OCR
RECOGNISING ACHIEVEMENT

GCE

Law

Advanced Subsidiary GCE

Unit **G152:** Sources of Law

Mark Scheme for January 2013

Oxford Cambridge and RSA Examinations

OCR (Oxford Cambridge and RSA) is a leading UK awarding body, providing a wide range of qualifications to meet the needs of candidates of all ages and abilities. OCR qualifications include AS/A Levels, Diplomas, Cambridge Nationals, Cambridge Technicals, Functional Skills, Key Skills, Entry Level qualifications, NVQs and vocational qualifications in areas such as IT, business, languages, teaching/training, administration and secretarial skills.

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This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which marks were awarded by examiners. It does not indicate the details of the discussions which took place at an examiners' meeting before marking commenced.

All examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes should be read in conjunction with the published question papers and the report on the examination.

OCR will not enter into any discussion or correspondence in connection with this mark scheme.

Annotations

Annotation	Meaning
	Not Relevant or no response or response achieves no credit
	Repetition
	Point being made/Past tense correctly used
	Developed point
	Developed point expanded
	Link to the source
	Vague
	level 1
	level 2
	level 3
	level 4
	Advantage or feature
	Disadvantage
	Definition
	Undeveloped case The highlight tool may also be used to draw attention to a word or phrase which means that the statement or reasoning is inaccurate

Subject-specific Marking Instructions

Before you commence **marking each question** you must ensure that you are familiar with the following:

- the requirements of the specification
- these instructions
- the exam questions (found in the exam paper which will have been emailed to you along with this document)
- levels of assessment criteria *1 (found in the 'Levels of Assessment' grid at the back of this document)
- question specific indicative content given in the 'Answer' column*2
- question specific guidance given in 'Guidance' column*3
- the 'practice' scripts*4 provided in Scoris and accompanying comment (where provided).

*1 The levels of assessment criteria (found in the 'Levels of Assessment' grid) reflect the expectation of achievement for each Assessment Objective at every level.

*2 The indicative content in the 'Answer' column provides details of points that candidates **may** be likely to make. It is **not** exhaustive or prescriptive and points not included in the indicative content, but which are valid within the context of the question, are to be credited. Similarly, it is possible for candidates to achieve top level marks without citing all the points suggested in the scheme.

*3 Included in the 'Guidance' column are the number of marks available for each assessment objective contained within the question. It also includes the 'characteristics' which a response in a particular level is **likely** to demonstrate. For example, "a level 4 response is likely to include accurate reference to all 5 stages of x with supporting detail and an accurate link to the source". In some instances an answer may not display all of the 'characteristics' detailed for a level but may still achieve the level nonetheless.

*4 The 'practice' scripts are live scripts which have been chosen by the Principal Examiner (and senior examining team). These scripts will represent most types of responses which you will encounter. The marks awarded to them and accompanying commentary (which you can see by changing the view to 'definitive marks') will demonstrate how the levels of assessment criteria and marking guidance should be applied.

As already stated, neither the indicative content, 'characteristics' or practice scripts are prescriptive and/or exhaustive. It is imperative that you remember at all times that a response which:

- differs from examples within the practice scripts; or,
- includes valid points not listed within the indicative content; or,
- does not demonstrate the 'characteristics' for a level

may still achieve the same level and mark as a response which does all or some of this. Where you consider this to be the case you should discuss the candidate's response with your supervisor to ensure consistent application of the mark scheme.

Awarding Assessment Objectives 1 and 2

To award the level for the AO1 or AO2 (some questions may contain both AO1 and AO2 marks) use the levels of assessment criteria **and** the guidance contained within the mark scheme to establish which level the response achieves. As per point 10 of the above marking instructions, when determining which **level** to award start at the **highest*** level and work down until you reach the level that matches the answer.

Once you have established the correct level to award to the response you need to determine the mark within the level. The marks available for each level differ between questions. Details of how many marks are available per level are provided in the Guidance column. Where there is more than one mark available within a level you will need to assess where the response 'sits' within that level. Guidance on how to award marks within a level is provided below, with the key point being that you start at the **middle*** of each level and work outwards until you reach the **mark** that the response achieves.

Answers, which contain no relevant material at all, should receive no marks.

For answers marked by levels of response:

Descriptor	Award mark
On the borderline of this level and the one below	At bottom of level
Just enough achievement on balance for this level	Above bottom and either below middle or at middle of level (depending on number of marks available)
Meets the criteria but with some slight inconsistency	Above middle and either below top of level or at middle of level (depending on number of marks available)
Consistently meets the criteria for this level	At top of level

Awarding Assessment Objective 3

AO3 marks are awarded based on the marks achieved for either AO1, AO2 or in some cases, the total of AO1 and AO2. You must refer to each question's mark scheme for details of how to calculate the AO3 mark.

Rubric

What to do for the question the candidate has not answered?
The rubric for G152 instructs candidates to answer one question all parts, eg question 1(a) – 1(c)(ii) **or** question 2(a) – 2(c)(ii). So each script you look at should have a response for **either** question 1 **or** question 2. For the question the candidate has not answered you should record a NR (No Response) in the mark column on the right-hand side of the screen. Do not record a 0.

What to do for the candidate who has 'violated' the rubric and attempted to answer question 1 and question 2?
You should mark both questions (all parts). Scoris will then work out the total mark for Question 1 and the total mark for Question 2 – it will award the candidate the highest mark of the two totals.

Blank pages and missed answers
Sometimes candidates will skip a few pages in their answer booklet and continue or add to a response. To be sure you have not missed any candidate response when you come to mark the part (c)(ii) question you must check every page of each script and annotate any blank pages with

You must also check any additional items eg A1, A. This will let your team leader, OCR and the centre know that you have seen every page.

<table>
<tr><th colspan="3">Question</th><th>Answer</th><th>Marks</th><th>Guidance</th></tr>
<tr><td>1</td><td>(a)*</td><td></td><td>Potential answers may:

Assessment Objective 1 – Knowledge and understanding

Describe distinguishing:
• A method where a judge can avoid an otherwise binding precedent
• In order to distinguish the judge must show that there is a difference in the material facts of the two cases
• If the material facts are sufficiently different then the instant judge is not bound by the earlier case
• Where this occurs the earlier decision need not be followed and a fresh precedent may be set
• Use any relevant pair of cases to illustrate: Balfour v Balfour (1919) and Merritt v Merritt (1971); Stilk v Myrick (1809) and Williams v Roffey (1990); Rylands v Fletcher (1868) and Read v Lyons (1947); R v Jordan (1956) and R v Cheshire (1991); R v Brown & Others (1994) and R v Wilson (1995).

Describe binding precedent:
• The part of a judgment that must be followed by future courts depending on their position in the hierarchy
• Explain that it is usually to be found in the ratio decidendi of the case (and distinguish from the obiter dicta)
• Distinguish binding from persuasive precedent
• Give an example of a famous binding precedent (Donoghue v Stevenson; Carlill v Carbolic, R v Dudley & Stevens etc).

Make relevant reference to the source.</td><td>12</td><td><table><tr><th>AO1 Levels</th><th>AO1 Marks</th></tr><tr><td>4</td><td>10–12</td></tr><tr><td>3</td><td>7–9</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table>
Responses will be unlikely to achieve level four without a good description of both distinguishing and binding precedent including a suitable case for distinguishing and a case example of binding precedent and a LNK.

Responses will be unlikely to achieve level three without an adequate description of both distinguishing and binding precedent including either a pair of suitable cases for distinguishing or a case example of binding precedent.

Responses will be unlikely to achieve level two without an adequate explanation of either distinguishing or binding precedent or a limited attempt at both.

Responses will be unlikely to achieve level one without making basic points.</td></tr>
<tr><td></td><td></td><td></td><td>Assessment Objective 3 – Communication and presentation

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.</td><td>3</td><td><table><tr><th>AO1 Marks</th><th>AO3 Mark</th></tr><tr><td>9–12</td><td>3</td></tr><tr><td>5–8</td><td>2</td></tr><tr><td>1–4</td><td>1</td></tr></table></td></tr>
</table>

Question			Answer	Marks	Guidance
	(b)	(i)	Potential answers **may:** **Assessment Objective 2 – Analysis, evaluation and application** Recognise that the instant court cannot overrule the earlier case (**CP**). Discuss the reason – that the later case is bound by the earlier case because the Practice Statement has not yet been published (even if the result were unjust). Consider the alternative method of distinguishing. Use an appropriate case such as London Street Tramways or any distinguishing case. Credit relevant reference to the source.	5	<table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td colspan="2">For each point i, ii, iii</td></tr><tr><td>4</td><td>5</td></tr><tr><td>3</td><td>4</td></tr><tr><td>2</td><td>3</td></tr><tr><td>1</td><td>1–2</td></tr></table> Responses will be unlikely to achieve level four without identifying the CP* and explaining ‘why’ and explaining one other relevant point. Responses will be unlikely to achieve level three without identifying the CP* and explaining ‘why’. Responses will be unlikely to achieve level two without identifying the CP*. Responses will be unlikely to achieve level one without making basic points of relevance. * Accept other expressions of the CP including simple Yes/No. For (b)(ii) and (b)(iii) credit may also be given for considering the possibility that a decision of the ECJ, ECHR or Privy Council may be followed in some circumstances.
		(ii)	Recognise that the instant court can overrule the decision of the earlier court (**CP**). Discuss the reason – the earlier decision was *per incuriam* which is one of the recognised exceptions under *Youngs v Bristol Aeroplane (1944)* (do not accept *Youngs* as a case). Use a relevant case – *Williams v Fawcett (1986)*. Consider also the possibility of distinguishing. Credit any relevant distinguishing case. Credit relevant reference to the source.	5	
		(iii)	Recognise that the instant court can overrule the decision of the earlier court (**CP**). Discuss the reason – because the new UK Supreme Court has stated that the Practice Statement 1966 continues to apply in the same way as it did in the House of Lords. Credit reference to *Austin v Southwark LBC (2010)*. Consider the possibility of distinguishing. Credit any reference to a relevant distinguishing case. Credit relevant reference to the source (cannot credit *Austin* twice in this context).	5	

<table>
<tr><th colspan="3">Question</th><th>Answer</th><th>Marks</th><th>Guidance</th></tr>
<tr><td></td><td>(c)</td><td>(i)</td><td>Potential answers may:

Assessment Objective 1 – Knowledge and understanding

Describe the development of the Practice Statement:
• Before 1898 the House of Lords was free to overrule its own previous decisions
• In London Street Tramways (1898) the House of Lords decided to follow its own previous decisions in the interests of certainty in the law
• The House of Lords decided they needed more flexibility in 1966 and issued the Practice Statement
• The Practice Statement was only to be used sparingly to avoid uncertainty
• The judicial functions of the House of Lords were transferred to the UK Supreme Court (UKSC) in 2009 and Practice Directions 3 & 4 as well as the 2010 case of Austin v Southwark LBC make it clear that the Practice Statement continues to apply in the UKSC.
• Describe any of the content of the Practice Statement (eg conditions for its careful use in crime, contract and fiscal matters).
Use any relevant pair of Practice Statement cases to illustrate its use: Conway v Rimmer overruling Duncan v Camel Laird; Herrington v BR Board overruling Addie v Dumbreck; Miliangos v George Frank Textiles overruling Re United Rlys of the Havana and Regla Warehouses Ltd; Shivpuri overruling Anderton v Ryan; R v Howe overruling DPP v Lynch, Murphy v Brentwood DC overruling Anns v Merton LBC; Pepper v Hart overruling Davis v Johnson; Arthur JS Hall v Simons overruling Rondel v Worsley; R v G and R overruling Caldwell; Horton v Sadler overruling Walkley v Precision Forgings; A v Hoare overruling Stubbings v Webb or a refusal to overrule such as Jones v Secretary of State for Social Services refusing to overrule Re: Dowling. Also credit description of the cautionary limits of judicial law-making expressed in C (a minor) v DPP. Credit any other relevant case.

Make relevant reference to the source.</td><td>15</td><td><table><tr><th>AO1 Levels</th><th>AO1 Marks</th></tr><tr><td>4</td><td>13–15</td></tr><tr><td>3</td><td>9–12</td></tr><tr><td>2</td><td>5–8</td></tr><tr><td>1</td><td>1–4</td></tr></table>
Responses will be unlikely to achieve level four without a good description of the development of the Practice Statement (PS) plus relevant PS cases (excluding London Street Tramways and Austin) plus a LNK.

Responses will be unlikely to achieve level three without an adequate description of the development of the PS plus relevant PS cases.

Responses will be unlikely to achieve level two without a limited description of the development of the PS with a relevant case or cases or a relevant LNK.

Responses will be unlikely to achieve level one without a range of basic points or a single point with a little development.</td></tr>
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<tr><th colspan="3">Question</th><th>Answer</th><th>Marks</th><th>Guidance</th></tr>
<tr><td></td><td></td><td>(ii)*</td><td>Potential answers may:

Assessment Objective 2 – Analysis, evaluation and application

A discussion of the following advantages:
• Certainty ... enables lawyers to advise clients accurately and individuals to plan their affairs according to likely outcomes. Also provides stability for business and other fiscal arrangements to be founded on
• Fairness & Consistency ... like cases are treated alike which is fair, just, certain and rational. The law is not subject to whims of individual judges which lends greater credibility
• Flexibility ... despite a fairly rigid system overall, the system allows room for development through distinguishing, overruling and so on which means judges can develop the law to meet changing social , political or moral conditions
• Precision ... in a system which has been refining law over hundreds of years the law becomes very precise as minor variations on the same principles arise
• Time – Saving ... because we have such a vast body of precise law to rely on cases do not have to be constantly re-argued from first principle saving lawyers, the court and clients time and money.
A discussion of the following disadvantages:
• Rigidity ... Precedent can make the law too inflexible with bad decisions being perpetuated – especially if it takes a long time for suitable cases to get to the senior courts that can change the law (R v R [1992]). Furthermore, such cases may only get to the senior courts where the parties have the money, courage and persistence to appeal their case
• Complexity ... with hundreds of thousands of reported cases it is difficult to identify and locate relevant case law, (even with computerised databases). The judgements themselves are sometimes very long with no clear distinction between obiter and ratio (Dodd's Case [1973])</td><td>12</td><td><table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td>4</td><td>10–12</td></tr><tr><td>3</td><td>7–9</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table>
Responses will be unlikely to achieve level four without four or more developed points one of which must be well developed. Cannot be one – sided (i.e. must consider both sides of the argument at bottom level four) and must have balance for top level four.

Responses will be unlikely to achieve top of level three without four or more developed points or two well-developed points. Three or more developed points for the bottom of level three. (Can be one – sided).

Responses will be unlikely to achieve top of level two without two developed points or one well developed point or a range of limited points.

Responses will be unlikely to achieve level one without basic points advantages and/or disadvantages.</td></tr>
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- **Illogical Distinctions** ... practices such as ‘distinguishing’ lead to ‘hair-splitting’ which, in its turn, can lead to certain areas of law becoming over-complex. The minor differences between some cases can be so small as to make the distinction appear illogical
- **Slowness Of Growth** ... unless parliament legislate, there is nothing the judges can do to reform the law – their hands are tied until suitable cases come along (note Denning’s argument for the Court of Appeal having greater powers as so few cases get to the HL)
- **Judicial Law Making** … There is a strongly held view that judges can and do use precedent to ‘make law’ (eg *R v R [1991]*) and that they do not have the mandate to do so because, according to the theories of separation of powers and supremacy of parliament, only parliament should make law. However, many judges argue that they are simply adapting existing legal rules to fit changing social conditions (so-called declaratory theory).

Responses are not required to reference the sources in this question but may attract credit from relevant use of the source.

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<tr><td></td><td></td><td></td><td>

Assessment Objective 3 – Communication and presentation

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.

</td><td>3</td><td>

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<tr><td>2</td><td>(a)*</td><td></td><td>Potential answers may:

Assessment Objective 1 – Knowledge and understanding

Define the golden rule:
• The golden rule is a modification of the literal rule
• The golden rule is thought to have its origins in the dictum of Parke B in Becke v Smith (1836)… that the words of an Act should be taken literally but they can be modified or varied to avoid inconsistency with the Act or a repugnant outcome
• Judges only use the rule when the use of the literal rule would produce an absurd or unjust result.
There are two versions of the rule:
• Narrow golden rule – where a word or words have two possible meanings but one would produce an unwanted or absurd outcome the court may chose between them (Jones v DPP (1962), R v Allen (1872))
• Wide golden rule – where the meaning of a word is not ambiguous but to give it its literal meaning would produce a repugnant outcome (Re: Sigsworth (1935)).
Use appropriate cases to illustrate:
Jones v DPP (1962); Re: Sigsworth (1935); R v Allen (1872); Adler v George (1964*); Ruther v Harris (1876); River Wear Commissioners v Adamson (1877); Grey v Pearson (1857); Meah v Roberts (1977); Maddox v Storer (1963); R v Pawlicki (1992); R v Samuel (1988); R v National Insurance Commissioner (ex p Connor) (1981).

Make relevant reference to the source.</td><td>12</td><td><table><tr><th>AO1 Levels</th><th>AO1 Marks</th></tr><tr><td>4</td><td>10–12</td></tr><tr><td>3</td><td>7–9</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table>
Responses will be unlikely to achieve level four without a definition of both the narrow and wide versions of the golden rule plus a case each* and a LNK. Candidates will be unable to achieve level 4 without defining both the wide and narrow versions of the rule.

Responses will be unlikely to achieve level three without a definition of both versions of the golden rule with one case* or a single definition with two cases*.

Responses will be unlikely to achieve level two without limited response based around definitions and/or cases and source use. Cannot move to level 3 without both a non-source based definition and a non-source based case. Lists and bullet points = max 6 marks.

Responses will be unlikely to achieve level one without any basic (relevant) point(s).

*Adler v George is not included above level 2 as it is given in the source.

Features should be noted and only influence the position within a level. Features might include comments such as ‘the rule avoids the absurdity of the literal rule’, ‘the rule provides an escape route from the harshness of the literal rule’ or ‘the wide rule can allow judges to effectively re-write statutes’.</td></tr>
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Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.</td><td>3</td><td><table><tr><th>AO1 Marks</th><th>AO3 Mark</th></tr><tr><td>9–12</td><td>3</td></tr><tr><td>5–8</td><td>2</td></tr><tr><td>1–4</td><td>1</td></tr></table></td></tr>
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<tr><td></td><td>(b)</td><td></td><td>Potential answers may:

Assessment Objective 2 – Analysis, evaluation and application</td><td></td><td rowspan="4"><table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td colspan="2">For each point i, ii, iii</td></tr><tr><td>4</td><td>5</td></tr><tr><td>3</td><td>4</td></tr><tr><td>2</td><td>3</td></tr><tr><td>1</td><td>1–2</td></tr></table>
Responses will be unlikely to achieve level four without the reasoned application of three rules of SI or without the reasoned application of two rules of SI and another relevant point such as:
• a relevant case
• a LNK
• mens rea
• intent of act etc

Responses will be unlikely to achieve level three without the reasoned application of two rules of SI.

Responses will be unlikely to achieve level two without the reasoned application of one of the rules of SI.

Responses will be unlikely to achieve level one without making basic relevant points.</td></tr>
<tr><td></td><td></td><td>(i)</td><td>Recognise that Giovanni would be guilty under any of the rules of interpretation (CP) as he is (a) literally ‘in the vicinity’ and guilty under the literal rule, (b) there is no ambiguity or repugnance and therefore the golden rule has no application and (c) he is doing exactly what the Act intended to criminalise and is guilty under the mischief rule and/or purposive approach – credit any or each correctly reasoned application. Credit the use of a relevant case. Credit reference to the source. Credit explanation that Giovanni has the intent or mens rea. Credit any other relevant point.</td><td>5</td></tr>
<tr><td></td><td></td><td>(ii)</td><td>Recognise that Mario would be not guilty under the literal rule as he is literally ‘in the school’ as opposed to ‘in the vicinity’ (CP); that Mario would be guilty under the golden rule as the literal rule produces an absurd outcome and ‘in the vicinity’ would be read as both ‘in’ and ‘near to’; that Mario would be guilty under the mischief rule and/or the purposive approach as he is doing what the Act intended as it would be obviously dangerous to drive on a playground. Credit any reasoning based on the similarity to the source. Credit any relevant case. Credit reference to the source. Credit any other relevant point.</td><td>5</td></tr>
<tr><td></td><td></td><td>(iii)</td><td>Recognise that Alfonso would not be guilty under the literal rule as, regardless of his being in the vicinity or otherwise, he is not selling ice cream (CP). Recognise that the literal rule produces an absurd outcome and that the golden rule would remedy this and find Alfonso guilty. Recognise that Alfonso would also be guilty under the mischief rule and/or purposive approach as he is doing what the Act intended to stop by creating a danger for children. Credit any relevant case. Credit reference to the source. Credit any other relevant point.</td><td>5</td></tr>
</table>

<table>
<tr><th colspan="3">Question</th><th>Answer</th><th>Marks</th><th>Guidance</th></tr>
<tr><td></td><td>(c)</td><td>(i)</td><td>Potential answers may:

Assessment Objective 1 – Knowledge and understanding

Identify that the mischief rule has its origins in Heydon’s case (1584) (“Four things are to be discussed and considered: (i) What was the common law before making the Act? (ii) What was the mischief and defect for which the common law did not provide? (iii) What remedy hath Parliament resolved and appointed to cure the disease of the commonwealth? (iv) What is the true reason for the remedy? Judges shall make such construction as shall suppress the mischief and advance the remedy.”)
Thus, in less obtuse language, the rule has four elements
1. What was the common law before the making of the Act.
2. What was the mischief and defect for which the common law did not provide.
3. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth.
4. The true reason of the remedy; and then the office of the Judges is to make such construction as shall suppress the mischief and advance the remedy.
However, a working definition might be that words are interpreted in such a way as to give effect to the intention of Parliament in the light of some pre-existing problem (or ‘mischief’) for which the common law did not provide a remedy.
Use any relevant case in illustration:
Jones v Wrotham Park Settled Estates (1979); Smith v Hughes (1960); Royal College of Nurses v DHSS (1981); DPP v Bull (1994); Corkery v Carpenter (1951); Gardiner v Sevenoaks RDC (1950); Elliott v Grey (1959); Alphacell v Woodward (1972); Whittaker v Campbell (1983); Bradford v Wilson (1983); R v Chief Constable of Kent (ex parte the Police Federation) (1999)</td><td>15</td><td>
<table>
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</table>
Responses will be unlikely to achieve level four without a good definition* of the mischief rule plus a LNK and at least three ‘developed’ cases* (mid) or two ‘developed’ cases** (low).

(*a ‘good’ definition will refer to the component parts of the rule although accurate recital is not expected. A ‘developed case’ will refer to the appropriate mischief and what the court’s resolution was).

Responses will be unlikely to achieve level three without an adequate definition of the mischief rule (recognise as the mischief rule but no accurate reference to component parts necessary) plus at least two ‘developed’ cases* (high) or one ‘developed’ case (low).

Responses will be unlikely to achieve level two without limited response based around definitions and/or cases and source use. Cannot move to level 3 without both a proper definition and a non-source based case. Lists and bullet points = max 6 marks.

Responses will be unlikely to achieve level one without any basic (relevant) point(s)

**Heydon’s Case and R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme (2001) are not included as developed cases as they appear in the source. Purposive Approach cases should be accepted unless a clear ‘mischief’ is identified.</td></tr>
</table>

Question			Answer	Marks	Guidance
					Features might include comments such as ‘the rule avoids the absurdity of the literal rule’, ‘the rule provides an escape route from the harshness of the literal rule’ or ‘the wide rule can allow judges to effectively re-write statutes’.

Question			Answer	Marks	Guidance
		(ii)*	Potential answers **may:** **Assessment Objective 2 – Analysis, evaluation and application** A discussion of the following **advantages**: • The rule helps to avoid the absurdity and injustices associated with more literal approaches and 'repairs' bad laws quickly • The rule promotes 'flexibility' and allows judges to put into effect the remedy Parliament chose (ie gives expression to Parliament's true intention) … thus also saving Parliament time in not having to legislate afresh • Leads to reforming and improving law as each case is interpreted to try and prevent the specific mischief which allows the law to develop and adapt to changing economic, social and physical conditions (*RCN v DHSS*) • Blackstone justified his support for the mischief rule by stating that *'[T]he fairest and most rational method to interpret the will of the legislator is by exploring his intention at the time the law was made'* • The rule offers an alternative to the literal and golden rules but one which is more narrow than the purposive approach allowing judges to show more respect for parliamentary sovereignty and separation of powers • Credit any other relevant advantage. A discussion of the following **disadvantages**: • Can create an offence 'after the event' (*eg* *Smith v Hughes*) which undermines the certainty and predictability of law (note possible impact on the rule of law) • It allows for potential judicial law-making (eg *RCN v DHSS*) which may have an impact on the doctrines of supremacy of parliament and/or separation of powers • There is also no consistency as different judges reach different conclusions as judges can bring their own views, moral values and prejudices to bear (*DPP v Bull*) • It can only be used if parliament's intention and, more specifically, the 'mischief' aimed at can be discovered and this may be hampered by the availability (or otherwise) of extrinsic aids (*eg Hansard*)	12	**AO2 Levels / AO2 Marks** 4: 10–12 3: 7–9 2: 4–6 1: 1–3 Responses will be unlikely to achieve level four without four or more developed points one of which must be well developed. Cannot be one – sided (i.e. must consider both sides of the argument at bottom level four) and must have balance for top level four. Responses will be unlikely to achieve top of level three without four or more developed points or two well-developed points (can be one – sided). Three or more developed points for the bottom of level three (can be one – sided). Responses will be unlikely to achieve top of level two without two developed points or one well developed point or a range of limited points. Responses will be unlikely to achieve level one without basic points advantages and/or disadvantages.

<table>
<tr><th colspan="3">Question</th><th>Answer</th><th>Marks</th><th>Guidance</th></tr>
<tr><td></td><td></td><td></td><td>
• It is a redundant rule – it is no longer needed now we have the purposive approach
• The rule dates back to a time (Heydon's Case (1584)) when statute was a minor source of law and Parliament often legislated to circumvent the common law. Parliament's intention and the fault in the common law were easier to discern. This may mean the rule is less appropriate now that the quality and quantity of legislation is so different
• Credit any other relevant disadvantage.
Credit discussion of the following question as appropriate: Is there any difference between the purposive approach and the mischief rule? Yes:
• The purposive approach goes further – the mischief rule is only applied where there was a gap (a fault) in the common law, whereas the purposive approach applies whether the area covered by the Act was previously governed by statute or common law
• The purposive approach is an extension of the contextual approach based on literalism. The mischief rule pre-dates both of these
• The mischief rule, as originally applied, was an attempt to restrict the scope of the court's enquiry into the Act itself, whereas the purposive approach allows much wider consultation as seen in the extensive use of extrinsic aids
• Credit any reference to Glanville William's comments on this point as set out in Source B.
Make relevant reference to the source.
</td><td></td><td></td></tr>
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Assessment Objective 3 – Communication and presentation

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
</td><td>3</td><td>
<table>
<tr><th>AO2 Marks</th><th>AO3 Mark</th></tr>
<tr><td>9–12</td><td>3</td></tr>
<tr><td>5–8</td><td>2</td></tr>
<tr><td>1–4</td><td>1</td></tr>
</table>
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AS GCE Law Levels of Assessment

There are **four** levels of assessment of AOs 1 and 2 in the AS units. Level 4 is the highest level that can reasonably be expected from a candidate at the end of the first year of study of an Advanced GCE course. Similarly, there are **three** levels of assessment of AO3 in the AS units.

Level	Assessment Objective 1	Assessment Objective 2	Assessment Objective 3 (*includes QWC*)
4	Good, well-developed knowledge with a clear understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate by good citation to relevant statutes and case-law.	Ability to identify and analyse issues central to the question showing some understanding of current debate and proposals for reform or identify most of the relevant points of law in issue. Ability to develop clear arguments or apply points of law clearly to a given factual situation and reach a sensible and informed conclusion.	
3	Adequate knowledge showing reasonable understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate with some citation of relevant statutes and case-law.	Ability to analyse most of the more obvious points central to the question or identify the main points of law in issue. Ability to develop arguments or apply points of law mechanically to a given factual situation, and reach a conclusion.	A good ability to present logical and coherent arguments and communicates relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
2	Limited knowledge showing general understanding of the relevant concepts and principles. There will be some elaboration of the principles, and where appropriate with limited reference to relevant statutes and case-law.	Ability to explain some of the more obvious points central to the question or identify some of the points of law in issue. A limited ability to produce arguments based on their material or limited ability to apply points of law to a given factual situation but without a clear focus or conclusion.	An adequate ability to present logical and coherent arguments and communicates relevant material in a reasonably clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
1	Very limited knowledge of the basic concepts and principles. There will be limited points of detail, but accurate citation of relevant statutes and case-law will not be expected.	Ability to explain at least one of the simpler points central to the question or identify at least one of the points of law in issue. The approach may be uncritical and/or unselective.	A limited attempt to present logical and coherent arguments and communicates relevant material in a limited manner using some appropriate legal terminology. Reward grammar, spelling and punctuation.

Appendix

Marking Guidance

This marking guidance should be used **in conjunction with** the above mark scheme, levels of assessment grid, Practice and Standardisation scripts. If you are unsure about what level and/or mark to reward you **must** contact your team leader.

Q1(a) A mark ('P') a point which can simply be counted off and converted to levels subject to rules detailed below:

List (not exhaustive) to include:

- A definition of distinguishing (1)
- An basic explanation of the 'mechanics' of distinguishing (1)
- A better explanation of the 'mechanics' of distinguishing (1)

May all be in one sentence

- Mere mention of one of a pair of distinguishing cases (1) each (**but no credit for using the source cases**)
- Explanation of the facts of one of a pair of cases (1) each
- Explanation of the legal principle of one of a pair of cases (1) each
- Explanation of the distinguishing principle (eg for *Balfour/Merritt* - the later case was distinguished because there was evidence of an intention to create legal relations and therefore a contract whereas in *Balfour* the court said the couple only had a social and domestic arrangement which could not amount to a contract; for *Brown/Wilson* – the later case decided you could consent to harm done in the context of personal adornment but not (as in the earlier case) in the context of sexual pleasure)
- Reference to the effect of distinguishing – such as: it becomes a new binding precedent, it allows a judge the freedom to escape otherwise binding precedents, it can lead to very fine and precise distinctions etc (but not AO2 such as 'it is misused by activist judges' or framing points in an AO2 context such as 'a disadvantage of …') (1) each

- A definition of binding precedent (1)
- Explain that the ratio of a case is the binding element (1) (distinguish ratio from *obiter* (1))
- Explain difference between binding and persuasive precedent (1)
- Mere mention of a case example (1)
- Illumination (facts or principle/binding precedent) of a case example (1)
- Any other relevant point (1)

NB: Responses placed in L4 should include BOTH distinguishing AND binding precedent, use of a case (for both) and a LNK (only once require) (ie max 9 + 3).
Annotations:
'P' for a point
LNK for link to source
X for incorrect point
wiggly line for vague or not relevant

Q1(b)(i), (ii), (iii)

L1 = Any relevant point(s) (eg distinguishing or use of source only)

L2 = CP (bound or not bound) accept other language that expresses the same – e.g. will have to follow, must do the same or even simple YES/NO response to command (but not **reversing** which is not relevant to any of the three questions)

(b)(i) **BOUND**
(b)(ii) **NOT BOUND OR BOUND (two route answer – see below)**
(b)(iii) **BOUND OR NOT BOUND (two route answer – see below)**

L3 = CP + 'WHY' (MUST ACHIEVE L3 BEFORE CREDIT FOR OTHER RELEVANT POINTS CAN BE GIVEN)

(b)(i) BECAUSE THE HOUSE OF LORDS WAS, IN 1960, ALWAYS BOUND BY IT'S OWN PREVIOUS DECISIONS FOLLOWING THE DECISION IN LONDON STREET TRAMWAYS or IT WAS BEFORE THE PS

(b)(ii) **ROUTE 1**: BECAUSE THE COURT OF APPEAL ARE FREE TO OVERRULE THEIR OWN PREVIOUS DECISIONS WHERE A YOUNGS EXCEPTION APPLIES or ROUTE 2: BECAUSE THE COURT OF APPEAL IS USUALLY BOUND EXCEPT WHERE A YOUNGS EXCEPTION APPLIES. ALSO SEE NOTES BELOW

(b)(iii) ROUTE 2: BECAUSE THE UKSC IS NORMALLY BOUND BY ITS OWN PREVIOUS DECISIONS (EXCEPT WHERE THE PS APPLIES) or ROUTE 2: BECAUSE THE UKSC IS NOT BOUND BY ITS OWN PREVIOUS DECISIONS DUE TO THE PS

L4 = L3 + SOMETHING ELSE – MOST LIKLEY:

(b)(i) Use of London Street Tramways, possibility of distinguishing, *per incuriam* or a LTS

(b)(ii) Reference to the right Young's exception (*per incuriam*), case (e.g. Williams v Fawcett) or a LTS. Also, see note below.

(b)(iii) This question was included to deliberately test whether students recognise the relevance of Practice Statements 3 & 4 and/or Austin v Southwark BC. The question would be too similar to (b)(i) without this. So, the ONLY route to L4 on this question is recognition of the significance of either of these.

Notes for (b)(ii) credit at L3 and/or L4 the possibility that a decision of the ECJ, ECHR or PC might also be followed in some circumstances. Also, cannot use '*per incuriam*' as **both** the 'why' and a L4 'extra'

Annotations = simple L2, L3 and L4 as appropriate next to correct point

Q1(c)(i) A mark ('P') a point which can simply be counted off and converted to levels subject to rules detailed below:

List (not exhaustive) to include:

- Development:
  - Before 1898 free to overrule (1)
  - 1898 decides to stick to previous decisions (1)
  - Mentions *London Street Tramways* (1)
  - Mentions reason - 'certainty' (1)
  - 1966 recognise need for flexibility (1)
  - 1966 HoL issues PS (1)
  - Any detail on content of PS (eg caution in use for crime and contract, need for certainty etc) (1) each
  - What is does/allows (even if lifted from source) (1)
  - In 2009 HoL transferred powers to UKSC including PS
  - Practice Directions 3 & 4 recognise continued application of PS
  - *Austin v Southwark BC* (2010) recognises continued validity of PS (do not credit case itself as it's in the source) (1)
  - Any other relevant point (1) eg 'when it appears right to do so', 'first criminal use', 'first major use', 'used sparingly at first'

- Use:
  - Mere mention of a single PS case (1) (eg Herrington)
  - Mere mention of the matching overruled PS case (1) (eg Addie)
  - Any detail on facts of a relevant case (1) each
  - Any detail on principle of a relevant case (1) each
  - Specific isolation of the SINGLE overruling principle (1)
  - Mention of a case where declined to use PS (eg Jones) (1)
  - Any comment on why declined to use (certainty more important than justice in instant case) (1)
- Any other relevant point (1)

NB: Responses placed in L4 should include at least ONE relevant case and a LNK.

No credit can be rewarded for discussing (AO2) the advantages or disadvantages of the use of the PS or the potential for judicial law-making etc

Annotations:
'P' for a point
'C' for a case
LNK for link to source
X for incorrect point
Wiggly line for irrelevant and vague

Contrary to popular opinion, *R v R* (rape within marriage) is NOT a PS case

Q1(c)(ii)

- L1 – simple points/bald points/lists (1 – 3)
- L2 – 1 or 2 developed points, a range of limited points or a single well developed point (4 – 6)
- L3 – 3 to 4 developed points (could be one-sided – i.e. only considers advantages or disadvantages) or two well-developed points (if balanced move towards top of mark range) (7 – 9)
- L4 – 4 or more developed points of which at least one must be a well developed point – should consider both sides of the argument (but not necessarily balanced) to get low level four but a balanced discussion (e.g. min 2:2) for full marks (10 – 12)
- **No LTS required**

Annotations:
'P' for points
'DEV' for developed points
'E' for well developed points

Q2(a)

Level 1 (1 – 3) - Basic point(s)

Level 2 (4 – 6)
Bottom – range of limited points or bald cases or definition (basic or 'lifted') alone
Mid - a definition (basic or 'lifted') and a bald/source case
Top – Mid plus feature(s)/relevant LNK

Level 3 (7 – 9)
Bottom - definition (basic or 'lifted') plus one developed case
Mid – definition (not lifted but may not identify wide and narrow) plus one developed case or definition (basic or 'lifted') plus two developed cases
Top – Mid plus feature(s)/relevant LNK

Level 4 (10 – 12)
Bottom - definition of both versions (wide and narrow) plus one developed case
Mid - definition of both versions (wide and narrow) plus a developed case for each
Top – Mid plus feature(s)/relevant LNK
Must include LNK

Notes: *Adler v George* does not count as a developed case above L2 as it is in the source (annotate with 'C' and 'LNK'). Furthermore, must be a Golden Rule case to be developed. If the candidate uses a case from a different rule but states how the golden rule would apply to it, then this can only be credited as a bald case.

Features should be noted but only influence position within a level – features might include comments such as 'the rule avoids the absurdity of the literal rule', 'the rule provides an escape route from the harshness of the literal rule' or 'the wide rule can allow judges to effectively re-write statutes' but do not credit AO2 especially where the comment is framed in the context of an advantage, disadvantage or effectiveness

NB: Only consider 'features' to lift to the top of the level if the candidate has already met the criteria for the middle of the level.

Annotations:
E – developed case
C for (each) case
'K' for definitions
LNK for link to source
S Features
X for incorrect point
Wiggly line for irrelevant and vague

Q2(b)

L1 Any relevant point(s) e.g. implicit reasoning with no outcome
L2 = ONE RULE CORRECTLY APPLIED (with or without 'why')
L3 = TWO RULES CORRECTLY APPLIED (with or without 'why')
L4 = THREE RULES CORRECTLY APPLIED OR TWO RULES CORRECTLY APPLIED PLUS SOMETHING ELSE (A RELEVANT CASE, A LTS, MENS REA, INTENT OF ACT ETC)

(b)(i)
LITERAL RULE = GUILTY
GOLDEN RULE = NO APPLICATION NOTED
MISCHIEF RULE/PURPOSIVE APPROACH = GUILTY
TYPICAL 'SOMETHING ELSE' = HAS MENS REA; WITHIN FOUR CORNERS OF THE ACT; AORP

(b)(ii)
LITERAL RULE = NOT GUILTY
GOLDEN RULE = GUILTY
MISCHIEF RULE/PURPOSIVE APPROACH = GUILTY
TYPICAL 'SOMETHING ELSE' = SIMILARITY TO ALDER; HAS MENS REA; WITHIN FOUR CORNERS OF THE ACT; AORP

(b)(iii)
LITERAL RULE = NOT GUILTY
GOLDEN RULE = GUILTY
MISCHIEF RULE/PURPOSIVE APPROACH = GUILTY
TYPICAL 'SOMETHING ELSE' = WITHIN FOUR CORNERS OF THE ACT; AORP

NB: Giving the incorrect reasoning for a correct outcome cancels out the mark. Also, if the candidate has hedged (two possible outcomes/rules but not committing to either) then they cannot be credited.

FOR LEVEL 2 AND ABOVE THE OUTCOME MUST BE CLEAR – THE RULE MUST BE APPLIED TO A LOGICAL OUTCOME – CANNOT ACCEPT IMPLIED REASONING/OUTCOME. ALSO, CANNOT CREDIT 'HEDGING'

MISCHIEF RULE/PURPOSIVE APPROACH USUALLY TREATED AS ONE - SEPARATE CREDIT CAN ONLY BE GIVEN WHERE EACH IS SUPPORTED BY CLEAR INDEPENDENT REASONS – I.E. FOR THE MR THE MISCHIEF IS MADE CLEAR AS WELL AS PARLIAMENT'S INTENT AND PARLIAMENT'S PURPOSE IS MADE CLEAR FOR THE PA

Annotations = simple L2, L3 and L4 as appropriate next to correct point

Q2(c)(i)

Level 1 (1 – 4) - Basic point(s)

Level 2 (5 - 8)
Bottom – range of limited points or bald case
Middle – a definition (including 'lifted' or basic) and a case
Top – Mid plus feature(s)/relevant LNK

Level 3 (9 - 12)
Bottom - definition (basic or 'lifted') plus a developed case
Mid – definition (basic or 'lifted') plus two developed cases OR a good definition plus one developed case
Top – Mid plus feature(s)/relevant LNK

Level 4 (13 - 15)
Bottom – good definition plus two developed cases
Mid – good definition plus three cases (at least two well-developed)
Top – Mid plus feature(s)/relevant LNK
Must include LNK

NB: Heydon's Case and *Spath Holme* (annotate as 'C' and 'LNK') do not count as developed cases as they are in the source and Purposive Approach cases should not be accepted unless a clear 'mischief' is identified (unlikely)

Features should be noted but only influence position within a level – features might include comments such as 'it is the oldest rule of interpretation' or 'the rule can lead to accusations of judicial law-making' or 'the rule relies on the availability of extrinsic aids' or 'the rule may be limited where it is difficult to establish the mischief' but do not credit AO2 especially where the comment is framed in the context of an advantage, disadvantage or effectiveness

Annotations:
'K' for definitions
LNK for link to source
C for each case
E developed case
X for incorrect point
Wiggly line for irrelevant and vague
S Features

Q2(c)(ii)

- L1 – simple points/bald points/lists (1 – 3)
- L2 – 1 or 2 developed points, a range of limited points or a single well -developed point (4 – 6)
- L3 – 3 to 4 developed points (could be one-sided – i.e. only considers advantages or disadvantages) or two well-developed points (if balanced move towards top of mark range) (7 – 9)
- L4 – 4 or more developed points of which at least one must be a well-developed point – should consider both sides of the argument (but not necessarily balanced) to get low level four but a balanced discussion (e.g. min 2:2) for full marks (10 – 12)
- **No LNK required**

Annotations:
'P' for points
'DEV' for developed points
'E' for well-developed points

OCR (Oxford Cambridge and RSA Examinations)
1 Hills Road
Cambridge
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Facsimile: 01223 552553