins, Henry Bournes (1851–1929)"

60 Marett Leiboff "Fabulous Law". Introduction to this volume.

61 Buroker, Jill, "Port Royal Logic," *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2014/entries/port-royal-logic/>>. (Last access April 12, 2015).

62 Antoine Arnauld and Pierre Nicole, *Logic, or, The art of thinking: being the Port-Royal logic*, trans. Thomas Spencer Baynes (Edinburgh: Sutherland and Knox, 1850).

England.⁶³ Higgins, who studied logic, must have known of its methods, and its pervasive influence meant that Griffith and Barton could not have avoided its influence. Though couched in formal legal method, the judgments of Griffith C.J. and Higgins J. recall the *Logic* as coded through Marin's reading of "The Wolf and The Lamb,"⁶⁴ and through their invocation of *fales and their morality*, we will see that through their reasoning, each evokes the reason of the strongest and the logic of the weak,⁶⁵ with inevitable results.

5. Fabling: The reason of the strongest is always best, redux

A few short hours after the High Court delivered its judgment in *Doodeward v Spence*, Sydney's *Evening News* adorned its report with this headline: "The Two Headed Baby. Supreme Court Judgment Upset. A 'Twentieth Century Case.' The Mummy, The Skeleton and The Skull."⁶⁶ Its author was able to speedily find the nub of each of the Chief Justice's and Higgins' judgments, represented in the headline. The headline is uncanny, cleverly speaking to each judgment, but once we read the judgments themselves, we find that something else is going on, that their reasoning represents the grammatical and discursive devices, as accounted for in the earlier chapter in this collection, that Marin attributes to La Fontaine's wolf (the Chief Justice) and lamb (Higgins J).⁶⁷

First to the Chief Justice. It is without question that the "great Queenslander" is a force of nature and a powerful figure. Once we start reading the Chief Justice's judgment, we realize just how his power is made manifest, and that is through the force of his reason and logic. We are captivated and captured, accepting its inerrancy however much we might want to demur. From the moment he observes that "it does not follow from the mere fact that a human body at death is not the subject of ownership that it is forever incapable of having an

⁶³ Listed at lot number 183: *The Sydney Morning Herald* Friday 26 February 1869: 11.

⁶⁴ Leiboff, "Fabulous Law."

⁶⁵ Edwin Patterson, "Logic in the Law," *University of Pennsylvania Law Review* 90 (1942): 875–909. He observes that lawyers and judges intuitively draw on "straight thinking" as *formal logic*: "The older treatises on logic, such as the "Port Royal Logic" of 1662 regarded logic as "the art of properly conducting one's reason in the knowledge of things," that is, the art of straight thinking" (citation omitted):876; concluding that "The lawyer and the judge can, and ordinarily do, reason in a way consistent with the rules of formal logic, without knowing those rules..." 909.

⁶⁶ *Evening News*, (Sydney), (July 31, 1908), 5.

⁶⁷ Leiboff, "Fabulous Law."

owner,”⁶⁸ we are left in doubt that we must accept whatever comes next. We quickly realize that the reason of the strongest is always best in order to vouchsafe the pre-eminence of rights of property in law. The small matter of the authorities or case law that might stand against this position is swiftly dispensed with, on grounds no less than their fabulousness:

Many doctrines have been asserted on the supposed authority of learned persons [...] I do not, myself, accept the dogma of the verbal inerrancy of ancient text writers. Indeed, equally respectable authority, and of equal antiquity, may be cited for establishing as a matter of law the reality of witchcraft. But in my opinion none of the authorities cited afford any assistance in the present case. We are, therefore, free to regard it as a case of first instance arising in the 20th century, and to decide it in accordance with general principles of law, which are usually in accord with reason and common sense.⁶⁹

This is a breath-taking device. To cast this as a case of first instance in the twentieth century is a stunning manoeuvre, its reason and logic the “*faire*” *savoir* of the wolf,⁷⁰ a violent discursive act dispensing with the law to make law, underscored by the little verse that A Barrister thought was “piffle”.⁷¹ I will return to the verse presently. Griffith C.J. had to swiftly dispense with the possibility that the possession of the baby was unlawful, or at least questionable, doing so by speaking of possession that “is not necessarily unlawful” that shifts immediately to “possession which is lawful.”⁷² The grammatical trick is stunning, for it grounds a claim to the baby that is based in lawful possession. Such possession “connotes a right to invoke the law for its protection. A lawful possession which does not invoke any right cognizable by law is a contradiction in terms. Otherwise there would be a field of English law where still prevails: “The good old rule [...]”⁷³ Three uncited lines of poetry underscore and ground principles invoked beyond the limits of the law, from beyond the law, and as we will soon see, they have been purloined and verbalised, for they mean something different entirely.

Another masterful stroke, for Griffith C.J. has somehow managed to convince us that Reuben’s rights have been violated, regardless of how he and his father acquired the baby – or, indeed, how the doctor acquired it. Reuben is now cast as the victim, the lamb, against the wolf of the Crown, which seeks to acquire

⁶⁸ *Doodeward v Spence* (1908), 412.

⁶⁹ *Doodeward v Spence* (1908), 412.

⁷⁰ Leiboff, “Fabulous Law.”

⁷¹ *Doodeward v Spence* (1908), 412.

⁷² *Doodeward v Spence* (1908), 412.

⁷³ *Doodeward v Spence* (1908), 412.

property through the naked power and without any lawful basis through the terms of “the good old rule,” in terms no different to that which characterized law under the *ancien régime* targeted by La Fontaine.⁷⁴ That the Chief Justice is doing precisely the same thing is obscured by through the grammatical violence deployed. He knows there is something not quite right about the character of the possession, but he is determined to establish a principle based in property nonetheless.

Surprisingly, his motives are grounded in the discursive ethics of his new society, and with an eye towards collections of scientific knowledge and the information they contain:⁷⁵ “If one medical or scientific student may lawfully possess it, he may transfer the possession to another. Nor can the right of possession be limited to students.”⁷⁶ Ergo, Reuben is not a student, but he too can have the same right of possession. Griffith C.J., though remembered as a conservative, was the champion of the worker when young. Even Reuben is able to hold property in the twentieth century in this new country. The concerns of the fabulists of old – Henryson and La Fontaine – are now remedied.⁷⁷ The reasoning is triumphantly egalitarian and diabolical in one for Griffith C.J. has established these rights on fabulous grounds.

It is incongruous, then, that a carefully crafted general principle he included in the judgment has itself been fabled by later generations of lawyers, extending the principle to living bodies when he had carefully limited his judgment to bodies from which life had been extinguished:

A human body or a portion of a human body, is capable by law of becoming the subject of property [...] I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial.⁷⁸

The latter part of the *Evening News*’ headline is pure schlock-horror, picking up the examples that Higgins J. used: the legal status of a mummy, skeletons and, of course, Yorick that A Barrister gleefully picked up on in 1910. Higgins J. is looking backwards in time, as represented by this *memento mori*, as well as forward in this judgment. It echoes and responds to Chief Justice through logic and law. But

⁷⁴ Leiboff, “Fabulous Law.”

⁷⁵ *Doodeward v Spence* (1908), 413.

⁷⁶ *Doodeward v Spence* (1908), 414.

⁷⁷ Leiboff, “Fabulous Law.”

⁷⁸ *Doodeward v Spence* (1908), 414.

as we know, wolves eat lambs.⁷⁹ Higgins' J. invokes culture and civil society, the lamb of Marin's reading of the fable, when he speaks of a baby and questions the lawful basis under which it was taken in the first place, and through the close reading and detailed account of the law, recounting all the principles including the ecclesiastical law dealing with the burial of two-headed babies, and authorities from the US.⁸⁰ He has not fabled the law to reach his conclusion, unlike the Chief Justice, but his resort to logic and reason will get him nowhere, as we know from La Fontaine.⁸¹ He is concerned about the consequences that will flow from any decision to allow property in a corpse, a two-headed baby today, Napoleon tomorrow. But there is something else. A Barrister left out something else Higgins J. said [my emphases]:

But even more—according to the plaintiff—if some one else take away the corpse, the first snatcher must be assisted by British law to recover it. The Court is to be used as a *catspaw* by a *body snatcher*. The law is invoked, not only to recognize the right to snatch a corpse, under the “good old rule,” but is asked to enforce the return of the body to the snatcher when he has not been able to keep it.⁸²

This call to and echo of the Chief Justice's use of “the good old rule” points us towards two things: that the Chief Justice has been selective in his use of the verse, and that he has himself, with Barton's J. aid, invoked the good old rule himself. The other emphasised words tell us precisely what he thinks about their actions. Both are fabulous, as we will now see.

6. The good old rule: the reason of the strongest is always best

In 1887, an illustrated article appeared in the *Australian Town and Country Journal*.⁸³ The *Journal*, a weekly English language broadsheet was published out of Sydney from 1870 until its demise in 1919.⁸⁴ It was founded by Samuel Bennett to be

⁷⁹ Leiboff, “Fabulous Law.”

⁸⁰ *Doodeward v Spence* (1908), 418–423.

⁸¹ Leiboff, “Fabulous Law.”

⁸² *Doodeward v Spence* (1908), 423–424.

⁸³ *Australian Town and Country Journal*, (Sydney), (August 6, 1887), 29

⁸⁴ “Australian Town and Country Journal” in *The Oxford Companion to Australian Literature* (2 ed.), eds. William H. Wilde, Joy Hooton, and Barry Andrews, <http://www.oxfordreference.com>.

“valuable to everybody for its great amount of useful and reliable information”, it dealt very thoroughly with diverse subjects: in addition to the customary domestic and foreign news, it included weekly essays on literature, science and invention. The “country” aspect of the journal was strongly emphasized in parliamentary reports and commercial news, with essays on all phases of agriculture, articles on rural towns for the edification of city dwellers, and weekly reports from correspondents scattered throughout the colony.⁸⁵

Samuel Bennett died in 1878, but even after his death, the *Journal* continued his “deep and lively interest in both history and literature, subjects on which he wrote many essays and reviews in his early years”,⁸⁶ as a key publication in which Australian writers could be published.⁸⁷ Bryce notes that this was his best known publication and its “breadth and thoroughness which made it well respected in his time and later a valuable source for the study of Australian social history”.⁸⁸ He was also the publisher of the somewhat differently coloured *Evening News*, of which the *Journal* was a companion publication.⁸⁹ A.B. or “Banjo” Paterson had been the editor of the *Evening News* (1904–06), and then took over as the editor of the *Journal* (1907–8). Banjo Paterson might not mean anything to people outside Australia. He wrote the poem that became Australia’s unofficial national anthem, “Waltzing Matilda”, and created the image of the mythical Australian horseman in “The Man from Snowy River”. He was also impeccably connected. A relative of Barton, A.B. Paterson was also a solicitor.⁹⁰ These webs of connection reveal everything as they do nothing. The swirling capital of shared discursive dispositions meant that the “good old rule” that remained uncited in these judgments did not need to be, because they were well-known in late colonial Australia. There was no need, just as La Fontaine

com/view/10.1093/acref/9780195533811.001.0001/acref-9780195533811-e-239, (last access November 28, 2015).

85 Marilyn J. Bryce, “Bennett, Samuel (1815–1878)”, *Australian Dictionary of Biography, National Centre of Biography*, Australian National University, <http://adb.anu.edu.au/biography/bennett-samuel-2975/text4337>, published first in hardcopy 1969, accessed online 12 November 2015.

86 “Samuel Bennett”

87 “Australian Town and Country Journal”

88 “Samuel Bennett”

89 “Australian Town and Country Journal”; *The Evening News* ran from 29 July 1867–21 March 1931.

90 Clement Semmler, “Paterson, Andrew Barton (Banjo) (1864–1941)”, *Australian Dictionary of Biography, National Centre of Biography*, Australian National University, <http://adb.anu.edu.au/biography/paterson-andrew-barton-banjo-7972/text13883>, published first in hardcopy 1988, (last access December 5, 2015).

did not need to point to the subject of his attention in in “The Wolf and the Lamb.”⁹¹

For the article in the *Journal* is our clue to the “good old rule”. These words do not need to be explained within the world of late colonial, early Federation Australia. But they mean nothing to those of us born out of time, without the benefit of this circulating shared capital that meant there seemed to be no need for any explanation or reference of these words as they appear in the judgment. They are left unnamed in the judgment, one a call (in the Chief Justice’s judgment), and an echo (in that of Higgins’ J). They need to be decoded and explained because there is nothing that tells us to what they refer. To cut to the chase: these are lines from an 1807 Wordsworth poem, “Rob Roy’s Grave”, and they point to the key site of dispute in the judgments of the Chief Justice and the dissenting Higgins J.

Though traceable to the Wordsworth poem, however, the reference in the judgment is not identical with the poem itself, however. If you look at the illustrated article in which they appear in the *Journal*, you might notice three numbered points. They comprise the form of words the Chief Justice used that A Barrister called “ancient piffle,” and each appends to the “moving image” of the “storyboard” of the illustrations accompanying the little article (Fig. 1).

The passage from the poem included in the piece in the *Journal* is cushioned by a modern, illustrated fable, complete with animals, for Wordsworth was describing *animal* behaviour; eagles in the air and Rob Roy on the ground. But this is far from being the poem’s moral. Rob Roy MacGregor (1671–1734) was both outlaw and political hero, a Highlander who demanded protection money from Lowlanders, a Jacobite rebel who helped poor tenant farmers against oppressive landowners.⁹² His legend was fanned by early nineteenth-century Romantics as a champion of liberty against might, justice against law as an agent of division in society, and rights of property as a tool of injustice.⁹³ It is a mistake to read the poem as negating law in favour of unbridled power, for through the figure of Rob Roy, Wordsworth has crafted a version of the “The Wolf and The Lamb” invoking the sentiments of that much earlier Scot, Henryson.⁹⁴

⁹¹ Leiboff, “Fabulous Law.”

⁹² Rob Roy (1671–1734) <http://www.scotlandspeople.gov.uk/content/help/index.aspx?116>, (last access June 12, 2015).

⁹³ Adam Potkay, *Wordsworth’s Ethics* (Baltimore: Johns Hopkins University Press 2012), 111–112.

⁹⁴ Leiboff, “Fabulous Law.”

For thou wert still the poor man's stay,
The poor man's heart, the poor man's hand!
And all the oppressed who wanted strength
Had thine at their command.

Fig. 1: 'The Good Old Rule', *Australian Town and Country Journal* 1887.

But now look at Wordsworth's actual verse. It is less attenuated than the stripped down words found in these numbered points in the *Journal*; *that is the words that have been used in the judgment*. The Chief Justice has fabled the 100 year old poem, perhaps even extracting the modifications from the magazine itself, accepting them at face value as literally advocating power absent law, that is, "might is right," or "the reason of the strongest is best." A fable fabled, based on the three lines of imperfectly extracted principle, a principle without the text that goes with it. But in its brevity, Higgins' J. retort hints at something more, and we see it through the next line: the catspaw. Another fable, and again, it is one of La Fontaine's: "The Monkey and the Cat" (1679). Bertrand the monkey gets Raton the cat to pull roasted chestnuts from a fire, and promises that he will give him some. Raton burns his paw taking them out of the fire, and Bertrand dupes him, eating all of them. Thus, the French saying *tirer les marrons du feu*, "pull the chestnuts from the fire" [my translation]; a catspaw is someone's dupe, doing someone's dirty work for their benefit.⁹⁵ The catspaw (and its variant, the cat's foot), have circulated in English since the seventeenth century. Higgins J. was making his meaning amply clear – through yet another fable.

A final trap. None of the judges or A Barrister cited the origin of the verse or fable. The words float free. In a study I conducted in 2010,⁹⁶ I asked lawyers of different age groups to explain what Higgins J. meant by catspaw, body snatcher, and good old rule. The meaning might have been perfectly clear in 1908, but twenty-first-century lawyers, whose training in the humanities has diminished, and who do not look for anything but law in law and for whom law is rules and doctrine,⁹⁷ looked for the two lines of principle that were not there. In their absence, they created some, fabling instead, as we see in this table:

⁹⁵ "cat's 'paw;' cat's-paw, n." *OED Online*. Oxford University Press, April 2015. Web. (Last access April 2, 2015): eg. 1657 These he useth as the Monkey did the Cats paw, to scrape the nuts out of the fire; 1817 Bothwell was merely the cat's-paw of Murray, Morton, and Maitland. 1877 I am not going to be made a cat's paw of. 1883 Making themselves mere catspaws to secure chestnuts for those publishers

⁹⁶ Talkin' "bout law" *s generations: an empirical and jurisprudential investigation into the reading of legal cases by different generations of lawyers*, funded by a University of Wollongong University Research Committee Small Grant 2009, University of Wollongong Human Research Ethics Approval HE10/206, 10 June 2010, as extended. See generally, Marett Leiboff, "'Ditto': Law, Pop Culture and Humanities and the Impact of Intergenerational Interpretative Dissonance," *Australian Feminist Law Journal* 36 (2012): 145 – 163.

⁹⁷ Peter Goodrich, "The New Casuistry," *Critical Inquiry* 33 (2007): 673 – 709; Marett Leiboff "Ghosts of Law and Humanities (Past, Present, Future)," 36 (2012) *Australian Feminist Law Journal*: 3 – 17.

Question 32		1925 – 1953	1954 – 1965	1966 – 1975	1976 – 1985	1986 – 2000
1. Catspaw	Dupe / Naïve Agent	28.6	0	0	0	2.4
	Agent	0	46.2	27.3	10	9.8
	Other/not answered	71.4	53.8	72.7	90	87.8
2. Body snatcher	Correct	42.9	46.2	36.4	20	34.1
	Other/not answered	57.1	53.8	63.6	80	65.9
3. Good old rule	Correct	0	0	0	0	0
	No property in body	14.3	23.1	9.1	0	0
	Possession is 9/10ths of law	0	7.7	0	10	0
	Finders Keepers	0	7.7	9.1	0	0
	Precedent, property law	42.9	7.7	9.1	20	17.1
	Other/not answered	28.6	53.8	72.7	70	82.9

Participants were given no clues. Body snatcher, a word in contemporary usage and with a legal meaning was capable of being coded generally, but not catspaw and the good old rule. To imagine catspaw as an agent, is to insert a formal legal concept into Higgins' J. reasoning. An agent is authorized to act in the stead of another without their actual authority, a positive concept. The meaning is changed utterly. *Good old rule* became a rule of property law and its associated rights of possession. *Not one participant knew that this was a quote from a poem*, the lawyer-participants insisting on finding a legal meaning where there was none. It reveals how lawyers invest meaning, impose law, and do injustice to the meaning of a case, through a form of conduct that invokes power without knowledge as "*faire*" *savoir*, making like knowledge. And this is precisely what happened to *catspaw*.

In a 2011 US Supreme Court decision, legal readers were again mystified by a 'new' legal term, catspaw, though if the lawyers had read the judgment, they would have found the answer they were looking for in a very detailed footnote. A legal blogger came to the rescue:⁹⁸

We have done some homework and offer the following insights into this relatively new legal phrase. The Supreme Court itself must have been aware of the fact [and ...] in the first footnote in *Staub*, offered this explanation: "cat's paw" derives from a fable conceived by

⁹⁸ *Staub v. Proctor Hospital* 562 U.S. 411; John Kalter, "The Origin of the Cat's Paw," *All in a Day's Work*®. Available at <http://godfreykahnlawblogs.com/2011/03/11/the-origin-of-the-cats-paw/> (last access September 24, 2014).

Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990 [...].

The catspaw doctrine in US law wasn't new, created by Posner J. That one of the nemeses of law and literature had drawn on a literary term to shape a legal concept is perhaps surprising, and a year later, Posner J. had enough of his catspaw:

This is all a dreadful muddle, for which we appellate judges must accept some blame because doctrine stated as metaphor, such as the "cat's paw" theory of liability [...] Spann was no one's cat's paw; he was the monkey [...] with his own paws rather than enlisting some hapless cat to do so.⁹⁹

This was no accidental "dreadful muddle." It is a joke about a lawyer who gets things wrong, literally, in Robert Louis Stevenson's and Lloyd Osbourne's 1889 black comedy *The Wrong Box*: "Next thing, you'll ask me to help you out of the muddle. I know I'm emissary of Providence, but not that kind! You get out of it yourself, like Æsop and the other fellow. Must be [a] dreadful muddle [...]." Stevenson, a Scots contemporary of the *Doodeward v Spence* High Court judges, is famous as the author of *Dr Jekyll and Mr Hyde*, and this little trap of Posner's takes us, again, for fable, to force us into a realization that we as lawyers make fabulous errors based in fable or fiction, through and in the law itself.

⁹⁹ *Cook v. IPC International Corp.*, 673 F.3d 625 (7th Cir.) 2012.