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EQUAL OPPORTUNITIES AND THE LAW: CATALYST FOR CHANGE?

*Kamlesh Bahl**

INTRODUCTION

I am delighted to be here today and to deliver this annual Nottingham Law Journal Guest Lecture and also to launch your equal opportunities report.¹ I intend to talk about the law as a catalyst for change in equal opportunities. I welcome this topic as my background is as a lawyer who has always had a passionate commitment to equality of opportunity.

I would like to begin my consideration of the law's role in equal opportunities by giving credit where it is due, which is to those individuals who doggedly and determinedly pursue their claims, sometimes against considerable odds. We should not underestimate the trauma and the cost involved in bringing a claim to an industrial tribunal. It is important to recognise that individuals as well as bodies such as the Equal Opportunities Commission can shape the law. It is the strength and courage of individuals who assert their rights, often at great personal and financial cost, which has resulted in improving the rights available to many other men and women. However, it is important for there to be an independent agency like the Equal Opportunities Commission that can help individuals to pursue their claims and challenge discrimination.

Let me start by telling you firstly about the Equal Opportunities Commission and the range of powers we have, focusing in particular on the legal powers. Following this, I would like to take you through some of the legal developments in our field over the last eighteen months, some of which have been momentous and have confirmed the value and necessity for having a firm legal basis for our work. Then I will consider the other ways in which we seek to achieve change in equal opportunities. Finally, I will conclude by looking briefly at what is happening to equal opportunities in the legal profession.

The Equal Opportunities Commission

The Equal Opportunities Commission was set up in 1975 following the Sex Discrimination Act and Equal Pay Act. It was set up with all-party support and is independent of Government. I would underline this. It is a very important characteristic of our work and it is not necessarily true of all other equal opportunities agencies in Europe. We have three duties: (1) To

* Chairwoman, Equal Opportunities Commission. This is the text of the Nottingham Law Journal Annual Guest Lecture given at Nottingham Law School on 23 November 1994.

¹ G. Jackson, "Equal Opportunities Annual Report 1993-94", The Nottingham Trent University, 1994.

enforce the equality laws, the Sex Discrimination Act 1975 and the Equal Pay Act (implemented in 1975); (2) to promote equal opportunities; and (3) to review the workings of the law. We operate on a budget of £6 million from the taxpayer. We have offices in London, Cardiff, Glasgow and Manchester (the head office) and 170 staff.

Legal powers

There are many ways in which these aims can be achieved but, without doubt, a strong legal base has been the significant and unique factor in enabling the Commission to work towards achieving equal opportunities. The Commission can: (1) Assist individuals in taking claims of sex discrimination and equal pay to industrial tribunals and on appeal. (In 1989 the Commission responded to 13,031 inquiries rising to 24,139 in 1992 and 24,920 in 1993.) (2) Conduct formal investigations: (a) where we *believe* discrimination has occurred, *e.g.* in the South Derbyshire formal inquiry; and (b) generally, where we look at an area to discover examples of good practice and, unfortunately, also bad practice. (One example is the general formal investigation we conducted into Training and Enterprise Councils, where we made 25 recommendations, of which 17 have now been accepted.) (3) Apply for judicial review, to challenge a decision or policy of a public authority. One such legal action can change the situation of many people and, if properly targeted, can be more effective, as well as being much quicker, than taking an individual case.

Priorities

Each year the Commission reviews its priorities and aims to target, where appropriate, its legal action to achieve its objectives in these areas. Where legislation is not working, we have a statutory duty to recommend changes to the law. The current priorities of the Commission are securing access to justice for individuals, achieving economic independence through pay, part-time work, pensions and social security and securing equal treatment in education.

LEGAL DEVELOPMENTS IN THE LAST EIGHTEEN MONTHS

The Marshall Case

So I would like to talk to you first about Miss Helen Marshall who, in 1980, was dismissed from her job at the age of 62. Men were allowed to work on to 65 and Miss Marshall was convinced that her dismissal was sex discrimination. But the Sex Discrimination Act excluded claims relating to

retirement. Eventually her claim went to Europe, where the European Court agreed that different retirement ages were discriminatory. Following this case, the Employment Protection (Consolidation) Act 1978 was amended to ensure that all employers had the same retirement ages for men and women in their undertaking.² This also had a knock-on effect with redundancy payments, requiring a further amendment to the statute.³

This, however, was not the end of the story for Helen Marshall. She went back to the industrial tribunal for her compensation to be assessed and persuaded the Southampton Industrial Tribunal to award her her full loss plus interest, so she received a total of £19,405, whereas the limit on the amount of the award at the date of her retirement was only £6,250. The case eventually reached the House of Lords and was then referred to the European Court where, in August 1993, a significant victory was gained.⁴ The European Court decided that compensation for sex discrimination must reflect the full loss to the individual and that interest should be awarded from the date of the discrimination, not the date of the tribunal hearing. A significant change therefore took place, the £11,000 limit had to be lifted, opening the door to higher awards and encouraging more men and women to come forward with claims who may in the past have been discouraged by the limit.

More significantly, we hope that the cost of discrimination will encourage employers to take discrimination issues more seriously, to introduce the right policies and to change their culture to prevent discrimination from occurring in the first place. In fact a recent analysis carried out by *Equal Opportunities Review*⁵ found a seven-fold increase in the awards of compensation made since the cap was lifted. Some cases, such as those involving sexual harassment, attract very high awards.

The decision has other implications, *e.g.* removing the requirement to show that indirect discrimination is intentional before compensation can be awarded. This used to be extremely difficult to prove. Another result of the European Court's decision was the pressure put on the Government to change the law in respect of race discrimination as well and, in January 1994, the limit on discrimination awards in race cases was also removed.

The Ministry of Defence cases

Miss Marshall's case was also the catalyst for catapulting the Ministry of Defence into the limelight this year. The case started and ended relatively

² Sex Discrimination Act 1986.

³ Employment Act 1989.

⁴ [1993] I.R.L.R. 445.

⁵ No. 57 (September/October 1994).

quietly. The Commission had had a telephone call one day from the Women's Legal Defence Fund lawyer concerning a nurse from the armed services who had been dismissed because of her pregnancy. Well, there *was* an exemption for the armed services in the Sex Discrimination Act *but* did that exemption accord with European law? There was no such exemption in the Equal Treatment directive.⁶ Thus the Commission undertook a judicial review action based on two cases, those of Mrs. Leale and Mrs. Lane. At the High Court hearing, the Ministry of Defence agreed that they had discriminated by dismissing servicewomen who were pregnant and a consent order was made by the court. Liability was therefore never contested. Following publicity, 2,500 women contacted the Commission for advice and a network consisting of 350 solicitors was set up to advise and represent them that is still in operation today. This is a fine example of the legal profession operating in a co-ordinated way to help a large group of litigants.

Many of these women waited for the decision in *Marshall* before they settled their cases or went to tribunal and, as a result, a few cases were heard which attracted very high awards and incredible publicity. A lot of that publicity was antagonistic to the women's claims. However, the Ministry of Defence claims are unique, *e.g.* many claims go back to 1978 and, as a result, interest accounts for up to 50 per cent. of the amounts awarded. Many women had fixed term commissions and the army offered salaries which were generally higher than outside and a career and a career structure unparalleled in civilian life. These factors have combined to lead to some very high awards in a handful of cases. In fact, two-thirds of the awards have been less than £30,000.

The real issue in the Ministry of Defence cases is that the exemption in the Sex Discrimination Act for the armed services is no longer sustainable and the Ministry of Defence is now actively considering how to ensure compliance with discrimination law. We continue to press for this change.

TRADITIONAL AREAS OF WORK – *BISHOP* AND *OLDFIELD*

More modestly but no less significantly, the removal of the ceiling on awards is having a marked effect on the other tribunal awards which are also moving upwards. In 1994 a tribunal awarded Karen Bishop over £20,000 for the failure by Coopers in Thames Ditton, a BMW dealer, to recruit her for an apprenticeship. The post went to two boys, one of whom

⁶ 76/207.

was clearly less qualified; indeed one did not possess all of the GCSEs stated to be required in the advertisement for the apprenticeship. That is the sort of fact that triggers a reaction in the tribunal and puts the employer on the defensive. Why did he get the job in those circumstances? In this case, the employer had no satisfactory explanation. This is another example of the often unconscious prejudice at work in such cases.

A further example was in a case decided two weeks ago in Scotland. Scotland and Wales indeed have some way to go in relation to developing equal opportunities. Grace Oldfield had applied for the job of firefighter at Tiree Airport, a job which was traditionally held by men. There were two posts and the airport recruited two men. One was a butcher, who was recruited because he "wouldn't be squeamish"; the other was a CB enthusiast who was recruited because he "would know how to operate the radio" but nobody considered that Grace's work on a fish-farming boat would make *her* less squeamish or that her interest in diving meant *she* knew how to use breathing equipment. Old-fashioned, unconscious, unintentional prejudice. You cannot legislate against that but you can make sure that you have an objective recruitment procedure that eliminates it as far as possible.

By getting publicity for our cases, as much for the man who wants to be a nursery worker as for the woman who wants to be a mechanic, we seek to inform employers where and how discrimination might arise and what is and what is not unlawful.

PART-TIME WORKERS

One success for which the Equal Opportunities Commission can take total credit is the case which is perhaps one of the most significant cases we have ever taken and which also confirmed our independence. In March 1994, the House of Lords delivered an historic judgment in the Commission's part-timers' judicial review.⁷ In this case, the Commission challenged the fact that part-timers must work for an employer for five years before they can acquire *statutory* employment rights such as the right to claim unfair dismissal rather than the two years required for full-timers. We argued that this was discrimination against women, who are the majority of part-time workers (87 per cent.). It was argued that this was contrary to European law. This was a claim of *indirect* discrimination and

⁷ *Equal Opportunities Commission and Another v. Secretary of State for Employment* [1994] 1 All E.R. 910.

therefore potentially the Government could justify the difference in treatment. The case was unsuccessful in the House of Lords, where the Equal Opportunity Commission's argument was completely vindicated. The House of Lords held that the legislation did have a disparate impact on women and that the Government had failed to justify the difference in treatment. This has potential repercussions for three-quarters of a million part-time workers.

Another issue in this case was whether the Commission had *locus standi* to bring judicial review proceedings in these circumstances. The court confirmed clearly that we did. This is an important constitutional safeguard. This was a key issue for the Commission, as the use of judicial review is an important and essential tool in enabling us to challenge discrimination where ever it occurs. Judicial reviews can alter the situation for millions of women and men and avoid the necessity of each individual person filing a case in the industrial tribunal, an action which would probably bring chaos to the industrial tribunals. We can see this with the Ministry of Defence claims which are taking a considerable amount of time to work their way through the tribunal system. In the absence of a class action, judicial review is a very effective agent for change.

There are more changes in the pipeline. The European Court's decision in *Enderby*⁸ should have a profound effect on equal pay and indirect discrimination (this case involving a collective bargaining agreement and pharmacists and speech therapists); a "non-Equal Opportunities Commission" case, *Webb v. EMO Air Cargo (UK) Ltd.*⁹ will hopefully settle the law in relation to pregnancy; a case on how disparate impact should be established in indirect sex discrimination claims is on its way to Europe, *Rudling v. Property Services Agency*;¹⁰ and, finally, a very interesting case on whether transsexuals come within sex discrimination law is also awaiting a hearing at the European Court.

FORMAL INVESTIGATIONS

We also have the power to conduct formal investigations, some based on a specific belief that an employer is discriminating, some more general. These can be very successful in generating changes in attitudes and practices. The South Derbyshire Health authority formal investigation was a prime example. Here a midwifery course for the non-clinically trained

⁸ Case C-127/92 *Enderby v. Franchay Health Authority and Another* [1994] 1 All E.R. 495.

⁹ [1992] 4 All E.R. 929.

¹⁰ I.T. No. 52828/93/B Ashford.

refused to offer places to those with family responsibilities, telling them to apply in a few years' time when their family was older. The Commission found this was indirect discrimination and was unjustifiable. We decided to follow up the formal investigation with a questionnaire to all health authorities in England and Wales. There was an incredibly high response rate. The responses were pulled together and we produced a booklet called *Equality Management in the NHS*, which looked at where improvements were needed and this began the process of change in that organisation which has resulted in equal opportunities being pushed higher up the agenda and a blue print for action in the NHS being produced. Today, the NHS is the leading Government department on equal opportunities for women, both in employment and service delivery, which is vital since the NHS is the largest employer of women in Western Europe.

EUROPEAN LAW

The Equal Opportunities Commission's victories have to a large extent depended on the use of European law and the infusion of that law into the UK has led to dynamic change. One case, *Bilka-Kaufhaus*,¹¹ has had a profound effect in our area of work. In this case, the European Court set out an objective standard test for justification which has led to a marked change in the determination of indirect discrimination cases. In *Bilka-Kaufhaus*, part-timers were unable to join a company pension scheme. The court said that, to establish justification, it was necessary to show that the exclusion of the part-timers (1) met a genuine need on the part of the employer; (2) was suitable for meeting that need; and (3) was necessary for that purpose. Such cases are important because they often challenge the most institutionalised of discrimination but, prior to *Bilka-Kaufhaus*, many such cases would have been lost because the standards of justification were insufficiently high. Since *Bilka-Kaufhaus*, the courts have applied this much more rigorous test, as in the Commission's judicial review proceedings and in those brought by the Camden Law Centre – *Seymour-Smith* and *Perez*,¹² which challenged the two-year qualifying period for employment rights as discriminatory. Although the House of Lords found there was no disparate impact on women, they did decide that the Government, on the *Bilka* test, had failed to justify the requirement.

Another area in which Europe has been crucial is in the pensions area.

¹¹ Case 170/84 *Bilka-Kaufhaus GmbH. v. Weber von Hartz* [1986] E.C.R. 1607.

¹² *R. v. Secretary of State for Employment ex parte Seymour-Smith and Perez*, 20 May 1994.

Here there has been considerable litigation regarding pension ages for men and women. However, whilst this area has now been clarified, some recent European Court decisions seem to throw up yet more questions, particularly in regard to part-time workers' access to pensions. Let me stress, however, that even if we lose cases, *all* is not lost as we have clarified the parameters of the law and created some legal certainty. We can consider other non-legal ways of achieving our strategic objectives or decide whether we should recommend that the law itself should be changed, which is another of our statutory duties.

THE HOLISTIC APPROACH

Let me now look at the other ways in which changes in equal opportunities can be achieved. The law can be a catalyst but our approach is a holistic one. The seatbelt law provides a good analogy. You cannot prosecute every single infringement but you must use other methods to change behaviour. We do not just rely on the law to achieve change. We want to win hearts and minds, not just secure outward conformity:

1. We speak to employers to persuade them of the benefits to their business of good equal opportunities practice, *e.g.* the retention of skilled trained workers and a more motivated, loyal workforce. It is not just a case of avoiding big tribunal pay-outs.
2. We have an "Equality Exchange" which disseminates information to employers, runs seminars on best practice and the law and keeps employers ahead on gender equality and legal issues. I am delighted that this University is a member and would like to welcome other members who are here today.
3. This year we have entered for the first time ever into a partnership with the Government to set up the "Fair Play for Women" initiative. This initiative will operate on a regional basis. The ten regions in England will establish their own consortium, identify key players at national level and develop their own action plan.
4. We also participate internationally. We are a member of the European Advisory Committee; we are attending the United Nations conference in Beijing on women's rights and we have recently met with the International Labour Organisation to discuss discrimination issues.
5. We also commission research to identify trends in equal opportunities. After 19 years, we are often being told equality has been achieved but our recent research on black and ethnic minority women shows a very different picture. For example, the

unemployment rate is higher for ethnic minorities. Black-Caribbean and Indian women are twice as likely as white women to be unemployed. Among the ethnic minorities, Pakistani and Bangladeshi women are four times as likely to be unemployed as white women. Although there are wide variations between ethnic groups, minority ethnic women tend to have worse terms and conditions of employment and tend to be in the lowest status jobs. They are also likely to work in poorer conditions than white women. The most disturbing finding is that ethnic minority women are more likely to obtain higher qualifications and yet still face double discrimination. This tends to indicate that educational qualifications alone are not enough for this group to access the job market and that women are not an homogenous group but have different needs.

6. Another way in which we convey our message is through section 54 grants¹³ to encourage equal opportunities. Many small grants to embryonic groups have resulted in major campaigns and lobbying organisations being formed which today are very well established and very influential, such as The Maternity Alliance, The Pay Equity Campaign, The Kids Club Network, *etc.* These are all organisations started from Equal Opportunities Commission grants.
7. Transferring knowledge and information as well as money out of the Commission into the wider community and facilitating other organisations is a key element in the Commission's strategy and no more so than in the legal arena. We get a grant in aid of just under £6 million per annum which equates to 10p per head of the adult population. We have to set strategies to achieve our objectives. The Commission has not got the resources to assist every worthy case that comes along but, without such support, a lot of complainants feel unable to go ahead on their own, daunted by the legal process involved. To help that group and improve access to justice, the Commission has a programme of action in the medium term to train outside organisations and to produce several publications. Next year we will publish a step-by-step guide to *Taking Your Own Case to the Industrial Tribunal* and *Towards Equality*, a casebook of Sex Discrimination Act decisions. We have just published a guide on sexual harassment called *Consider the Costs* for employers and employees, and information packs on maternity rights and compensation. This year, our lawyers have trained law centre workers, solicitors and trade unionists, particularly in sexual harassment, maternity rights and equal pay.

¹³ *i.e.* Sex Discrimination Act 1975, s. 54.

THE LEGAL PROFESSION

To bring the discussion back home, let us look forward to a discrimination-free legal profession. The Law Society has recently published its guidance, *Advice on Avoiding Racial Discrimination*, and The Bar Council has produced its own code of conduct (although there seems to be a little local difficulty in persuading the Inns of Court to adopt it wholesale). The entry for women and men in the legal profession has been approximately 50-50 for almost ten years now, yet for those women qualifying since 1985, only 16 per cent. are now partners, compared to 31 per cent. of men. So where have all these women gone? It seems that when women start a family, they often drop out of the legal profession altogether because of the difficulty of combining work and family. We have had a few cases about lawyers at the Commission which might be of interest to you as you prepare for your professional careers. A Leicestershire solicitor was dismissed after claiming equal pay with her male colleague who had been taken on as a maternity replacement. She was awarded compensation of £17,000. Another lawyer in Scotland claimed to have been dismissed because he had supported a secretary claiming sexual harassment. His case settled for £4,000. The Association of Women Solicitors last year set up a helpline for women made redundant in their view because of family commitments. We know from our enquiries that this is the tip of the iceberg.

This is something that you can do something about. When you qualify, show a commitment to treating your colleagues on merit and looking at ways in which you can recognise the different working patterns of those with children and make the best use of highly skilled trained resources. A major city firm has calculated that they have invested £100,000 per trainee solicitor by the time they qualify, which is a considerable investment to lose by failing to have policies which retain your staff. I look forward to a time when there will be no difference in women obtaining partnerships and tenancies and eventually in the number of women appointed to the judiciary. Change really can start here with you.

COMPUTERISED EVIDENCE: FINDING THE RIGHT APPROACH

*Valerie Collins**

INTRODUCTION

Paperless offices may still be a thing of the future but, nevertheless, every day more information is being stored on computers, an increasing number of transactions are being automated and many manual systems are becoming computerised. As a result documents and other information that could be used as evidence are now stored in computers rather than being available as hard copies, that is, either printed or written on paper. A whole chain of transactions can take place on the basis of machine interaction without any person being involved at all. Colin Tapper¹ gives an example whereby telephone calls may be placed by computer, logged by computer, passed for payment by computer, and deducted by computer from the customer's bank account without any employee of the telephone operator or bank having the slightest knowledge that the transaction has taken place. The only evidence of these transactions would be a computer print-out.

Optical scanning technology allows documents originated in printed form to be read by computers and then transferred to computer files. This means that a lot of information previously stored only as hard copies is now stored in computers or on optical disks which can only be read by computers. In many instances the original hard copies may have been destroyed as the object of such scanning exercises is to reduce storage space or to put documents in a form that can be more easily accessed and amended. However, surveys have shown² that many organisations retain hard copies due to concern about the admissibility of computerised evidence which is an expensive and burdensome practice.

Nowadays most business documents are created through word processing on a computer and generally modern computer systems can then transmit these documents to another computer at another site through a public telecommunications network. When such a document is received it does not need to be printed out but can be stored on a disk and retrieved when required. The contents of such a document can be re-negotiated without having to re-type the document each time. Such technological changes have posed problems concerning the use of information generated by computers as evidence in court and have resulted in piece-meal

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¹ C. Tapper, "Evanescence Evidence" (1992) *International Journal of Law and Information Technology*, vol. 1, no. 1, 5.

² I. Walden, "Evidence", *Information Technology Law Today*, November/December 1993, 2.

legislation concerning the admissibility of computerised evidence.³ A recent Law Commission report on the hearsay rule in civil proceedings⁴ concluded that "The general view is that the current statutory regime is unwieldy, and that the law is unnecessarily difficult to understand and in some instances outmoded. The rules which govern its practical application are too complicated and as a result great reliance is placed by parties on the rule which allows hearsay evidence to be rendered inadmissible . . .". Two fairly distinct routes for admissibility of computerised evidence have been developed whereby evidence is admissible either as "real" evidence or under the statutory provisions of the Civil Evidence Act 1968 in civil proceedings or the Police and Criminal Evidence Act 1984 and the Criminal Justice Act 1988 in criminal proceedings.

Real Evidence

It is now well established in case-law that where a computer is being used as a "recording device" or calculator and is not "contributing to its own knowledge" then a computer print-out is a piece of real or original evidence and admissible as such. In the case of *R. v. Wood*,⁵ Wood was charged with handling stolen metal. Samples of metal found in his possession were compared by detailed scientific analysis with metal from the stolen consignment and the results were then processed mathematically so that the percentage of various metals in the samples could be stated as figures. The process was done by a computer operated by scientists. At the trial, detailed evidence was given as to how the machine had been programmed and used. The judge ruled that the evidence was real evidence rather than hearsay.

When real evidence is tendered it is always open to challenge on the basis of malfunction, unreliability or improper use of the computer and evidence that the computer was not working properly would entitle the court to attach little or no weight to the evidence. There is a presumption that mechanical instruments have been working properly unless evidence to the contrary is introduced and this should be applicable to computers. However, as long as the courts continue to regard computers as new and unfamiliar, something more such as testimony may still be required to establish the ordinary working of the device. In the case of *R. v. Spiby*⁶ in which Spiby was charged with importing prohibited drugs, the prosecution

³ Computerised evidence will be used throughout this article as a generic term to describe any computer-generated information or document that may be tendered in court as evidence.

⁴ (1993) Law. Com. No. 216; Cmnd. 2321. (H.M.S.O.).

⁵ [1982] Crim. L. R. 667.

⁶ (1990) 91 Cr. App. Rep. 186.

produced as evidence computer printouts of telephone conversations made from a hotel. The computer functioned automatically without the intervention of any human being and the court decided that the printouts were real evidence and therefore admissible because evidence was also given that the computer had been functioning correctly at the material time.

It is clear therefore that wherever a computer record is a direct recording of external facts, for example, bar-code readings on a supermarket till or a record of the operation of the computer itself and the results it produced, there will be no need to bring it within one of the exceptions to the hearsay rule as it will be admissible. It seems however that the court will still need to be convinced that it is an accurate and authentic record and expert evidence on this point may be required. In *R. v. Neville*⁷ Neville was charged with handling stolen hi-fi equipment and the Crown tendered as evidence a computer print-out showing telephone calls made on his mobile telephone in connection with the hiring of a tractor unit and the employment of a driver to transport the stolen property. A Crown witness stated that having checked all the relevant records she had no reason to believe that the bill was inaccurate due to any improper use of the two computers involved. One computer checked the time and duration of the calls and these details were then processed by a second computer which produced itemised bills. Neville had paid the bill without any query which the judge decided was significant. Being satisfied with the evidence that both computers were functioning properly at the relevant time the judge concluded that the computer print-out was real evidence and admissible. As the print-out was real evidence the judge ruled that section 69 of the Police and Criminal Evidence Act 1984 was not applicable. The provisions of section 69 are designed to ensure that the computer concerned was operating properly at the relevant time and are discussed in detail later in this article. Professor Smith argues in his commentary on this case⁸ that section 69 should be applicable in any criminal proceedings where computer print-outs are tendered as evidence because section 69 is not concerned with the admissibility of evidence but simply provides an extra test that must be passed by computerised evidence tendered in court. Section 69 states quite clearly that "In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown etc. . .". Professor Smith argues that as the section itself does not distinguish between hearsay and non-hearsay evidence then the courts should apply section 69 to both situations

⁷ [1991] Crim. L. R. 288.

⁸ [1991] Crim. L. R. 289.

particularly as the judge would require evidence that the computer in question was functioning properly at the relevant time anyway.

According to Alison Nyssens⁹ the case of *R. v. Cochrane*¹⁰ appears to have come closer to resolving the issue of what qualifications should be required in order for an expert to testify about the functioning of a computer. In *Cochrane* a building society had mistakenly credited Cochrane's account with a large sum of money. Using her cash card Cochrane took cash from automatic tills on several occasions. Cochrane had previously been convicted of offences connected with the fraudulent use of her cash card. This appeal focused on the question of whether it was proper for the court to admit computer print-outs of the transactions. The system involved in this case was a typical automatic till where the user placed a cash card in the machine and entered a PIN (personal identification number). The PIN triggered a link with the central mainframe computer, linking the PIN to the relevant account which in turn triggered a link to the computer at Cochrane's building society branch to give the balance of her account. The date and time of each transaction was recorded by the mainframe computer and the branch code and the transaction number were supplied by the branch computer. There were two main arguments in the appeal:

1. That the cash point service was operated by a basically typewritten process with the till rolls being admissible as real evidence under section 24 of the Criminal Justice Act 1988 (which allows exceptions to the hearsay rule and which is discussed in detail later in this article); and
2. That if section 69 of the Police and Criminal Evidence Act 1984 applied, the entries in the user's passbook constituted good evidence, as they were correct, and an implication could be raised therefrom that the computer was working properly on earlier occasions.

The Court of Appeal considered the evidence in the light of section 24 of the Criminal Justice Act 1988 and section 69 of the Police and Criminal Evidence Act 1984 and took the view that authoritative evidence was required to describe the function of the mainframe, primarily how it validated transactions. Having failed to satisfy this test the Crown could not produce till rolls as evidence and the question of whether section 69 applied did not need to be addressed.

This was the first occasion on which the court had pressed the issue this far and advised that evidence should have been produced explaining the

⁹ A. Nyssens, "The Law of Evidence: On line with the Computer Age?" [1993] 10 E.J.P.R. 360.

¹⁰ [1993] Crim. L. R. 49.

nature and function of the computer system even before the court could move on to determine whether section 69 of the Police and Criminal Evidence Act 1984 need apply. Moreover the court said that the Crown Prosecution Service should have produced standard forms of evidence that such cashpoint transactions were properly recorded and that the till was working well at the relevant time. Only then could the court decide whether the relevant parts of the till rolls were real evidence or whether the issue of admissibility must be decided in accordance with other statutory provisions.

For instruments other than computers which produce information technologically (such as radar records which have been in common use for a single purpose) the court has been taking judicial notice that such instruments “work”. In the *Statue of Liberty* case¹¹ radar records, produced without human involvement and reproduced in photographic form, were held to be admissible to establish how a collision between two ships had occurred. The court decided that this was “real” evidence, no different in kind from a monitored tape recording of a conversation and that in such cases no extra tests of reliability were needed; the common law rebuttable presumption, that the machine was in order at the material time, applied. The same presumption has been applied to intoximeter printouts¹² which record the results of breath tests. These instruments have now it seems been judicially noticed despite the fact they are operated by computers a situation which has prompted Professor Smith to comment:¹³ “Perhaps the time is coming when the court can take judicial notice of other everyday applications of computers – for example, the automatic records made of telephone calls of guests in hotels . . . The category of matters which may be judicially noticed is always increasing”.

Evidence that is not real evidence will be subject to the hearsay rules which relate to information which has passed through a human mind and if the input to the computer would have fallen foul of the hearsay rule, the output will be tainted in the same way. Conversely the computer cannot convert original evidence into hearsay evidence. The application of the hearsay rule of evidence to criminal cases has always been particularly strict because of the danger of depriving a person of his liberty on evidence the truth of which cannot be tested in cross-examination. However, a record stored on a computer will only be hearsay if it is the record of some observation made by a person in which case the person is *prima facie* the best source of the evidence. If the information is collected directly by the

¹¹ *Sapporo Mani (Owners) v. Statue of Liberty (Owners)* [1968] 1 W.L.R. 739.

¹² *Castle v. Cross* [1984] 1 W.L.R. 1372.

¹³ [1991] Crim. L. R. 290.

computer itself it is not hearsay and there are no barriers to its admissibility as evidence. A computer record that does come within the hearsay rules may nevertheless be admissible if it satisfies the statutory provisions introduced to deal with this situation.

STATUTORY PROVISIONS

Definitions

The relevant statutory provisions refer to “documents” and “computers”. Whereas it seems to have been decided wherever the issue has been considered, that information in electronic form counts as a “document” for the purposes of such provisions¹⁴ the definition of a “computer” is not so easily established.

“Computer” is not clearly defined in any of the relevant statutory provisions and has been completely omitted in some. An omission that may give rise to problems is the lack of any definition of the term in the Police and Criminal Evidence Act 1984 which prompted the judge in *R. v. Shepherd*¹⁵ to comment:

There is no definition of ‘computer’ in the 1984 Act, so we are entitled, and indeed bound, to give the word its ordinary meaning. It occurred to us that we might get assistance from section 5(6) of the Civil Evidence Act 1968, which defines a computer very broadly as ‘any device for storing and processing information’. It could be argued that a cash till is a device which, among other things, stores and processes information on the till roll, just as information in a computer may be stored on a floppy disk. But we feel considerable hesitation in applying the definition in the Civil Evidence Act 1968 by analogy. It seems likely that Parliament has deliberately left the word undefined, just as it did in the Data Protection Act 1984 and in the recent Computer Misuse Act 1990, following a recommendation by the Law Commission . . .

The definition in section 5 of the Civil Evidence Act 1968 would seem to be too broad because if taken literally it would include many typewriters, calculators and filing cabinets operating on a purely mechanical basis. In

¹⁴ See *Grant v. South Western and County Properties Ltd.* [1974] 2 All E.R. 465; *Derby v. Weldon* [1989] 2 W.L.R. 276; *Alliance and Leicester Building Society v. Ghahramani* (1994), unreported, Court of Appeal (Civil Division) 24 March.

¹⁵ (1991) 93 Cr. App. Rep. 139.

the United States when this problem was identified some States enacted similar definitions but then inserted clauses excluding such things as calculators; other States have adopted the “usual” definition of a computer as: “an electronic device that performs logical, arithmetical and memory functions by the manipulation of electronic or magnetic impulses, and includes all input, output, processing, storage, computer software and communications facilities that are connected or related to a computer”.

Generally, the view seems to have been taken that it would be better not to attempt to define “computer” in any legislation but instead the word should be given its ordinary meaning, because, like many things, a computer is easy to recognise but hard to define.

Criminal Proceedings

Computerised evidence such as print-outs may be the only record of the facts contained therein and this may give rise to problems of hearsay. The hearsay rule states that the original maker of a particular statement should be called as a witness wherever possible rather than the court having to rely on the testimony of some other person. Although this rule has been very important in the case of documentary evidence it has at last been recognised that the rejection of evidence other than that of the original maker of the statement will often be unrealistic and unnecessary and may result in criminal behaviour going unpunished. As the Law Commission stated in 1972,¹⁶ “The increasing use of computers by the Post Office, local authorities, banks and business firms to store information will make it more difficult to prove certain matters such as cheque frauds, unless it is made possible for this to be done from computers”.

The problem had already been highlighted in the case of *Myers v. D.P.P.*¹⁷ Myers was accused of the theft of motor vehicles and an essential part of the evidence were the serial numbers of various vehicle parts which had been noted down by workers as the vehicles were assembled. These numbers had then been transferred to micro-film. The House of Lords decided that the records were inadmissible because they were hearsay and that the only admissible evidence would have been that of the workers who recorded the numbers. The workers could not be identified and even if they could it was unlikely they could truthfully swear that they could recall the serial numbers.

Following this decision legislation was introduced to deal with this issue and the relevant provisions are currently found in the Police and Criminal

¹⁶ (1972) Criminal Law Revision Committee, 11th Report, “Evidence”, Cmnd. 4991.

¹⁷ (1965) A.C. 1001.

Evidence Act 1984 and the Criminal Justice Act 1988. These provisions set out the circumstances in which documentary evidence will be admitted as an exception to the hearsay rule and make provision to ensure that such documents when stored on computers are sufficiently accurate to be used in evidence. In *R. v. Minors*¹⁸ the court decided that computer records have to satisfy the requirements of both Acts as the mere fact a record satisfies the accuracy requirements of section 69 of the Police and Criminal Evidence Act 1984 did not exempt it from the admissibility requirements of the Criminal Justice Act 1988.

Exceptions to the hearsay rule are provided in section 24 of the Criminal Justice Act 1988 in respect of documents arising from trade, business, professional, occupational or official activities which record information supplied by a person who has personal knowledge of the matters recorded. Such documents are admissible in criminal proceedings provided the requirements of section 23(2) or section 24(4)(iii) are satisfied. Section 23(2) provides that documents are admissible if the person who would otherwise give oral evidence is dead or unfit to testify, if he is abroad and it is not practicable for him to testify or if he cannot be found although reasonable steps have been taken to find him. Section 24(4)(iii) permits documents to be given in evidence if the maker of the statement cannot reasonably be expected to remember the matters contained in the record.

Sections 25 to 28 of the Criminal Justice Act 1988 give the courts further powers to exclude evidence if, for example, its exclusion is in the interests of justice or its admission would be prejudicial to the accused or out of proportion to its evidential value. Where a document is sought to be admitted under section 24 oral evidence that the requirements of the section have been complied with must be given whereas the accuracy requirements of section 69 of the Police and Criminal Act 1984 can be proved by a certificate.

The conditions set out in section 69(1) of the Police and Criminal Evidence Act 1984 are as follows:

- a. that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;
- b. that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and

¹⁸ [1989] 2 All E.R. 208.

- c. that any relevant conditions specified in rules of court under subsection (2) below are satisfied.

These requirements are designed to overcome any doubts about the accuracy of the statement either because it was not stored correctly in the first instance or has become corrupt over time. There is not likely to be a problem with, for example, a record of serial numbers which are input once and then stored until needed. If, however, the computer is programmed to collate a number of separately input records, for example, various serial numbers of the component parts of a car, to make the record admissible the court will need to be convinced that no inaccuracy has crept in during the processing of the data. These matters may be evidenced by a certificate which must identify the document, describe the manner of its production, give particulars of equipment used in its production, deal with the requirements of section 69 and be signed by a person occupying a responsible position in relation to the operation of the computer. It will be sufficient for the certificate to be signed to the best knowledge and belief of that person. The court has the power to require oral evidence of any of these matters but, in practice, is unlikely to do so unless the accuracy of the certificate is challenged.

Under section 69 the evidence is only admissible if the court is satisfied that the computer was working properly or that, if it was not, any malfunction did not affect the statement in the document under consideration. This section also allows the court to draw reasonable inferences from the circumstances in which the statement was made and from any other circumstances including the "form and contents of the document" in question. The courts have not made much use of this provision but in *R. v. Minors*¹⁹ it was established that if there was a dispute concerning admissibility of a computer print-out then the issue should be resolved by the judge.

In the case of *R. v. Shephard*²⁰ the accused was found guilty of shop-lifting. Goods from Marks and Spencer were found in her car but she had no till receipt. At her trial a store detective from Marks and Spencer gave evidence that on the day in question she had examined all the till rolls for that date but there was no record of any of the items found in Shephard's car. A claim that the till rolls were inadmissible because there was no evidence the computer was operating properly was rejected and the accused was convicted. On appeal the House of Lords²¹ confirmed that the till rolls were admissible provided the person seeking to rely on this evidence had

¹⁹ Note 18 above.

²⁰ (1991) 93 Cr. App. Rep. 139.

²¹ [1993] 1 All E.R. 225.

shown that the computer concerned was operating properly. In this case the store detective gave evidence that she had never known the computer to break down and having spent many hours examining till rolls would undoubtedly have noticed if there had been internal evidence of malfunction. On that evidence it was legitimate for the court to infer that the computer was working properly and therefore the till rolls were admissible in evidence.

The court did not accept the argument that the till rolls were real or original evidence, like the computer printouts in *R. v. Spiby*²² because in *Spiby* the computer was recording information automatically, without the intervention of any human agency. Here much of the information recorded on the till rolls was supplied by the cashiers. So far as that information is concerned, it was clearly hearsay and would only be admissible if it could be brought within one of the exceptions, such as section 24 of the Criminal Justice Act 1988 which it was. The court also accepted the evidence of the store detective who had examined the till rolls that the computer was functioning properly at the time thereby also satisfying the requirements of section 69 of the Police and Criminal Evidence Act 1984.

Civil Proceedings

The admissibility of computerised evidence not considered to be real evidence is further complicated by the fact that a different set of rules apply in the civil courts. Section 1 of the Civil Evidence Act 1968 which governs civil proceedings before the High Court, county courts and some tribunals allows statements, other than those in oral evidence, to be admissible only as evidence if they comply with the provisions of that Act or other legislation. Documents which are fully generated by computers are admissible as evidence only under section 5 of the Act which provides that: "a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) are satisfied".

These conditions, described by Michael Hirst²³ as "painfully complex and verbose, particularly insofar as they make special provision for cases in which two or more computers are used in combination" are as follows:

1. The document was produced over a period when the computer was regularly used to store or process information;

²² (1990) 91 Cr. App. Rep. 186.

²³ M. Hirst, "Computers and the English Law of Evidence" (1992) *Law, Computers and Artificial Intelligence*, vol. 1, no. 3, 365.

2. Over the relevant period similar information was regularly supplied to it;
3. Throughout the relevant period the computer was operating properly; and
4. The information derives from information supplied to the computer in the ordinary course of the activities then being carried on.

Proof of compliance with any of the pre-conditions may be supplied by certificate. Compliance with section 5 is a prerequisite for all computer produced documents and therefore also applies to statements produced by a computer which come within sections 2 or 4. Section 2 of the Act allows the admissibility of “first-hand” hearsay statements which are statements made by a person and which are proved either by his direct oral evidence, or by the production of the document in which he made the statement, or by the direct oral evidence of a witness who heard him make it. Many computer-generated documents will also be records, those compiled by persons acting under a duty come under section 4 which expressly provides that such statements are admissible “without prejudice to section 5”.

Real problems concerning admissibility of computer print-outs in civil proceedings were experienced by local authorities attempting to collect arrears of poll tax and council tax through the magistrates courts. In most cases the only evidence available was a computer print-out of the register showing how much the defendant had to pay. Magistrates had been admitting computer printouts as evidence of non-payment in reliance on the Civil Evidence Acts 1938 and 1968 but in *Camden London Borough Council v. Hobson*²⁴ the metropolitan stipendiary magistrate held that computer printouts showing the amount of community charge outstanding were not admissible as evidence in liability order proceedings in a magistrates court because the records were ultimately of human and not purely mechanical origin and were therefore hearsay. The 1938 Act made no mention of computers and the 1968 Act which allows computer records as evidence in place of personal testimony had never been extended to magistrate’s courts.

In *R. v. Coventry Justices ex parte Bullard and Another*²⁵ the High Court reached the same conclusion by deciding that in civil proceedings before justices the hearsay rule remained fully applicable subject to the Civil Evidence Act 1938 and therefore printouts showing information input by humans was inadmissible as evidence of non-payment of the community charge. This High Court ruling was binding on all magistrate courts which

²⁴ (1992) *The Independent* 28 January.

²⁵ (1992) *The Times* 24 February.

were then unlikely to pursue liability orders based on computer evidence. When the Coventry magistrates considered the *Bullard* case a council official gave sworn evidence based on a computer printout that the couple were both on the community charge register and owed poll tax but the actual register was not produced in court. The judges ordered Coventry magistrates to re-hear the *Bullard* case which meant new evidence would have to be called to prove the couple were liable to pay the tax and had not paid.

According to Geoffrey Holgate²⁶ even before these decisions many thousands of cases against non-payers had been adjourned due to uncertainty regarding admissibility of computer printouts. The government was therefore under pressure to change the law and legitimise the situation, preferably retrospectively. In cases where payment had already been made following the acceptance of computer printouts in a magistrates court the Home Secretary advised that such payments were not refundable as the individuals concerned were required to pay the charge by law and could not reclaim any money extracted by invalid liability orders. People who had paid could, if still within the time limits, appeal to the High Court, but although the High Court would be expected to overturn the previous order it could also remit the case to the magistrates for a re-hearing under the new law²⁷ and this was the result in *Watkins and Another v. Hackney London Borough Council*²⁸. This would have the effect of making the new law retrospective but was justified on the grounds that the offence itself had not been abolished it was simply the method of proof that had been changed.

This example illustrates the problem of changing the law piecemeal to deal with new situations, and as Colin Tapper has commented,²⁹ "It is too much to expect that . . . the whole of the existing pattern of law, designed for, and matured within, a less advanced state of technology can be adapted smoothly and without tension to the constantly moving kaleidoscope of technological change".

In fact the problem of computer generated evidence was already subject to review by the Law Commission which published a Consultation Paper in 1991 with the provisional recommendation that the rule excluding hearsay evidence in civil proceedings should be abolished provided safeguards were

²⁶ G. Holgate, "Community Charge Enforcement, the Admissibility of Computer Records and the Legislative Dilemma", *Local Government Review* No. 156, 401.

²⁷ The situation was subsequently rectified by an amendment to the community charge regulations (S.I. 1992, No. 474) and the Local Government and Finance Act 1992, then a bill, was amended in respect of council tax.

²⁸ (1993) 13 January, unreported.

²⁹ C. Tapper, "Evanescence Evidence" (1993) *International Journal of Law and Information Technology*, vol. 1, no. 1, 35

introduced against any abuse of the power to adduce hearsay. Subsequently the Law Commission's report on the Hearsay Rule in Civil Proceedings³⁰ drew up a draft Bill based on the following recommendations: "Documents, including those stored by computer, which form part of the records of a business or public authority should be admissible as hearsay evidence under clause 1 of our draft Bill and the ordinary notice and weighing provisions should apply".

The current provisions governing the manner of proof of business records should be replaced by a simpler regime which allows, unless the court otherwise directs, for a document to be taken to form part of the records of a business or public authority, if it is certified as such, and received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerised records."

Evidence in civil proceedings, it was felt, should not be excluded simply on the grounds that it was hearsay and the Commission further recommended that multiple as well as simple hearsay should henceforth be admissible but that there must be safeguards. Parties intending to rely on hearsay evidence should be under a duty to give notice of that fact to all other parties to the proceedings wherever it is reasonable and practicable in the circumstances. There should also be a power for rules of court to be made to allow a party to call a witness whose evidence has been tendered as hearsay by another party so that witnesses could be cross-examined on the statement. Statutory guidelines should be provided for all courts to assess the weight they should attach to hearsay evidence.³¹

Complex precautions governing computer records had been included in section 5 of the Civil Evidence Act 1968 (see above) due to a fundamental mistrust and fear of the potential for computer error or mechanical failure and were no doubt inserted to gain acceptance of what was then a novel form of evidence.³² Technology has now developed to such an extent that computers and computer generated documents are relied on in every area of business and have long been accepted in banking and other important record-keeping fields.³³ These safeguards have been widely criticised on the grounds that they were originally aimed at operations based on the type

³⁰ Law Com. No. 216 Cmnd. 2321.

³¹ These recommendations reflect the position that already exists in Scotland under the Civil Evidence (Scotland) Act 1988 and the general practice in other jurisdictions including the United States and the rest of Europe.

³² (1966) Cmnd. 2964, para. 10.

³³ See, e.g. Patents, Designs and Trademarks Act 1986; Bankers' Books Evidence Act 1879 (modified by the Banking Act 1979) and the Land Registration Act 1925 which was modified by the Administration of Justice Act 1982.

of mainframe computers common in the mid 1960s which daily processed thousands of similar transactions in batches. Now computer software, including spreadsheet, database and word processing programs are widely available. These programs are flexible and reliable and there is no inherent danger of information being misplaced or misinterpreted. This does not mean that computer records are inherently more reliable than records kept in physical form as there is still the possibility of human error, but in the opinion of Chris Reed³⁴ they are equally reliable and therefore there is no logical reason for applying a higher standard of accuracy to computer records than to any other kind of document put forward as evidence.

Although familiarity with and confidence in the inherent reliability of computers has grown so has concern over the potential for misuse through hacking, corruption or altering of information in an undetectable manner. Such dangers should not be underestimated but would not be prevented anyway by the current provisions of section 5 of the Civil Evidence Act 1968. It is not possible to introduce protective legislation although it is possible to introduce specific requirements relating to the authenticity of computer documents or the security of computer systems. The Law Commission's proposals will neither encourage abuse nor prevent proper challenges to the admissibility of computerised records where abuse is suspected. Their concern relating to the authentication of computerised records and documents was apparent in their recommendation that: "A document, including one generated by a computer, which forms part of the records of a business should be received in evidence without the need for oral proof from a witness, if its authenticity is certified by an appropriate officer".

The real issue in relation to computerised evidence must now be authenticity, a matter best dealt with by a vigilant attitude that concentrates upon the weight to be attached to the evidence in the circumstances of the individual case rather than a reformation of the complex and inflexible conditions currently existing.

AUTHENTICITY OF COMPUTERISED EVIDENCE INFORMATION

Evidence generated by computers should be authenticated which, according to Michael Turner,³⁵ could be done by proving that it was stored

³⁴ C. Reed, "Response to the Law Commission's Consultation Paper No. 117 'The Hearsay Rule in Civil Proceedings'", *Computer Law and Practice*, July/August 1991, 261.

³⁵ M. Turner, "Examining the Authenticity of Computer Generated Evidence" (1992) *Sol. Jo. Supplement*, vol. 136, no. 48.

in such a way that it can be shown that the contents are unchanged, the originator of the document is identifiable beyond dispute and that other information such as the document's originating date can be proved.

Basic problems face a court concerning authenticity because there is no way of observing the actual operation of a computer, hard copies bear no traces of any alterations made to the contents of a document and witnesses, whose reliability can be tested, cannot verify what happened inside the computer. It may therefore be necessary to produce with computerised evidence any information recorded about the originating source documents, contemporaneous post-processing reports, audit trails and activity logs where these exist. Unfortunately record management and audit trails have not been a strength of the new technological age because, as Professor William Saffody³⁶ states: "Data processing is concerned about getting a system up and running and not the long term fate of the information generated by the system".

Record management has traditionally been the responsibility of the filing clerk but there is no longer such a clear cut division in most offices. Now there should be more collaboration between records management and computer management to combine the former's strength in document issues with the latter's strength in technology. Ideally computer systems should establish and maintain a comprehensive record of transactions and automatic integrity controls which would enable the authenticity of computerised evidence to be checked. Unfortunately there has been only a belated recognition by the computer industry of the need to improve document authentication procedures both within and between computer systems.

Authenticity is not a pre-requisite for the admissibility of a physical document but is instead a matter to be dealt with at the trial and contributes to the weight to be given to the document as evidence. Christopher Reed³⁷ supports the view that the exclusionary rule in section 5 should be abolished as it would be more effective to admit computer documents as evidence and leave authentication problems to be dealt with by the courts when assessing the weight to be attached to the document. It is clear the courts are competent to assess the weight of hearsay evidence, whether or not it is derived from a computer and abolishing the exclusionary rule would be a beneficial simplification of the law.

³⁶ Professor at the School of Information Science and Policy at the State University of New York at Albany. Quoted in an article by M. Betts, "Ignore Archive Issues at your Peril", *Computerworld*, 2 March 1992, 71.

³⁷ Note 34 above.

Although it may well be true that the courts are competent to deal with problems of authenticity there are nevertheless inherent difficulties in the use of computerised evidence. There may be particular difficulty in assessing the authenticity of a computer document because its data content is not linked in any fixed way to the physical storage of that data, unlike a paper document, with the result that alterations to the content cannot be seen on the face of the document. This problem can to an extent be overcome by the provision of circumstantial oral evidence but the fact that the problem exists at all creates uncertainty in the minds of computer users which is a disincentive to the adoption of the electronic storage and communication of information even though there may be sound commercial reasons for doing so. To overcome this problem there may be a temptation to introduce complex audit methods to try and convince the court that a document is authentic. Such an approach will lead to more expensive and protracted litigation and the difficulty of explaining authentication procedures to judges which will in turn require expert witnesses. Even were this approach to be considered the right one it would not overcome uncertainty until particular authentication techniques had been ratified by the courts because only then would the users know their records would be acceptable as evidence. Until then users run the risk of becoming a test case which may deter many potential users of computer technology until either legislation is introduced confirming that their records will be accepted by the courts as authentic or the commercial pressures compel them to do so.

Published standards for the authentication of computer documents, validated under legislation, would reduce this uncertainty to an acceptable level but in the fast moving field of information technology primary legislation would not be suitable. Flexible and easily changed secondary legislation would be more appropriate. The English and Scottish Law Commission's Report Rights of Suit in Respect of Carriage of Goods by Sea³⁸ which aims to make provision for the use of Electronic Data Interchange ("EDI") in international trade includes a draft Bill which contains provisions intended to give legislation sufficient flexibility to cope with increasing use of EDI. This draft Bill includes the power to make regulations so that EDI transactions can have the same effect as if they were in writing. Also included are wide powers to make regulations regarding authenticity. Such secondary legislation enables industry groups to establish authentication standards which could then be incorporated in the

³⁸ (1991) Law Com. No. 196; Scottish Law Com. No. 130.

regulations thereby giving records complying with these standards *prima facie* status as authentic evidence of their contents.

An issue related to authenticity is reliability and evidence of the reliability of computerised evidence is often essential to establish admissibility. If the reliability of computerised evidence is questionable due to a malfunction or evidence of hacking this may prevent its consideration by the court. In *R. v. Kardbardak*³⁹ a case concerning charges of theft and criminal damage to a City solicitor's micro-computer the trial judge heard two days' legal argument and evidence of fact and opinion on the reliability of the evidence contained in a single screen display before ruling which elements of the display were admissible before the jury. Expert evidence (which all adds to the cost) was also given in the case concerning the reliability of the computer system clocks to identify the date and time of an event recorded by a computer and the level of knowledge required by the perpetrator of such damage.

Computerised evidence therefore has many potential sources of error which include operator error, hardware and software error, unauthorised modification through hacking, deliberate interference by authorised users and viruses. Although evidence may be required regarding the correct operation of the computer at the relevant time in the extreme case of unauthorised modification of data by a hacker it is clear that the integrity of the very data which is relied on may have been jeopardised. Many computer systems, and certainly most personal computer networked systems, do not record and preserve sufficient information to be able to establish that the computer was functioning properly at a particular time. Where a well disciplined back up regime is in force it is more than likely this essential evidence may have been overwritten daily or weekly as a matter of course. Some of the problems faced are encapsulated in Kevin Tombs's⁴⁰ comment that: "With so many systems becoming available today, a document never actually exists as a single entity, but in a series of interlinked pages, spreadsheets, DP tabulations, comment notes and even voice messages. How in future can any auditor genuinely make a statement that the material compiled from dozens of different sources is true and valid?"

Authentication is a problem that experts in the field are constantly addressing and it is a fast evolving area. Whereas computerised evidence should be treated the same as other records, such evidence should be weighed according to its authenticity and reliability, with parties being

³⁹ Unreported but referred to in M.J. Turner's article, note 35 above.

⁴⁰ K.N. Tombs, "Document Image Processing: The Auditor's Challenge for the 90's". Journal of the Computer Audit Specialist Group of the British Computer Society, Autumn 1992. 11.

encouraged to provide information concerning the security of their systems. In this context computer security becomes an important issue and one which has hitherto been overlooked.

SECURITY

Only relatively recently has security become an important issue, possibly because as Dr. Stephen Castell observes: "computer systems, ontologically, cannot meet the standards for evidence which the law lays down since such systems are essentially untrustworthy".⁴¹ Such untrustworthiness Dr. Castell says derives from the fetch-process-store cycle and intrinsically "open" machine architecture evolved in the first days of computing on large mainframe computers. This "open" architecture still pervades the hardware-software design interface of all commercially available computer systems resulting in inherent insecurity and untrustworthiness and according to Dr. Castell: "You cannot secure a fundamentally insecure technology by a fundamentally insecure technology".

In the early days of computing security was not a big issue as access to the mainframe computers housed in one large room could be controlled. Now computer security is a big issue because, according to Wendy London,⁴² users have become complacent about the processing power on their desks. Any organisation relying on computer systems should examine the adequacy of their security regime, particularly methods of access control actually in use. Backup and archive logs and password files should also be examined to investigate whether there is any possibility that the information has been tampered with. It may be necessary to have highly qualified expert opinion on the security of a system where information derived from that system is offered as evidence in court. Expert opinion may be sought concerning the accuracy and integrity of such evidence and unless very high standards have been adopted and maintained in force throughout in the design, development, implementation and operation of the computer system such opinion may well be qualified. One way of dealing with this problem would be the introduction of codes of practice relating to security and in fact a Code of Practice for Information Security Management has already been put together by the Department of Trade and

⁴¹ S. Castell, "Technology and the Challenge for Law: Computers Trusted and Found Wanting" [1993] *The Computer Law and Security Report*, vol. 9, 155.

⁴² W.R. London, "Computer Security: Not Just a Technical Issue" Unicom Seminars Ltd.; "Securing Your Information Network; Technical and Legal Issues", Conference Proceedings, June 1993.

Industry to “provide a common basis for companies to implement sound security management and to provide confidence to counterparties to facilitate inter-company electronic trading”.⁴³

Security of computer systems is not a problem confined to the UK and membership of the European Union means that it is also a European problem and one that is currently being tackled.⁴⁴ A European Council decision⁴⁵ required the Commission to prepare an Action Plan to develop strategies to protect information from accidental and deliberate threats. The task was to assess whether the lack of harmonisation in the field of information security and legislation posed a threat to the achievement of the Single Market and to commercial relations with other countries due to the creation of barriers impeding the free flow of information and also to consider and evaluate the potential for harmonisation within the Union. The current lack of harmonisation is creating a barrier which threatens the promotion of the effective use of information technology, the protection of privacy and confidentiality and the support of national security. Security of information has become a central issue anyway due to the sheer growth of the use of computer systems with the resultant growth of the threats to these systems.

Some member States have legislated in depth and detail concerning information security but in other States such legislation is virtually non-existent. This is due not only to the differing legal systems but also to a wide range of other factors such as significant differences in what actually constitutes such legislation. It is difficult therefore to find a common starting point for any attempt at harmonisation. Many other problems also compound this initial difficulty such as differing definitions of fundamental concepts like “property”, “theft”, “computer misuse” and “damage” as well as attitudes to basic human rights.

Harmonisation becomes necessary where the desire of particular organisations and individuals to protect their own interests results in measures that are inconsistent with the wider public interest in the security of information. Beneficial effects of the free circulation of data and information can also have an adverse effect on the privacy and confidentiality of individuals and organisations. Some intervention is therefore required to strike a balance between a free market and protection against abuse within as well as from outside the European Union.

⁴³ See N. McEvoy, “Information Security II: A Code of Practice for Information Security Management” [1994] 10 C.L.S.R. 31.

⁴⁴ W.R. London, “EC Information Security Legislation: Where Now?”; W.R. London, “Securing Your Information Network: Technical and Legal Issues”, note 42 above.

⁴⁵ 92/242/EEC.

Government intervention may be necessary at two levels. Firstly to comply with general standards within the European Union to ensure compliance with the Single Market objectives and, secondly, in relation to the rest of the world, where information security and the ability to rely on it is necessary for the European Union to be internationally competitive. Without interaction and standards national governments and regulatory bodies impose their own restrictions on the cross-border flow of data which militates against a policy to ensure reliability of computer generated information throughout the European Union. Intervention could take the form of compulsory compliance with codes of conduct thereby ensuring certain standards throughout the European Union.

Other possible options concerning harmonization include a legal obligation to report incidents of breaches of information security and a legal obligation to undertake reviews focusing on the security of information technology systems. A further recommendation by Wendy London⁴⁶ was the introduction of a specific duty of care conforming to traditional tort theories supported by the establishment of users' civil liability arising from breaches of their systems security or the security of the data handled.

CONCLUSIONS

The present cumbersome state of the law relating to the admissibility of computerised evidence is due to the fact the law tends to develop incrementally, rather than by radical change. A simplified procedure has been recommended by the Law Commission whose main recommendation was that where a statement contained in a document was admissible as evidence in civil proceedings, it should be capable of being proved, by the production of that document or by the production of a copy of that document, authenticated in such a manner as the court might approve. It should be immaterial how many removes there are between a copy and the original.

This heralds a return to the original rules of evidence because, as Colin Tapper⁴⁷ points out, by a curious inversion an originally inclusionary rule of evidence to permit the best evidence that the case allowed⁴⁸ became transformed into a rule excluding anything other than the best evidence. This rule does survive it seems but only in relation to copies of documents in their classical form and not in relation to more modern technologies for

⁴⁶ Note 42 above.

⁴⁷ Note 29 above.

⁴⁸ See *Omychund v. Barker* (1745) 1 Atk. 21.

holding information.⁴⁹ One of the old reasons for preferring reference to the original is not really true of electronic copies; as reproduction is mechanical the copy should be no different from the original. In fact the Federal Rules of Evidence⁵⁰ have made special provision for the reclassification of a printout of data held in a computer as an “original”. There may still be difficulties associated with such an assumption as much depends on the nature of the electronic copy, *e.g.* the scanning of a hard copy document into an electronic form to store in a computer. Here the hard copy version is the original though it now seems likely that in most common law jurisdictions the electronic copy would be accepted in lieu of an original destroyed following the creation of the electronic copy. Where image processing is used there should be formal certification from day one with affidavits or certified statements stored on the system itself because the opposition may try every ruse to discredit evidence and therefore a supporting testimony is needed to show that the system has already worked reliably. The challenge in such cases would be that the documentary evidence did not exist within the image system itself but existed in paper form before it was scanned and destroyed.

Whatever the ultimate decision regarding the means of proving the underlying transactions in the future it is clear that the foundations of the current law in its treatment of copies and originals have been undermined by modern technological developments and must be reconsidered. Dr. Stephen Castell⁵¹ argues that any attempt to audit documents would prove to be difficult if not impossible and that it is not changes in the law relating to admissibility that are required but changes in technology. Dr. Steven Castell suggests that new machine architecture is needed to create for the future a “legally reliable computer system paradigm to ‘fix’ an audit trail intrinsically within any data being processed, that is, modified, stored, assembled, interlinked, copied *etc.*”.

The problems relating to “originals” and copies require the adoption of a different approach and Colin Tapper⁵² suggests that the best guarantee of the authenticity of the form of information which is in dispute would be the recovery of a contemporaneous copy from the custody of a neutral custodian who can certify that the information has been retained in the same form in which it was deposited. Such a solution would be easily practicable so far as the creation of the copy is concerned since it is a further

⁴⁹ *Kajala v. Noble* (1982) 75 Cr. App. Rep. 149.

⁵⁰ Rule 1001(3) “... if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the original accurately, is an ‘original’.”

⁵¹ Note 41 above.

⁵² Note 29 above.

characteristic of computers that they are able to produce electronic copies with complete accuracy at enormous speed, and at very low cost.

Acceptability of computerised evidence is not a problem confined to the UK and internationally there is an increasing demand for consistency of treatment in different jurisdictions to promote the development of trade and a more ordered international community. Confidence requires predictability and predictability of legal application requires consistency throughout the different jurisdictions. The Verdict report 1987 on the current position on legal admissibility of digitally transmitted and processed data information in the UK,⁵³ recommended the repeal of section 5 of the Civil Evidence Act 1968 which should be balanced by the establishment of an official body to draw up guidelines and a code of practice with regard to the design, security and management of computer and communications systems.

Reform is considered particularly necessary in the UK because otherwise it is feared that uncertainty over the treatment of computer records in civil litigation in the UK could be detrimental to commerce. In particular Lloyds of London were concerned that section 5 might discourage international insurance business from being conducted in London. Lloyds are co-sponsors of LIMNET, an electronic network used by insurers, brokers and others and who have expressed concern that the continued existence of section 5 may discourage international buyers from conducting business electronically in the London market. The United Nations Commission on International Trade Law Working Group on EDI is carrying out a review of the legal issues arising from the increased use of EDI in international commerce. It is possible that the outcome will be a Model Law, intended to be incorporated into the national law of as many countries as possible. In its report in March 1993 it is recorded that strong support was expressed for a provision declaring EDI records to be admissible evidence. The existence of the hearsay rule was considered to be "an undesirable and unnecessary obstacle to the use of EDI in international trade".

To date only the abolition of the hearsay rule in civil proceedings has been recommended but there are different rules relating to admissibility of computerised evidence in criminal proceedings. The Civil Evidence Act 1968 provides that proof of a conviction in criminal proceedings may be admitted as evidence of relevant facts in subsequent civil proceedings. As Colin Tapper⁵⁴ points out because the rules of admissibility of computerised information in criminal proceedings are more extensive than

⁵³ Prepared by the Central Computer and Telecommunications Agency for H.M. Treasury.

⁵⁴ Note 29 above.

those in civil proceedings this effectively subverts the rules of admissibility in civil proceedings. The converse of this does not follow and findings in civil proceedings may not be submitted as evidence in subsequent criminal proceedings. Although this situation may have been rare in the past it is now a possibility especially in cases of large commercial fraud where computerised evidence is particularly likely to be required, that some civil proceedings will be brought before it has been possible to complete the often highly protracted investigations and preparations necessary to start criminal proceedings. It would therefore seem to be sensible that when reform is undertaken it should apply to both civil and criminal proceedings.

The problems outlined in this article must be dealt with in order to find the right approach to the admissibility of computerised evidence and whereas the transition from a mainly oral process to one involving more reliance on documentation was difficult it is likely that the next stage which will have to deal with the use of transient electronic information will be even more difficult.

HOW ENGLISH JUDGES GET EUROPEAN LAW WRONG

*John Hodgson**

It has been repeatedly laid down by the Community Court and is in general accepted by the original six Member States that the Community Treaties have established a new and distinct system of law, the rules of which have to prevail over the rules of the municipal laws of the Member States. Thus from the commencement and for the duration of British membership the municipal law of the United Kingdom must yield in cases of conflict to the superior Community law.¹

This proposition, as refined and developed in the jurisprudence of the European Court, is in truth consistent only with the assumption that the legal order of the Community is a federal one, whatever its political order may be. In this order, the superior, federal level is represented by Community institutions and law. Municipal institutions and law represent the lower level which must, in principle, be set aside where necessary. This does not yet appear to have sunk in fully to the English judicial consciousness, as this article seeks to demonstrate. Even a fundamental provision of the Treaty of Rome appears to be almost ignored, namely art. 5, which imposes a general obligation on member States² to “. . . take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community . . .”.³

THE PROBLEM DESCRIBED

Initial judicial reaction to membership of the, then, EEC was gratifyingly positive. Lord Denning and others recognised the superior nature of Community law, and the duty imposed on them to interpret and apply that law: *Macarthy's Ltd. v. Smith*.⁴ Subsequent decisions have retreated to a narrow basis of construction recalling the attitude of the early modern common lawyers to statutes. While formally superior to the

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¹ Lasok and Bridge, *Law and Institutions of the European Communities* (5th ed.), pp. 422-23.

² This expression clearly includes the organs of the States: Case C-2/88 *Zwartveld* [1990] 3 C.M.L.R. 457. The issue in the case was whether the Community institutions were bound by art. 5 but, in holding that they were, the ECJ relied on the fact that it was the judicial authorities which were charged with operating Community law.

³ This provision derives from art. 86 ECSC.

⁴ [1981] 1 Q.B. 180.

common law, in that a statute could replace a rule of the common law, statute law was regarded as intrinsically inferior.⁵ Currently there are three *foci* of error:

1. Failure to grasp the implications of the superiority to municipal law of Community law deriving from secondary legislation or the jurisprudence of the ECJ;
2. Misdefining the addressee of directives as the UK government; and
3. Distorting the relative importance and sphere of operation of Cases C-6/90 and 9/90 *Francovich v. Italy*⁶ and Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentación*.⁷

These cases, it is submitted, mark a departure in Community jurisprudence which has been undermined in the UK by dicta in *Kirklees MBC v. Wickes Building Supplies*,⁸ and *Webb v. EMO Air Cargo Ltd.*,⁹ which overvalue *Francovich* and undervalue *Marleasing*.

Kirklees concerned a cross-undertaking as to damages in relation to an injunction to restrain Sunday trading. Lord Goff suggested that most problems of incompatibility between the two legal orders could be resolved by applying non-contractual state liability in damages, following *Francovich*:

In *Bourgoin v. Minister of Agriculture Fisheries and Food*,¹⁰ it was held . . . that a breach of article 30 would not of itself give rise to a claim in damages by the injured party. However, since the decision . . . in *Francovich* . . . there must now be doubt whether the *Bourgoin* case was rightly decided . . . [If] . . . the ECJ should hold that section 47 of the Shops Act 1950 is invalid as being in conflict with article 30 [EEC], the UK may be obliged to make good damage caused to individuals by the breach of article 30 for which it is responsible.¹¹

Webb turned on whether dismissal of a woman engaged for maternity cover who also became pregnant constituted sex discrimination. Lord Keith stated:

⁵ *Dr. Bonham's Case* (1610) 8 Co. Rep. 114. See O. Hood Phillips, *Constitutional and Administrative Law*, 7th ed., pp. 47-49.

⁶ [1993] 2 C.M.L.R. 66.

⁷ [1990] E.C.R. I-4135, [1992] 1 C.M.L.R. 305.

⁸ [1993] A.C. 227.

⁹ [1992] 2 All E.R. 43; 4 All E.R. 929.

¹⁰ [1986] Q.B. 716.

¹¹ [1993] A.C. 227, 281.

[The Equal Treatment Directive] does not have direct effect upon the relationship between a worker and an employer who is not the state or an emanation of the state, but nevertheless it is for a UK court to construe domestic legislation in any field covered by a Community directive so as to accord with the interpretation of the directive as laid down by the European Court, if that can be done without distorting the meaning of the domestic legislation: see *Duke v. GEC Reliance Ltd*¹² per Lord Templeman.¹³

His Lordship referred to *Marleasing*, stressing that the decision required national courts to construe national law in conformity with directives only “so far as possible”:

... the provision of Spanish law in issue in that case was of a general character capable of being construed either widely or narrowly. It did not refer specifically to the grounds upon which the nullity of a public limited company might be ordered. If it had done so, and had included among such grounds the case where the company had been formed with the intent of defrauding creditors of one of the corporators, the Spanish court would have been bound and entitled to give effect to it notwithstanding the terms of the directive. . . . [A] national court must construe a domestic law to accord with the terms of a directive in the same field only if it is possible to do so. That means that the domestic law must be open to an interpretation consistent with the directive whether or not it is also open to an interpretation inconsistent with it.¹⁴

It is only a short step to bring together the two key concepts:

1. Domestic legislation remains pre-eminent, at least where the Community law with which it is inconsistent is a directive. Where litigation is in the private law sphere, such Community rules are not the business of the courts; and
2. The state should pay compensation where it fails in its obligations to the Community legal system, thus exonerating the judges from their responsibility to ensure the application of Community law by overriding national law.

¹² [1988] A.C. 618 at 639-40.

¹³ [1992] 4 All E.R. 929 at 939.

¹⁴ [1992] 4 All E.R. 929 at 940.

Wood J. makes exactly this link in *Walden v. Warrenner*:¹⁵

Firstly as we are dealing with the private sector, directives are not directly enforceable.

Secondly . . . it is always open to the European Commission to take proceedings against the UK government if it is of the opinion that domestic legislation is not giving effect to directives or to the Treaty.

Thirdly, if the UK government fails to carry out the effect of the directive and if it is correct that the Regulations do not satisfy the requirements of the directive, then an individual may have a right to claim damages directly against the government . . .¹⁶

This approach is, it is submitted, highly retrogressive and leaves the UK isolated in its approach to the integration of the Community and national legal orders.

THE REAL RULES ON DIRECTIVES

A long and illustrious series of cases¹⁷ establishes the direct applicability and effect of relevant Community law. In Case 106/77 *Amministrazione delle Finanze v. Simmenthal* the European Court was uncompromising:

[Any] recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by member-States pursuant to the Treaty and would thus imperil the very foundations of the Community . . . The effectiveness of [art. 177] would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case law of the Court . . . every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights

¹⁵ [1993] 3 C.M.L.R. 179 (Employment Appeal Tribunal).

¹⁶ *Ibid* at 183.

¹⁷ Case 6/60 *Humblot* [1960] E.C.R. 559; Case 26/62 *van Gend & Loos* [1963] E.C.R. 1, [1963] C.M.L.R. 105; Case 6/64 *Costa* [1964] E.C.R. 585, [1964] C.M.L.R. 425; Cases 11,25,26 & 30/70 *Internationale Handelsgesellschaft* [1970] E.C.R. 1125, [1972] C.M.L.R. 255; and Case 106/77 *Simmenthal* (No. 2) [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263.

which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.¹⁸

This very forceful statement is not qualified, but should be seen in context. Italy had been found to be in breach of arts. 12, 13 and 30 of the Treaty of Rome ("EEC"). This was a classic direct effect case against the state apparently raising none of the issues relating to direct or indirect applicability and effect of directives which have since emerged.

The principle that Community law of itself 'breaks' municipal law¹⁹ goes back at least to Case 6/60 *Humblet*:²⁰

If the Court rules . . . that a legislative or administrative act of a Member State is contrary to community law, that Member State is obliged, by virtue of Article 86 ECSC Treaty,²¹ to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the Protocol [on tax immunities] which have the force of law in the Member States following their ratification and which take precedence over national law.²²

Simmenthal further confirms the primacy of Community law, and imposes an obligation to apply it immediately, rather than waiting for action by the member State as envisaged in *Humblet*. Direct effect does not expressly extend to directives, but they oblige the member state to transpose them into national law and can be relied upon against a defaulting member

¹⁸ *Ibid.* Judgment §18-22. *C.f.* Advocate General Reischl.

¹⁹ In the sense of Art. 31 of the German *Grundgesetz*: "*Bundesrecht bricht Landesrecht*".
²⁰ [1960] E.C.R. 559.

²¹ "Member States undertake to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions and recommendations of the institutions of the Community..."

²² at 569.

state (including local authorities and other emanations of the state) where it is a party to the litigation.

The obligation to implement directives implies an obligation to provide an adequate remedy for breaches of Community law. In Case 14/83 *von Colson v. Land Nordrhein-Westfalen*²³ German implementation²⁴ of the Equal Treatment Directive²⁵ gave a claimant who had been refused employment on discriminatory grounds a remedy limited to reliance damages, rather than a right to be appointed to the post, or to receive compensatory damages.

The applicant, having proved discrimination, claimed to be entitled to be appointed. She failed, as the directive merely required member states to “introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by the failure to apply to them the principle of equal treatment . . . to pursue their claims by judicial process . . .”.²⁶ The German government maintained that the apparent restriction of damages was not insurmountable and the national court could apply the ordinary rules of compensation allowing for substantial damages, which it ultimately did.²⁷ The ECJ indicated clearly the requirements of Community law:

. . . the member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, . . . is binding on all the authorities of member States, including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 . . . It should, however, be pointed out to the national court that although Directive No 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a member State chooses to penalise breaches of that prohibition by the award

²³ [1984] E.C.R. 1891, [1986] 2 C.M.L.R. 430.

²⁴ §611a BGB.

²⁵ 76/207/EEC.

²⁶ Art 6.

²⁷ *Arbeitsgericht Hamm*, 6 September 1984 [1984] D.B. 2700.

of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law.²⁸

Von Colson concerned implementing legislation, but the principle applies generally, as established in *Marleasing*. A company, La Comercial, had allegedly been established by another company, Barviesa, with the sole and fraudulent intention of putting Barviesa's assets into La Comercial to put them out of the reach of Marleasing, who were substantial creditors of Barviesa. Spanish company law did not specify grounds for declaring a company to have been improperly formed and thus a nullity, but the received view was that the normal rules on nullity of contracts applied, whereby a contract whose cause was unlawfully fraudulent had no legal effect.

La Comercial relied by way of defence on a directive,²⁹ which contained an exhaustive list of grounds³⁰ for nullity of a public company. None covered underlying fraud of the kind alleged here. The Spanish court asked: "Is Article 11 of Council Directive 68/151 which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said Article?"³¹ The ECJ found a general obligation to apply Community law in such a case:

With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the court has consistently held, a directive may not of itself impose obligations on an individual, and, consequently, a provision of a directive may not be relied upon as against such a person . . . [T]he national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and

²⁸ §26,28.

²⁹ 68/151/EEC.

³⁰ Art. 11.

³¹ [1980] E.C.R. 1319; [1981] 3 C.M.L.R. 25.

the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive . . . [A]s the Court pointed out in *von Colson*, the member-States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 EEC to take all appropriate measures . . . to ensure the fulfilment of that obligation, is binding on all the authorities of member-States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 EEC.³²

This decision has aroused lively debate, since, despite the disclaimer, the effect of the judgment is to require the application of any relevant directive "so far as possible".

NONCONTRACTUAL DAMAGE CLAIMS

Noncontractual liability of the State is a corollary of the existence of directly effective Community law rights. The ECJ recognised in Case 60/75 *Russo*³³ that, in principle, the person aggrieved was entitled to a national remedy, "If an individual has suffered damage as a result of the intervention of a member state in violation of Community law it will be for the state, as regards the injured party, to take the consequences upon itself in the context of the provisions of national law relating to the liability of the state."³⁴ The national rules must provide effective remedies no less favourable than those applying to cases entirely governed by national law: "If such damage has been caused through an infringement of Community law the State is liable to the injured party of [*sic*] the consequences in the context of the provisions of national law on the liability of the State."³⁵ This leaves the precise remedy open, just as in *von Colson*.

In *Francovich*, Italy had failed to implement Directive 80/987 on the protection of employees following the insolvency of their employers. Italy

³² §6-8.

³³ [1976] E.C.R. 45.

³⁴ Operative paragraph of judgment, clause (c).

³⁵ Judgment §9.

had already been found to be in breach in art. 169 proceedings. Individuals commenced proceedings against the Italian state for the payments due to them by virtue of the directive on the basis of direct effect. The directive did not fulfil the established criteria of precision and certainty.

The Court considered an alternative claim based on non-contractual liability of the state for failure to meet its obligation to transpose the directive:

The EEC Treaty has created its own legal system which is an integral part of the legal systems of the member-States and which their courts are bound to apply; the subjects of that legal system are not only the member-States but also their nationals. Just as it imposes obligations on individuals, Community law is also intended to create rights which become part of their legal patrimony; those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the member-States and the Community institutions.³⁶

The judgment reiterates the obligation on national courts “whose task it is to apply the provisions of Community law in cases within their jurisdiction [to] ensure that those rules have full effect and protect the rights which they confer on individuals.”³⁷ However liability must still be imposed on member states where they are responsible for breaches of Community law which infringe the rights of individuals:

The possibility of compensation by the member-State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and consequently individuals cannot, in the absence of such action, enforce the rights granted to them by Community law before the national courts . . . Further foundation for the obligation on the part of member-States to pay compensation for such harm is to be found in Article 5 EEC . . . Among these [measures] is the obligation to nullify the unlawful consequences of a breach of community law.³⁸

This principle applies generally, although its precise operation will depend on the circumstances. The Court does not discuss mis-

³⁶ §31.

³⁷ §32.

³⁸ §34, 36.

implementation or directives bearing on non-implementative national legislation. Advocate General Mischo recognises that different considerations must apply where the Community rule does not have direct effect and goes on to consider the effect of a prior ruling on the point: Cases 24 & 97/80R *Commission v. France*:³⁹

The finding in a judgment having the force of *res judicata* that the member-State concerned has failed to fulfil its obligations under Community law amounts to a prohibition having the full force of law on the competent national authorities against applying a national rule recognised as incompatible with the Treaty and, if the circumstances so require, an obligation on them to take all appropriate measures to enable community law to be fully applied.⁴⁰

This proposition is of wide significance, requiring the application of all relevant ECJ decisions to the exclusion of national law by all courts and authorities. This did not arise in *Francovich* as there was merely a vacuum, or absence of national law, which the state should have filled.

Obligations to comply with Community law attach to all organs of the state equally.⁴¹ In *Russo* and *Francovich* the entity concerned was equated with the state. Parity of reasoning would however suggest that as the “decentralised authority” is subject to Community law it will be equally liable in damages for its own default.

Lord Goff’s dictum in *Kirklees MBC v. Wickes Building Supplies*⁴² that “the United Kingdom may be obliged to make good damage caused to individuals by the breach of article 30 for which it is responsible”⁴³ may be *per incuriam*. It tacitly assumes that the obligation falls on the government; English judges tend to equate the member state exclusively with the central government. Applying the normal Community definition, which assimilates all organs of state power into the state, the local authority, when exercising discretionary powers rather than acting as a mere extension or agent of the central power, should bear any liability under *Francovich*.

³⁹ [1980] E.C.R. 1319, [1981] 3 C.M.L.R. 25.

⁴⁰ §16.

⁴¹ Case 103/88 *Costanzo* [1989] E.C.R. 1839, [1990] 2 C.M.L.R.

⁴² [1993] A.C. 227.

⁴³ *Ibid.* at p. 284C.

UK DIFFICULTIES

The UK is in the same position as the other member States. On accession it accepted the obligations imposed by EEC and the *acquis communautaire*, including the direct effect doctrine. These took effect in municipal law by virtue of the European Communities Act 1972 (“ECA”):

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable Community right’ and similar expressions shall be read as referring to one to which this subsection applies.⁴⁴

[Any] enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; . . .⁴⁵

For the purpose of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by any relevant decision of the European Court . . .⁴⁶

Judicial notice shall be taken of the Treaties, of the Official Journal of the Communities and of any decision of, or expression of opinion by, the European Court . . . on any such question as aforesaid; . . .⁴⁷

Initially it seemed the provisions meant what they said. In *Macarthy’s Ltd. v. Smith*⁴⁸ a woman claimed equal pay. The comparator was her predecessor in the same post. The Court of Appeal interpreted the Equal Pay Act 1970 to mean that the woman and the comparator must be

⁴⁴ Section 2 (1), ECA.

⁴⁵ Section 2 (4), ECA.

⁴⁶ Section 3 (1), ECA.

⁴⁷ Section 3 (2), ECA.

⁴⁸ [1981] 1 Q.B. 180.

employed simultaneously. They accepted that art. 119 EEC, and Directive 75/117/EEC were relevant, and that the former had direct effect, and referred the issue of the direct effect and applicability of the latter, and the interpretation of both, to the ECJ, which held that art. 119 itself covered the case where “a woman has received less pay than a man who was employed prior to the woman’s period of employment and who did equal work for the employer”. The matter came back to the Court of Appeal on the issue of costs. Lord Denning M.R. expressed himself with typical forthrightness:

The majority of this court felt that article 119 was uncertain. So this court referred the problem to the European Court at Luxembourg. We have now been provided with the decision of that court. It is important now to declare – and it must be made plain – that the provisions of article 119 of the EEC Treaty take precedence over anything in our English statute on equal pay which is inconsistent with article 119. That priority is given by our own law. It is given by the European Community Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law, it is part of our law which overrides any other part which is inconsistent with it . . . That interpretation must now be given by all the courts in England. It will apply in this case and in any such case hereafter.⁴⁹

The court unhesitatingly disapplied the English statute in favour of the relevant Community rule, once ascertained. This was of course a Treaty provision, not a directive. There has been greater difficulty with those aspects of Community law which do not have direct effect, particularly non-implemented or mis-implemented directives.

*Duke v. GEC Reliance Ltd*⁵⁰ concerned equality of retirement ages. The UK government had decided that this issue was outside the purview of the Equal Treatment Directive and the relevant statutory provisions clearly did not seek to implement the Directive. This interpretation had already been rejected by the ECJ.⁵¹ Indeed, amending legislation, in the shape of the Sex Discrimination Act 1986 had been passed, but was not yet in force. Even then, the House of Lords declined to apply Community law. *Per* Lord Templeman:

⁴⁹ *Ibid.* at 200E-F.

⁵⁰ [1988] A.C. 618 at 639-40.

⁵¹ Case 152/84 *Marshall v. Southampton and South West AHA (No. 1)* [1986] E.C.R. 723, [1986] 1 C.M.L.R. 688.

[The] Sex Discrimination Act 1975 was not intended to give effect to the Equal Treatment Directive as subsequently construed . . . the words of section 6(4) are not reasonably capable of being limited to the meaning ascribed to them by the appellant. Section 2(4) of the European Communities Act 1972 does not . . . enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no effect between individuals. . . . The *von Colson* case is no authority for the proposition that the German court was bound to invent a German law of adequate compensation if no such law existed and no authority for the proposition that a court of a member state must distort the meaning of a domestic statute so as to conform with Community law which is not directly applicable. If, following the *von Colson* case, the German court adhered to the view that under German law it possessed no discretion to award adequate compensation, it would have been the duty of the German Government in fulfilment of its obligations under the Treaty of Rome to introduce legislation or evolve some other method which would enable adequate compensation to be obtained.⁵²

These dicta underlie those in *Webb* and other recent cases.

*Pickstone v. Freemans Ltd.*⁵³ concerned the “equal value” provisions of the Equal Pay Act 1970. Although originally independent of Community law, the act had been amended to comply with art. 119 and the Equal Pay Directive following art. 169 proceedings. The Court of Appeal concluded that the act as amended did not give effect to Community law, but that art. 119 had direct effect and so allowed the applicant’s claim. The House of Lords reached the same result by a different route. The relevant amendments had been introduced as a statutory instrument which was represented as closing a gap identified by the ECJ. The instrument was not fully debated and its defective drafting went undetected. The intention of Parliament was clear and the relevant provisions should be read to comply with it. *Per* Lord Templeman:

In *Duke* this House declined to distort the construction of an Act of Parliament which was not drafted to give effect to a Directive and which was not capable of complying with the Directive as

⁵² At 639-40.

⁵³ [1989] A.C. 66.

subsequently construed by the European ECJ. In the present case I can see no difficulty in construing the Regulations . . . in a way which gives effect to the declared intention of the Government of the UK . . . and is consistent with the objects of the EEC Treaty, the provisions of the Equal Pay Directive and the rulings of the European Court.⁵⁴

*Lister v. Forth Dry Dock*⁵⁵ concerned interpretation of UK Regulations which ‘implemented’ a directive. There was no relevant treaty provision. The House followed *Pickstone* rather than *Duke*. Lord Templeman cited *von Colson*:

‘The member states’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty . . . is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [a directive], national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189.’ Thus the Courts of the UK are under a duty to follow the practice of the European ECJ by giving a purposive construction to Directives and to Regulations issued for the purpose of complying with Directives.⁵⁶

In these cases the House of Lords accepted that where UK legislation is implementative of Community law, and was introduced in the form of regulations which were not subjected to full Parliamentary scrutiny, but approved on the basis of ministerial assurances that they were intended to, and did, properly implement Community law, it will be interpreted accordingly. A deep divide has thus been created between this privileged category of case and the “ordinary” approach exemplified by *Duke*.

This was achieved, not by the direct route accepted by the Court of Appeal in *Macarthy’s Ltd. v. Smith* and in *Pickstone* itself, namely giving direct effect to the Treaty provision as superior law which “broke” the UK statute, but by a wholly artificial “interpretation” of the domestic legislation.

⁵⁴ At 123C-D.

⁵⁵ [1990] 1 A.C. 546.

⁵⁶ At 558C-E.

In *Garden Cottage Foods Ltd. v. Milk Marketing Board*,⁵⁷ the House of Lords considered the availability of an interlocutory injunction for an alleged breach of art. 86 EEC where damages, if available, were an adequate remedy. The majority held that breach of Community law was, *prima facie*, a breach of statutory duty which sounded in damages:

I . . . find it difficult to see how it can ultimately be successfully argued . . . that a contravention of article 86 which causes damage to an individual citizen does not give right to a cause of action in English law of the nature of a cause of action for breach of statutory duty. . . . What . . . I *do* regard as quite unarguable is the proposition . . . that if such a contravention of article 86 gives rise to any cause of action at all, it gives rise to a cause of action for which there is no remedy in damages to compensate for loss already caused by that contravention, but only a remedy by way of injunction to prevent future loss being caused.⁵⁸

*Bourgoin SA v. Ministry of Agriculture Fisheries and Food*⁵⁹ concerned a claim for breach of statutory duty against the UK government. The plaintiffs imported turkeys into the UK from France under the terms of a general licence which was withdrawn. They had to cease operations, suffering substantial loss of profits. The withdrawal of the licence purported to be a health measure to prevent the spread of Newcastle disease. The ECJ found that its true purpose was “to block, for commercial and economic reasons, imports of poultry products from other member states, in particular from France”. It was thus an illegal quantitative restriction under art. 30 EEC. The plaintiffs claimed damages for, *inter alia*, breach of statutory duty. The majority of the Court of Appeal struck the allegation out.

Oliver L.J. adopted *Garden Cottage Foods mutatis mutandis*: Individual rights for breach of Community rules must be equivalent in scope to those available in domestic law, enforced by the same actions, under equally favourable conditions and not subject to any indirect derogations. His Lordship considered and rejected three bases for distinguishing *Garden Cottage Foods*:

1. Art. 30, unlike art. 86, creates only public law rights, for which the UK remedy is by way of judicial review rather than an action for damages;

⁵⁷ [1984] A.C. 130.

⁵⁸ *Per* Lord Diplock at 144.

⁵⁹ [1986] Q.B. 716.

2. “[T]he ‘right’ conferred by, for instance, article 86 is a right to be protected from abusive acts rather than measures, whereas article 30 is concerned merely with prohibiting, and thus rendering void or ineffective in law, measures producing quantitative restrictions on import.⁶⁰” This was a distinction without a difference, having regard to the Community law obligation of the states to protect the rights of individuals;
3. That on the basis of public policy economic policy decisions of this kind should not be influenced by the threat of actions for damages. This argument had been accepted for liability of the Community institutions under art. 215, which could arise “only exceptionally in cases in which the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers”. However, once art. 30 was accepted as conferring direct rights which sounded in financial terms, it would be wrong to refuse a remedy in damages simply because similar domestic law rights attracted a remedy by judicial review rather than breach of statutory duty, provided that, as was the case, certain classes of wrongful act by the state *could* amount to breach of statutory duty. It was for the ECJ, not the national court, to categorise acts.

Oliver L.J. concluded that member States are regarded as ordinary subjects of Community law. They are therefore liable for all infractions, and do not benefit from the “political” or “sovereign” restrictions on liability conferred on the Community institutions.

The majority disagreed on the second and third bases of distinction. Parker L.J. stressed the limitation on liability of the Community institutions under art. 215, which he regarded as a basis for regulating the liability of the member States, relying upon a passage in Case 143/77 *Koninklijke Scholten Honig*:⁶¹

If an individual takes the view that he is injured by a Community legislative measure which he regards as illegal he has the opportunity, when the implementation of the measure is entrusted to national authorities, to contest the validity of the measure, at the time of its implementation, before a national court in an action against the national authority. Such a court may, or even must, in pursuance of article 177, refer to the ECJ a question on the validity of the Community measure in question.⁶²

⁶⁰ At 766E.

⁶¹ [1979] E.C.R. 3583.

⁶² *Ibid.* §11.

His Lordship goes on to say:

If the position is that the Council is not liable in damages for a mere breach of an article conferring individual rights, where that breach consists in legislative act, but that the United Kingdom government is so liable, a strange situation might arise. If that government, acting in pursuance of an invalid council regulation, sought by legislative action to implement it, it would be liable in damages whilst the Council, despite the express provisions of article 215 and the fact that the United Kingdom is obliged to implement regulations, would not.⁶³

Bourgoin is not a case of mis-implementation, but a calculated application of an illegal restriction on imports. The two situations are readily distinguishable.

A Community *regulation* does not require *legislative* implementation. The reference in *Koninklijke Scholten Honig* is, in context, clearly to *administrative* implementation. This can be judicially challenged; in that context the observations of the ECJ are both comprehensible and accurate. The Court was not considering the position of directives, which do require legislative implementation. There is no “mismatch” of liability.

His Lordship also held that breach of art. 30 amounted to an invalid order or excess of power which is not an actionable breach of statutory duty. The plaintiff’s right is “a right not to be subjected to a restriction which is not justified under article 36”. This statement is not supported by any authority, and is said not to be a matter of Community law. It ignores the whole jurisprudence of the ECJ that art. 36 “constitutes a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly”.⁶⁴ It also fails to take into account the subordinate position of the UK within the Community legal order.

THE CURRENT POSITION

The apparent recognition of the primacy of EC legislation, and willingness to use an aggressively purposive canon of interpretation to enable this to prevail which came to the fore in *Pickstone* and *Litster* gave

⁶³ [1986] Q.B. 716 at 783F-G.

⁶⁴ e.g. Case 80/86 *Kolpinghuis Nijmegen* [1987] E.C.R.3969.

hope that wiser, or at least more *communautaire*, counsels had prevailed. It was hoped that this approach would be extended to all conflicts between EC and UK legislation. *Webb* dispels this optimism, which was at best based on implication from the earlier cases rather than the actual words used, which distinguished, but did not disapprove of, *Duke*. Lord Keith has reasserted the applicability of the *Duke* approach. Lord Slynn has expressed similar views extra-judicially: "I find it difficult to say that a statute of 1870 must be interpreted in the light of a 1991 directive. If the former is in conflict with the latter, it is not for judges to strain language, but for governments to introduce new legislation".⁶⁵ Hopes expressed at the time of the House of Lords decision in *Webb* that the issue would not surface just yet, because the ECJ would remove the basis for conflict by approving the English approach comparing the pregnant woman with a hypothetical sick man have been dashed. The ECJ in Case C-32/93 *Webb*⁶⁶ has stated that, with the possible exception of a woman employed on a short term contract:

There can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the work for which she was recruited with that of a man similarly incapable for medical or other reasons.⁶⁷

The fact that Mrs. Webb was recruited to cover for another employee's maternity leave is irrelevant, given that it was a permanent, rather than a temporary appointment. Neither the ECJ nor Advocate General Tesaro address the hypothetical issue of a temporary employee.

The dictum of Glidewell L.J. in *Webb*, "The Directive is, of course, addressed to governments. The court's task is to interpret and apply its own national legislation,"⁶⁸ is clearly a lapse. The directive is addressed to member States, which includes judicial organs, whose functions are stated in *Marleasing*.⁶⁹

Von Colson was the authority on the duties of national courts when *Duke* was decided. It applies in terms to implementing legislation and concerns remedies, which are acknowledged as being, in principle, a matter for the national court. It is in this context that the obligation "to interpret and apply the legislation adopted for the implementation of the directive in

⁶⁵ *Introducing a European Legal Order* (1992), p. 124.

⁶⁶ [1994] 4 All E.R. 115.

⁶⁷ §24.

⁶⁸ [1992] 2 All E.R. 43 at 53g.

⁶⁹ Advocate General Tesaro refers to this at §6 of his opinion in *Webb*.

conformity with the requirements of Community law so far as it is given discretion to do so under national law" was interpreted. It was perhaps open to the House of Lords in *Duke* to interpret *von Colson* as it did, when it did. On the other hand, *Commission v. France* (which predates *Duke*) suggests that there is no liberty to disregard a ruling in the way that *Marshall (No.1)*⁷⁰ was disregarded in *Duke*.

Whether or not *Duke* was rightly decided at the time, account must now be taken of *Marleasing*. The only scope for the application of *Duke* after *Marleasing* is the proviso "so far as possible".

Lord Keith interpreted this broadly. He referred to the Spanish rule which was disapplied as general rather than specific in character, asserting that the Spanish court was entitled and bound to apply a specific incompatible Spanish provision. For *Marleasing* to apply, "the domestic law must be open to an interpretation consistent with the directive, whether or not it is also open to an interpretation inconsistent with it".⁷¹

Pickstone and *Litster* establish that aggressively purposive interpretation (amounting in truth to substitution) is available to the English court where required by Community law.

Prior to *Marleasing*, it was not thought that such interpretation was required for directives in the absence of direct effect through state involvement or the presence of an implementing enactment. *Marleasing* requires this form of interpretation in all cases, including wholly independent national legal rules.

Marleasing is a decision on the application of Community law which, by virtue of section 3 ECA, is authoritative. The substance of that decision is that litigants have a right to have national law interpreted where relevant to accord with directives as well as directly effective Community rules. This right itself is an "enforceable Community right" within section 2 (1) ECA. *Commission v. France* also applies.

"So far as possible", being a derogation, must be narrowly construed. The relevant narrow construction is "except where the court is prevented from applying such an interpretation". This would arise only where there was a deliberate disapplication of Community law, not in cases of inadvertent inconsistency where the court is not so prevented. Disapplication is a serious breach of the obligation imposed by art. 5, and can only be imputed to the member State on the clearest evidence. In *Duke* it was clear that the UK was not legislating to flout Community law, but under a misapprehension:

⁷⁰ [1986] E.C.R. 723.

⁷¹ [1992] 4 All E.R. 929 at 940b.

The Acts were not passed to give effect to the Equal Treatment Directive and were intended to preserve discriminatory retirement ages. Proposals for the Equal Treatment Directive . . . were in circulation when the bill for the Sex Discrimination Act 1975 was under discussion, but it does not appear that these proposals were understood by the British Government or [Parliament] to involve the prohibition of differential retirement ages linked to differential pensionable ages.

In *Webb* the ECJ adopts a firmly teleological approach, including reference to the Pregnancy Directive⁷² which was not extant, let alone in force, at the date of the events of *Webb*. This is precisely the reverse of the approach of the English judges. It is quite clear that the ECJ expects no temporising over the application of these principles.

Marleasing represents a substantial departure from received wisdom as to the interrelationship of the various elements of Community law, and effectively creates direct effect for directives by the back door. The scope for the application of directives is thereby widened, but this is comparable to allowing direct effect as against the state in the 1970s. It is simply a further example of judicial activism. *Marleasing* is binding on English courts by virtue of section 3 ECA. This brings into play *Simmenthal* and the proposition in *Francovich*:

The EEC Treaty has created its own legal system which is an integral part of the legal systems of the member-States and which their courts are bound to apply; the subjects of that legal system are not only the member-States but also their nationals. Just as it imposes obligations on individuals, Community law is also intended to create rights which become part of their legal patrimony; those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the member-States and the Community institutions.⁷³

As argued above, the operation of Articles 5 and 189 on *Marleasing* creates such a right.

In Cases C-87-9/90 *Verholen*,⁷⁴ which concerned the interpretation of Dutch Social Security regulations in the context of proceedings between an

⁷² 92/85.

⁷³ [1993] 2 C.M.L.R. 66, §31.

⁷⁴ [1994] 1 C.M.L.R. 157.

insured and the Dutch authorities, the Dutch court posed the following question: "Does Community law preclude the national courts from reviewing (of their own motion) a national legal provision in the light of an EEC directive, the time for whose implementation has elapsed, if an individual (possibly through ignorance) has not relied on it?"⁷⁵ The ECJ answered the question in the negative,⁷⁶ although this can be said to be permissive rather than mandatory. Advocate General Darmon went further. He clearly regarded such unilateral consideration as mandatory rather than permissive. "Such an obligation [he said] is inferred from the primacy of Community law, which presupposes that the rules of Community law are applied uniformly and immediately throughout the territory of the Community". The learned Advocate General clearly treated this as an instance of the obligation to apply Community law "so far as possible". He contrasted reliance on Community law to interpret national law, with applying that law. National courts cannot directly protect Community law rights where there is no direct effect, but "... when the national court is concerned with a directive without such effect, *it is required*, under the Court's case law, to interpret its national law, so far as possible, in the light of the wording and the purpose of the directive". There is nothing in his opinion, or in the judgment of the ECJ, to limit this principle to cases directly involving an emanation of the state as a party.

National courts must now apply Community law in virtually every case, if necessary in the face of inconsistent national law. They cannot hide behind the failure of the legislature to perform its task. This restricts the area in which it will be necessary to consider the application of a *Francovich* claim by excluding cases where a claim against the natural defendant was frustrated by a decision such as *Duke*. This is no bad thing. A *Francovich* claim arises only when the initial claim fails. Redress is long delayed. In any event the extant cases of noncontractual liability concern positive wrongful acts or total non-feasance confirmed by an art. 169 decision, not negligent omissions to amend existing non-compliant legislation or negligent mis-implementation. While *Francovich* is said to be of general application, the conditions for liability in other types of case have not been established.

Francovich offers the only redress where a directive cannot be applied because some key element is missing, and appears to be the appropriate redress where administrative action is taken in contravention of directly effective Community rules. It will also apply to the hypothetical case of

⁷⁵ Case C88/90, question 1.

⁷⁶ para. 16.

legislation which openly defies Community law and positively compels the national court to refuse to apply it. The plaintiff must always prove the necessary causality and quantifiable harm.

If the English judges accept the full impact of *Marleasing*, and allow the *Francovich* principle to develop only in its allotted sphere, the spectre of a retrogressive and idiosyncratically inconsistent English perversion of Community law raised by *Duke*, *Webb* and *Kirklees* will, it may be hoped, recede. However, for this to occur, those judges must bite the bullet of the federal legal system and acknowledge their place therein, coupled with their obligations as organs of the state. There is little sign of this happening. Indeed many senior judges seem not even to have grasped what was self-evident to Lord Denning at the time of accession. We can but wait and see.

RELATIONAL THEORY AND THE TRUST CONCEPT

Gary Watt*

A suitable sub-title to this article might have been – “The Trust Concept – Medieval or Modern?” Ever since a Select Committee report of March 1992¹ blamed “medieval trust law” for the confusion in the law on pensions, legal commentators have rallied to the defence of the trust.² They all agree that the trust concept is sufficiently flexible to suit modern commercial conditions.³ The recommendations of the Goode report 1993⁴ support this view in proposing that the trust concept should continue to under-pin occupational pension schemes. At the same time at least one commentator acknowledges that it may have become increasingly artificial to extend a homogenous law of trusts to cover cases from settled land to occupational pension schemes and wonders whether such generic application can succeed without some fragmentation of trust law.⁵ If the trust is to survive its own flexibility it is important to attempt to assert, at this stage, the essence of the concept.

The aim of the present piece is to suggest that “Relational Theory”, a prime strand of current socio-economic analysis, provides a satisfactory rationale for trusts ancient and modern, and that this rationale should inform our understanding of the trust concept and guide future developments in the law.

Relational Theory, sometimes termed “relationality”⁶ or “Relationism”,⁷ is a collaboration of philosophy, economic theory and sociology. Relational Theorists agree that neither conservative liberal individualism nor Marxist/socialist collectivism provide an adequate analysis of the complexity of human relations. Relational Theory proposes an alternative rationale on the basis of fluid, often empirical, assays of human interaction.⁸ Perhaps the foremost of these tools of analysis is

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¹ House of Commons Select Committee on Social Security, Session 1991-1992, “The Operation of Pension Funds”, 4 March 1992, HC 61-11.

² Professor David Hayton, “Trust Law and Occupational Pension Schemes” [1993] Conv. 283; Graham Moffatt, “Pension Funds: A Fragmentation of Trust Law?” [1993] 56 M.L.R. 471.

³ See, e.g., Hayton, *op. cit.*, at 284, “Trusts are considered ideal modern commercial vehicles . . .”.

⁴ The Report of the Pension Law Review Committee, chaired by Professor Roy Goode, September 1993.

⁵ Moffatt, *op. cit.* Moffatt adopts Unger’s categorisation of contemporary legal doctrines, if only as a “heuristic device”, when he says, at 488, “The line of reasoning is initially straightforward, it is that pension funds operate in the realm of work, exchange and economy, whereas their formal legal framework is derived from the realm of family and friendship”. There are echoes of this approach in the Relational analysis.

⁶ See “Distributive Liberty: A Relational Model of Freedom, Coercion and Property Law” (1994) 107 Harv. L. Rev. 859.

⁷ See M. Schluter and D. Lee, *The R Factor*, Hodder and Stoughton 1993, at p. 264.

⁸ Thus providing immunity from Unger’s critique of normative conceptualisation. See R. M. Unger, “The Critical Legal Studies Movement” 96 Harv. L. Rev. 563 at pp. 584-585, “None of the social and mental forms within which we habitually move nor all the ones that have ever been produced in history describe or determine exhaustively our capabilities of human connection”.

“Relational Proximity”. It might be described as the paradigm assay of the relational quality of any given context. According to one account,⁹ which I have taken the liberty of paraphrasing, persons will be at their most Relationally Proximate if they act:

1. immediately (without an intermediary); and
2. continually (with continuity and regularity); and
3. with contextual multiplexity (in a variety of social contexts); and
4. with parity (with equal status); and
5. with commonality (with common purpose).

When a person is Relationally Proximate to another it is assumed that they are more likely to act in a manner beneficial to the other’s interests than they would if Relational Proximity were absent or of a lesser quality. Perhaps the prime instance of a Relationally Proximate context is “the family”. In the familial context supply cannot necessarily be raised to meet demand, which is one reason why the nature of the demand changes from that of consumer to that of co-operator. The free-market economy is ousted in favour of relations based on inter-dependence, trust and sharing. (One would not expect to have to pay for “prime time” in the shower!) In the family the free market is replaced by the Relational market; the market of buying and selling is replaced by the market of give and take. This is not to contrast “an ideal of private community, meant to be realized chiefly in the life of family and friendship, to the ideal of contractual freedom, addressed to the world of self-interested commerce”.¹⁰ Although “the family” can be expected to reflect greater, arguably the greatest, levels of Relational Proximity, Relational Theory pre-supposes that the economic world can foster these attributes. Indeed a prime observation of Relational Theory is that Relational Proximity already exists in the commercial realm, and can be increased. According to one Relational commentary, “Following the individualistic account of self, orthodox property law seeks to identify a subject, who holds all the rights to an object as freeholder. Property theory corollaries of the relational critique of individualism supplant this orthodox account with institutional designs that mediate the dialectic of separateness and union”.¹¹ (To this it might be added that Relational Theorists observe as many institutional designs as they purport to impose.)

The opinion of the present writer is that a pre-eminent example of such an institutional design is readily discoverable and observable in the form of the trust concept (despite its apparently medieval nature and in spite of the supposed modernity of Relational Theory). Relational Theorists have

⁹ See *The R Factor*, *supra*, ch. 3.

¹⁰ See R. M. Unger, *op.cit.*, at 622.

¹¹ See 107 Harv. L. Rev. 859 at 861.

already suggested as much, in a passage which further criticises the “dialectic of separateness and union”: “Private ownership does not have to be defined in individualistic terms . . . it can also mean ‘non-state’ ownership, and of this many examples can already be found - including family businesses and trusts, partnerships, co-operative enterprise, and some forms of mutual society - all of which in some way provide incentives for the individual to seek the benefit of a wider group”.¹²

There is not the scope in this article to offer a satisfactory introduction to Relational Theory. Nevertheless the reader might readily sympathise with its principal premise that individualism and collectivism have both failed and that a new analysis is needed to bridge these two extremes. Legal writers on both sides of the Atlantic have recently favoured a departure from liberal-individualistic constructs of property as being something of inherent market alienability.¹³ And, as for the Marxists, who once so confidently predicted the “withering away” of law,¹⁴ they themselves appear to have withered away, discredited by the unfolding of historic events which once formed the basis of their determinist theories. Relational Theory presents itself as the analysis to bridge the gap between individualism and collectivism.

The principal assertion of this paper is that we can expect Relational Theory to elucidate the essence of the trust concept because the trust is, fundamentally, a Relational “institutional design”. I now turn to some of the evidence supporting this assertion.

I. THE FAMILIAL TRUST FOR SALE

Whenever two or more persons co-own land they will hold the legal estate on trust for sale. If the parties do not express the trust for sale it will be implied;¹⁵ it is said to be “imposed” upon them by statute. The assumption underlying the imposition of a trust which places a duty on the trustees to sell the land is that the co-owners will at some point wish to “go their separate ways” and dispose of their portion of the land. This approach is clearly a concession to liberal individualism and is based perhaps, also, upon an analysis of property as ultimately requiring market alienability.

¹² See *The R Factor*, *supra*, p. 197.

¹³ See K. Gray, “Property in Thin Air” [1991] 50 C.L.J. 252; R. M. Radin, “Market Inalienability” [1987] 100 Harv. L. Rev. 1849.

¹⁴ See, *e.g.*, E. B. Pashukanis, “The General Theory of Law and Marxism”.

¹⁵ Law of Property Act 1925, ss. 34-36; and see also, generally, *Re Citro* (A Bankrupt) Ch. 142 at 150.

While the duty to sell might possibly be suitable for tenants in common¹⁶ (often business partners), its applicability to the relationship between joint tenants is doubtful and it would appear to be especially unsuitable to familial joint tenants. The “immediate binding trust for sale”¹⁷ is so clearly inappropriate to some circumstances that there is always implied a power to postpone,¹⁸ which is presumed to be exercised in the absence of expression to the contrary.

The difficulties inherent in the statutory trust for sale, in particular its awkward attempt to reduce complex expectations to an intention to sell, are more or less self-evident.¹⁹ A more subtle observation would be that, despite criticism of the underlying duty to sell, it is generally accepted that the trust concept itself is appropriate to the family situation, if only the terms of the trust could be sensitive to the particular circumstances and intentions of the parties. It has not been suggested, for example, that the law of partnerships or a contractual model of unincorporated association²⁰ would be more suitable to the familial situation. Estoppel would possibly be a more suitable analysis, but it is essentially a cause of action attracting remedial alternatives and is therefore inappropriate as a description of long-term arrangements where there is no intention to create legal relations.

The writer takes the view that a trust, some kind of trust, is the legal construct most appropriate to the family. Perhaps it is a construct not so much imposed as observed. In the family we have already noted that relationships do not tend to be regulated at arms’ length; indeed there is generally no intention to create legal relations. Familial relationships are holistic, taking account of a whole range of dependencies and of genetic and moral bonds; they are not merely interactions between bundles of rights gathered behind legal *persona*. The law must inevitably struggle to find the legal construct best suited to express implicit aspects of this close institution. It is the writer’s submission that the choice of the trust model is neither accidental nor inappropriate. The trust, as we shall shortly see, is a relationship of dependence, the beneficiaries’ dependence upon the trustee.

¹⁶ Between whom one of the unities required for a joint tenancy is missing or, as between whom, the joint tenancy has been severed, thus possibly indicating a relationship of an inherently lower level of Relational Proximity.

¹⁷ Law of Property Act 1925, s. 205(xxix).

¹⁸ Law of Property Act 1925, s. 25(1).

¹⁹ See, e.g., *Re Buchanan-Wollaston’s Conveyance* [1939] Ch. 738.

²⁰ As to which, see *Re Recher’s Will Trusts* [1972] Ch. 526.

II. TRUSTEES' STANDARD OF CARE

Further evidence for a Relational view of the trust is to be found by looking at the standard of care expected of trustees. The standard was at one time a fairly uniform one. It was said to be the standard of care an ordinary prudent man of business would extend to his own affairs.²¹ The term "business" immediately puts one in mind of arms' length transactions in the free-market. But the precise meaning of the term has received scrutiny, clarification of the phrase being given in *Re Whiteley*,²² where "business" was said to be the business of acting with a view to another's benefit. This approach is echoed in the Goode report.²³ This would appear to support the claim that the trust concept is a Relational institutional design, that is, an institution which provides "incentives for the individual to seek the benefit of a wider group".²⁴ Yet can it really be said that moral provision is the motivation of the modern professional trustee? In *Bartlett v. Barclays Bank*²⁵ the court demanded a higher standard of care from those who professed a higher degree of skill. However, as Moffat²⁶ has pointed out, there are many questions left unresolved by the case. Is it really the "profession", of skill which determines the higher standard, or is it the fact of remuneration which the professional trustee insists on by the charging clause? I submit that the settlor's intention is best met by applying the higher standard to the trustee who receives remuneration from the fund. Thus to the extent that Relational aspects of the trust are diluted by profit-motivation there might be compensation by insisting upon a higher standard of care.²⁷ This might, indeed, be the true rationale of *Bartlett*. However, although there is clearly a difference between the motivation of moral obligation (the desire to provide benefit for another) and the motivation of self-interest, it is readily acknowledged that both are liable to be found to some degree in most trustees.

²¹ See *Speight v. Gaunt* (1883) 22 Ch. D. 727.

²² (1886) 33 Ch. D. 347 at 355.

²³ Above, recommendation 103, which proposes the following standard for pension fund trustees : "to exercise, in relation to all matters affecting the fund, the same degree of care and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide and to use such additional knowledge and skill as the trustee possesses or ought to possess, by reason of the trustee's profession, business or calling".

²⁴ Note 12, above.

²⁵ *Bartlett and Others v. Barclays Bank Trust Co. Ltd.* (Nos. 1 and 2) [1980] 1 Ch. 515.

²⁶ *Trust Law, Text and Materials*, 2nd ed., 1994, p. 369.

²⁷ Of course the reality may well be that, despite attempts to ensure a higher standard from professional, remunerated trustees, it is those same trustees who are most likely to secure for themselves a lower standard of care by means of carefully drafted clauses limiting their liability. On this, see, *inter alia*, P. Matthews [1989] Conv. 42 and W. Goodhart [1980] Conv. 333.

The mixed motivation of modern trustees is well attested to. G. W. Keeton has said²⁸ of the trustee, "Increasingly, he has neither the time, nor the capacity, nor the inclination to spend considerable time administering a trust, at any rate where the trust has no direct connection with the affairs of himself or his family, more especially when, apart from a provision for payment in the trust instrument, he is still expected to act gratuitously . . .". A recent empirical study found that "despite the onerous nature of the office of trustee, getting suitable private individuals to agree to become trustees is not a major problem. Friendship for the settlor/testator or a sense of duty arising from the fact that the settlor/testator is a relative are the main reasons for private individuals agreeing to act as trustees. However, knowledge of the beneficiaries and a desire to help them was also highlighted in the solicitor's survey as a factor. It is interesting to note that private individuals who agree to act as trustees usually regard it as an honour and not a chore".²⁹

In addition to the usual standard and the higher standard of care, there is the possibility of a third, lower, standard. Namely that which was applied in *Re Vickery*.³⁰ This lower standard has received much criticism,³¹ because the reasoning in the case was clearly a fresh invention and a misapplication of existing law. Further, it seems to have the result of protecting the trustee who is an "honest fool" (restricting, as it does, the trustee's liability for the defaults of their agents to those situations where the trustee is subjectively aware of his own wrongdoing). Nevertheless some commentators have supported the end result as ultimately a fair one.³² It might be trite to take the realist stance which is to observe that the judge in the case clearly sympathised with the trustee and did not find the agent he employed to be totally trustworthy. These factual observations cannot be entirely divorced from the outcome of the case. Whatever the arguments as to the correctness of the decision, however, as a result of *Re Vickery*, there may now exist the third, lower standard of care, to be applied only in the limited circumstances to which Maugham J. and Cross J. referred in *Re Vickery*³³ and *Re Lucking*³⁴ respectively. These are where the trustee has deposited trust money or securities within the meaning of section 30(1) of the Trustee Act 1925.

²⁸ G. W. Keeton, *Modern Developments in the Law of Trusts*, 1971, p. 13.

²⁹ C. Bell, *Trust Law and Practice*, January 1988, 86.

³⁰ *Re Vickery*, *Vickery and Stephens* [1931] 1 Ch. 572.

³¹ See, e.g., J. E. Stannard [1979] Conv 345; G. H. Jones [1959] 22 M.L.R. 388.

³² Notably Parker and Mellows, *The Modern Law of Trusts*, 5th ed. at p. 287. Even G. H. Jones in his criticism of *Re Vickery* admits that "in the result" the case might be correctly decided!

³³ *Supra*, at p.582.

³⁴ *Re Lucking's Will Trusts* [1968] 1 W.L.R. 866 at 874.

The usual standard of care places great weight on the aspect of moral obligation and provision for the dependent beneficiary. This accords with the Relational analysis of the trust as an institution which “provides incentives for the individual to seek the benefit of a wider group”.³⁵ The higher standard of care aims to compensate for the higher level of self-interest to be expected in remunerated, professional trustees. And (rather more speculatively) it may be that the lower standard of care applied in *Re Vickery* arose from the fact that the judge was sympathetic with the trustee in the case (a missionary ignorant of business affairs), and did not wish to penalise his well-motivated involvement in the trust.

III. THE DUTY OF PERSONAL SERVICE

The rule against delegation, otherwise known as the duty to provide personal service, buttresses the Relational qualities of the trust. It achieves this by seeking to maintain the immediacy of the trustee/beneficiary relationship and (in an express trust) by attempting to sustain the settlor's choice of decision-maker. This goes some way to enhancing commonality between trustee and beneficiary.³⁶ However, the rule, expressed in the maxim *delegatus non potest delegare*, has lost some of its historical potency.³⁷ In the modern investment environment it is often essential to delegate certain executive functions to expert agents and by their nature some of these so-called executive functions appear to necessitate the exercise of discretions, which, according to the orthodox analysis, should be reserved to the trustee. To the extent that decision-making is delegated to these agents, strangers have usurped the trustee's duty of moral provision.

On a Relational analysis, the ideal trust might see the appointment to the office of trustee of a close family member or relative of the beneficiary, who happened also to be a professional stockbroker, solicitor and accountant. The assumption is that choosing a family member is likely to introduce greater levels of commonality, parity, continuity, contextual multiplexity and immediacy. The product of these factors should be Relational

³⁵ Note 12 above.

³⁶ One might expect the settlor to appoint a trustee whom they felt would best “look after” the beneficiary's interests.

³⁷ There are isolated situations where the rule has been almost entirely stripped of its force. See *e.g.* the possibility of appointing an attorney (Powers of Attorney Act 1971); Trustee Act 1925, s. 25, which allows for a delegation of decision-making powers on a temporary basis; and the Enduring Powers of Attorney Act 1985, the scope of which is uncertain (see Hayton (1990) 106 L.Q.R. 87 and Law Commission Consultation Paper No. 118).

Proximity between the trustee and the beneficiary and therefore better service to the trust. Delegation to profit-motivated agents introduces an intermediary between the beneficiary and the person supposedly making decisions in the beneficiary's best interests. Further, it is to be expected that the "hired hand" will have fewer things in common with the beneficiaries than would a close family member, will have a more temporary relationship with the beneficiary and will, in general, be less likely to relate to the beneficiary in contexts other than that of the agency. The consequence of the resultant lack of Relational Proximity will be a lower level of service to the beneficiaries.

It would, of course, be unrealistic to restrict the office of trustee to members of the beneficiary's family. Relational Theory is a realistic analysis. It therefore requires only that the trust be allowed to reflect as closely as possible aspects of the Relational ideal (and, failing achievement of the Relational ideal, a generous conception of the family is the next best thing). This involves, *inter alia*, continued support for the rule against delegation in the general law and, so far as possible, a restriction of delegation to the devolution of executory functions. With this latter point in mind, I now turn to a consideration of recent proposals for reform of the law on trustees' delegation powers.

The Goode Committee proposed reform of section 23 of the Trustee Act 1925;³⁸ eleven years previously the 23rd report of the Law Reform Committee also considered the section. At present, section 23 limits delegation to the delegation of executive and administrative functions. The 23rd report proposed no change to the law, preferring additional powers to "be found in the trust instrument rather than the general law".³⁹ The Goode Committee, in contrast, believed it to be inappropriate to leave the general law in a vague state⁴⁰ and urged a wholesale reform of section 23:

It does not seem sensible to require trustees who wish to delegate investment management on a discretionary basis to go through all the formalities required for a power of attorney. Equally, there appears to be no good reason why trustees who choose an authorised, and apparently competent, fund manager to engage in discretionary management of the pension fund portfolio and who keep investments and investment strategy under regular review,

³⁸ Section 23(1) provides, *inter alia*, that "Trustees . . . may, instead of acting personally, employ and pay an agent . . . to transact any business or do any act required to be transacted or done in the execution of the trust . . .".

³⁹ Para. 4.20.

⁴⁰ Para. 4.9.25.

should be vicariously liable for the fund manager's defaults . . . We consider that the simple solution would be to extend section 23 to allow decision-making powers to be delegated.⁴¹

There is no doubt that section 23 is urgently in need of reform but, it is submitted, that the radical reform proposed by the Goode Committee should be expressly limited to the operation of occupational pension schemes. The report of the Goode Committee acknowledges no such limitation and expressly states that many of its proposals are likely to be of general application and are not peculiar to pension fund investments.⁴² It is the writer's contention that the duty to provide personal service is not an optional aspect of the trust but is fundamentally bound up in the meaning of the concept, and, if the duty of personal service is entirely removed from the field of occupational pension schemes, this should take place on the understanding that the law of pension funds really is, at most, a fragment of trust law.

IV. DEFINITION AND COMPARISON

It is generally accepted that the trust is not a concept susceptible of precise definition. The orthodox approach is to attempt to identify trusts on the basis of certain essential constituents.⁴³

Without denying the assistance that can be drawn from this constitutional approach, it is here submitted that the trust concept can also be identified on the basis of its essential relationship, namely, the relationship between trustee and beneficiary. Trusts without a trustee and a beneficiary exist as exceptions to the general concept of the trust.⁴⁴ The semantic descriptions of these parties bear out the Relational nature of the concept. On the one hand, there is the *cestui que trust*, "the one who trusts",

⁴¹ Para. 4.9.29.

⁴² Para. 4.9.

⁴³ The usual elements are known as "the three certainties", after the dictum of Lord Langdale in *Knight v. Knight* (1840) 3 Beav. 148 at 173. They might be summarised as: (1) certainty of intention to create a trust; (2) certainty as to the subject matter of the trust; (3) certainty as to the beneficiary or purpose of the trust. An alternative is proposed by S. Gardner in *An Introduction to The Law of Trusts* (1st ed., 1990) at p. 9 "...we arrive at an idea of a trust as a situation in which property is vested in a trustee who is under an obligation to handle it in some particular way, with the riders that this obligation is equitable and that the trustee has no interest of his own in the property". Gardner has to admit that this analysis "would not be altogether accurate as a description of existing case-law". (Thus illustrating the apparent impossibility of reaching a satisfactory definition which is both descriptive and prescriptive.)

⁴⁴ Notably, charitable purpose trusts, which are clearly defensible on a Relational analysis as trusts which seek the benefit of others; also those strange non-charitable purpose trusts, such as that in *Re Dean* (1889) 41 Ch. D. 552, which are clearly unsupported by principle, and the class of which is now closed.

and on the other hand there is the “trustee”, the one in whom trust is reposed. In purely semantic terms therefore the trust can be seen as a relationship of dependence and obligation.

It might be argued that contract, just as much as the trust, is an example of a Relational design. *Prima facie* there is some truth in this. At the heart of contract there is privity, a private relationship between parties. There is, of course, no such concept as “privity of trust”, indeed many modern trust cases concern strangers who become fundamentally involved in the trust.⁴⁵ A contract fails for lack of a party, but theoretically a trust does not fail for lack of a trustee.⁴⁶ Except in those situations where there is inequality of bargaining power, the parties to a contract seem to exhibit a level of parity which is at first sight quite lacking in the trust relationship. Commonality might also be seen in the contract, on the basis *inter alia* of a common intention to bargain. Further, contract is apparently quite an immediate relationship; the concept of privity buttresses this. Contextual multiplexity and continuity of relationship, however, are not factors inherent in contract.

Is contract a Relational design, then, for it appears to display a high enough level of Relational Proximity? Contracts underpin unincorporated associations, partnerships and even corporations (by means of shareholders agreements), so in these contexts the law of contract is clearly an associating facility. Crucially, though, freedom of association underlies freedom to contract. Contracts are freely entered into.⁴⁷ The beneficiaries of a trust, on the other hand, are obliged to participate, although having become involved they can, of course, dispose of their entitlement by sale, gift or re-settlement, assuming them to be of full age. Likewise, it seems that trustees are often obliged to participate in the trust, at least at its inception. An instance of this is the trustee of an imposed trust, for example an automatic resulting trust or the statutory trust considered earlier. Even the original trustees of an express trust are usually nominated to act and can only be said to associate freely to the extent that disclaimer of the trusteeship is permitted. Yet, as we have already seen, the acceptance of the office by un-remunerated trustees is more likely to be motivated by “a sense of duty” to others than by self-interest. This is not “free association” as the

⁴⁵ e.g. The five cases reported at [1992] 4 All E.R.: *Baden v. Societe Generale*; *Agip (Africa) Ltd. v. Jackson*; *Eagle Trust plc. v. S.B.C. Securities Ltd.*; *Lipkin Gorman v. Karpnale Ltd.*; *Cowan de Groot Properties Ltd. v. Eagle Trust plc.*

⁴⁶ This observation should not detract from my earlier assertion that a trust without a trustee is an oddity, for the maxim “a trust does not fail for want of a trustee” pre-supposes legal procedures for the appointment of new trustees in the event of vacancies in the office.

⁴⁷ With the obvious exceptions of contracts subject to a court order for specific performance and contracts of compulsory purchase.

liberal individualist would use the phrase.

It would appear that the trust makes far fewer concessions to liberal individualism than does the law of contract. There is nothing essential to the concept of contract which provides “incentives for the individual to seek the benefit of a wider group”; indeed it seems intrinsically to serve the individual’s self-interest. In contrast the trust displays a lesser degree of freedom of association. According to all that has been said so far it should come as no surprise to observe that freedom of association is also quite lacking from the institution of the family.⁴⁸

It is, of course, not only the inception of the trust that suggests it to be a Relational design. During the currency of a trust the general law provides that trustees should not delegate their trust, should act gratuitously, should not allow their personal interests to conflict with the trust and should provide a high standard of care based on the notion of provision for another’s benefit. It is only by means of contract that these elements of the general law of trusts are avoided or watered down.

V. CONCLUSION

The trust has always presented problems for an analysis of property which pre-supposes a need for market alienability. Many trusts necessitate periods of market inalienability, limited, of course, to the duration permitted by the rules against perpetuity.⁴⁹ The very existence of these rules is a response to the risk of perpetual market inalienability. The trust concept, far from being susceptible to a mercantile analysis, seems to run counter to the ideals of free-market liberal individualism. In contrast, the trust appears to be consistent with a Relational analysis, which helps to explain, amongst other things, its application to familial co-ownership.

The trust, I have suggested, is a Relational design. The beneficiary’s trust is reposed in the trustee who, *according to the general law*, should act with a view to the beneficiary’s best interests. Only when the trustee *contracts* with the settlor or beneficiary are delegation of decision-making powers, remuneration and a lower standard of care introduced. The writer has suggested a rationale of the trust concept on the basis of Relational Theory and has suggested that this will lead to a more rigorous

⁴⁸ The word “institution” is chosen advisedly to lay the emphasis on the initial constitution of the family by birth. Clearly, one obvious exception to this is the family created by legal adoption. Another possible exception is the family associated by marriage, if one accepts a purely contractual analysis of marriage, which approach the present writer rejects as inadequate.

⁴⁹ See Gardner, *op.cit.*, for a fascinating discussion on market-alienation aspects of these rules.

development of the trust concept with a view to better guarding the beneficiary's interests. The reform of the rule against delegation as proposed by the Goode Committee threatens to introduce into the general law of trusts a regulatory scheme which could previously only be introduced by special contractual agreement. Perhaps the duty to act gratuitously will be the next aspect of the trust to undergo scrutiny. A Relational analysis provides a rationale for the protection of these and other aspects of the orthodox trust which might otherwise be thought to be without principled support. Parliament is, therefore, urged to protect the Relational essence of the general law and begged not to sacrifice the greatest asset of English jurisprudence⁵⁰ at the altar of contractual self-interest.

⁵⁰ Echoing, amongst others, F. W. Maitland's description of the trust idea as "the greatest and most distinctive achievement performed by Englishmen in the field of Jurisprudence".

THE BENEFIT AND BURDEN OF COVENANTS — NOW WHERE ARE WE?

John Snape*

I. INTRODUCTION

The judgment handed down by the House of Lords in *Rhone v. Stephens*¹ on 17 March 1994 marks a welcome return to orthodoxy in the law relating to covenants affecting freehold land. For some commentators, the decision may be profoundly disappointing. *Rhone v. Stephens* has ruled authoritatively that the burden of a positive covenant will not run in equity and only exceptionally at law. Perhaps the spirits of the distinguished Victorian judges who *in equity* first confined the running of the burden to restrictive (*i.e.* negative) covenants nodded their assent at the restraint with which their successors chose to apply the orthodox rules in 1994. Briefly stated, these orthodox rules are different for the transmission (the running) of, on the one hand, the *benefit* and, on the other, the *burden* of covenants at common law and in equity. They are preserved virtually intact in *Rhone v. Stephens*. No distinction is drawn at common law between restrictive and positive covenants; a purchaser from the original covenantee may claim the benefit of *any* covenant at law, provided certain basic conditions are fulfilled. Only exceptionally however, at law, will a purchaser from the original covenantor be subject to the burden of a covenant. *Rhone v. Stephens* definitively underlines the proposition that in equity, by contrast, the distinction between positive and restrictive covenants is fundamental. The burden of a *positive* covenant, it seems, will not run in equity. However, if a covenant is in substance restrictive, then equity has special rules for the running of each of the benefit and burden. Basically, the burden runs if the covenant protects land retained by the covenantee and, depending on whether it was created before 1926, is in addition either subject to the doctrine of notice or registrable as a notice or class D(ii) land charge. The benefit runs provided it is (a) somehow annexed to the land; or (b) assigned separately from the land; or (c) transmitted to a purchaser pursuant to a building scheme. Such, very briefly, are the orthodox rules.

This article takes the opportunity presented by the House of Lords in *Rhone v. Stephens* to examine the orthodoxy in context. It does so both in relation to the benefit of covenants (an area traumatised by the heterodoxy of *Federated Homes Limited v. Mill Lodge Properties Limited*)² and the

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¹ *Rhone and Another v. Stephens (Executrix)* [1994] 2 All E.R. 65; reported in the Court of Appeal at (1994) 67 P. & C.R. 9.

² [1980] 1 All E.R. 371.

burden of covenants, the running of which, in both the common law and equitable context, was the relevant issue in *Rhone v. Stephens* itself. As will be seen, *Rhone v. Stephens* has reiterated the orthodox rules relating to the burden, whilst *Federated Homes* seemed to replace the common law rules and possibly all but (c) of the orthodox equitable rules relating to the running of the *benefit* with a single concept of automatic or statutory annexation. The article welcomes the statement of the orthodox rules in *Rhone v. Stephens* and advocates a return to orthodoxy in relation to the running of the benefit. It goes on to suggest that there could have been no possible basis on the facts of *Rhone v. Stephens* for allowing the burden of positive covenants to run in equity and keeps in sight a relatively recent Privy Council decision³ in respectfully plotting a course for the courts to take, in relation to benefit, until the passage of time and statutory reform replace covenants with the new concept of the “land obligation”.⁴ *Rhone v. Stephens* may mean that legislation is now required to deal with the running of the burden of positive covenants, on an interim basis, even before the land obligation is introduced. It does not follow that it is wrongly decided. The article is, above all, far more than yet another addition to the plethora of comment once generated by *Federated Homes*. It is intended to provide a context and a perspective which would, it is respectfully submitted, (a) have led their Lordships in *Federated Homes* to quite a different conclusion; and which (b), whilst emphasising the need for interim legislative action, will illustrate the correctness of the decision in *Rhone v. Stephens* itself.

II. RHONE v. STEPHENS

The facts of *Rhone v. Stephens* were sufficiently simple to enable a fundamental consideration by the court of the orthodox rules. A positive covenant to maintain a roof was given by the vendor to the purchasers in the conveyance by which Walford Cottage was sold off from Walford House in 1960. Both properties had been sold more than once since then. The appellants in the House of Lords, Mr. and Mrs. Rhone, were the present owners of Walford Cottage. The respondent, Mrs. Stephens, was the executrix of the deceased owner of Walford House. Lord Templeman (Lord Oliver, Lord Woolf, Lord Lloyd and Lord Nolan concurring) held that, although Mrs. Stephens was in breach of the repairing covenant, the burden

³ *Jamaica Mutual Life Assurance Society v. Hillsborough* [1989] 1 W.L.R. 1101.

⁴ “Transfer of Land - the Law of Positive and Restrictive Covenants” (Law Com. No. 127, 1984).

of the positive covenant was not enforceable against her. Summarising his conclusions, in a passage to which further consideration will be given below, his Lordship said that:⁵

Equity does not contradict the common law by enforcing a restrictive covenant against a successor in title of the covenantor but prevents the successor from exercising a right which he never acquired . . . [To] enforce a positive covenant would be to enforce a personal obligation against a person who has not covenanted. To enforce negative covenants is only to treat the land as subject to a restriction.

The covenant itself (clause 3 of the 1960 conveyance) was in the following terms:

3 The Vendor hereby covenants for himself and his successors in title owner or occupiers for the time being of the property known as Walford House aforesaid to maintain to the reasonable satisfaction of the Purchasers and their successors in title such part of the roof of Walford House aforesaid as lies above the property conveyed in wind and water tight condition.

A property lawyer looking at this even in 1960 would have concluded that the drafting was inadequate. In the Court of Appeal, faced with the task of arguing that the burden did run, counsel for Mr. and Mrs. Rhone argued that the burden had passed under the so-called “pure principle” of benefit and burden - an alleged general principle, now at best heavily discredited by the House of Lords,⁶ stating that a person who takes a benefit under a deed must submit also to any burdens imposed by it (the benefit here apparently being certain quasi-easements referred to in clause 2 of the 1960 conveyance). Understandably, counsel seems to have conceded before the Court of Appeal that the burden of the covenant, it being positive, could not have run at law or in equity in any other way. The Court of Appeal (Nourse and Steyn L.J.J.) held that the “pure principle” did not apply to the 1960 conveyance and that the burden had not therefore run. Nourse L.J.(with whom Steyn L.J. concurred) reached this decision with considerable reluctance. Indeed, his sympathies seemed quite different from those of Lord Templeman in the House of Lords, who said that the basis of the

⁵ [1994] 2 All E.R. 65 at 68g.

⁶ At worst now non-existent; for a full consideration, see Gravells (1994) 110 L.Q.R. 346; Snape [1994] Conv. 477.

decision was a rule “imparted at an elementary stage to every student of the law of real property”. (Nourse L.J. in the Court of Appeal had preferred to describe it as a rule which, though familiar to him, had shocked more than one eminent judge unversed in the subtleties of property law.)

Without betraying any of the reluctance shown by the Court of Appeal, the House of Lords held that the burden of the covenant had not run and (except in one case not discussed involving a rentcharge) could not have run.⁷ Their Lordships’ decision was based on three grounds: first, that the burden of a positive covenant does not run in equity; secondly, that there was no relevant “pure principle” of benefit and burden; and, thirdly, that section 79 of the Law of Property Act 1925 did not have the effect of annexing the burden automatically to the land. Each of these grounds is to be welcomed with enthusiasm.

III. THE MODERN STATUTORY BACKGROUND

It is possibly unnecessary, although useful, to state that the modern statutory provisions relating to the running of the benefit and the burden of covenants are contained in sections 78 and 79 respectively of the Law of Property Act 1925. They have a certain deceptive similarity but quite a different effect from each other. Section 78, obviously, since it is headed “Benefit of covenants relating to land”, is about covenants relating to any land of the covenantee⁸ and section 79, headed “Burden of covenants relating to land”, is about covenants relating to any land of the *covenantor*.⁹ The similarity begins and ends, however, with the wording relating to successors in title of the covenantor or the covenantee (as the case may be), both section 78 and section 79 stating that covenants are to “have effect as if such successors and other persons were expressed”.

Each section *deems* the covenant to have a particular effect; and the use of the word “deemed” in both sections is at the heart of the confusion over their meaning. The crucial difference between the two sections is that, whilst section 78 (occasionally referred to below as “the benefit section”) deems the covenant to be made “*with the covenantee* and his successors in title and the persons deriving title under him or them”, section 79 (occasionally referred to below as “the burden section”) deems the covenant

⁷ The rentcharge is one method of circumvention. See *e.g.* Snape, “Positive Guidance on Covenants” *The Law Society’s Gazette* 15 June 1994 at 22 and 14 September 1994 at 15. Law Com., note 4 above, para 3.31ff.

⁸ *i.e.* The person to whom the obligation under the covenant is owed, having the benefit thereof.

⁹ *i.e.* The person owing the obligation under the covenant, having the burden thereof.

to be made “on behalf of [the covenantor] and his successors in title and the persons deriving title under him or them”. Whatever the precise scope of the word “deemed” is in each section, this difference in wording makes it clear that the benefit is, in principle, to pass to the covenantor’s successors *etc.* quite easily, whilst section 79 is intended, in the absence of contrary intention, to ensure that the *burden* remains firmly with the original covenantor. (Even this conclusion, however, depends on the words “on behalf of” being regarded as quite different in effect from the wording of section 78.) Indeed, as Lord Wilberforce commented in *Tophams Limited v. Sefton*,¹⁰ “[Section 79] merely extends the scope of Tophams’ [the covenantors’] covenants”. This is not the only important difference, however. Another one is that the burden section, section 79, applies “unless a contrary intention is expressed”, whereas, setting aside what is implied by *Federated Homes*, section 78 is not subject to such contrary intention.

The position of *both* sections in the orthodoxy of these matters is that the words “shall have effect as if such successors and other persons were expressed” represent a “conveyancing shorthand”, the non-inclusion of these persons in the drafting of a covenant not *by itself* preventing the running of the benefit or the burden, at common law or in equity, as the case may be. In an area where reported decisions offer little guidance to interpretation, the number of judicial dicta to this general effect, small though it is, is encouraging.¹¹ In *Federated Homes*, as will be seen, Brightman L.J. seemed to endorse this interpretation in relation to the burden section¹² but, in an unreserved judgement,¹³ promulgated the heterodoxy referred to earlier, that the effect of the benefit section was to annex the benefit of a covenant “relating to” land of the covenantee¹⁴ to such land *and every part of it* without using special words and irrespective of intention “unless the contrary clearly appears”.¹⁵ This is “automatic” or, even more dramatically, “universal” annexation. In other words, far from being simply “conveyancing shorthand”, the effect of section 78 on its natural reading is dramatically to abrogate all the equitable rules in the orthodoxy relating to running of the benefit (and possibly the common law

¹⁰ [1967] 1 A.C. 50 at 81E. In relation to section 79, note the comment of Pennycuik J. in *Re Royal Victoria Pavilion* [1961] Ch. 581 that “It can hardly be the intention of the section [*i.e.* section 79] that a covenant which, on its natural construction is manifestly intended to be personal only, must be construed as running with the land merely because the contrary is not expressly provided . . .”.

¹¹ Trial judge in *Federated Homes* (quoted [1980] 1 All E.R. 378d-e); *Tophams Limited v. Sefton* per Lord Upjohn at 73C and Lord Wilberforce at 81 (on section 79); Lord Templeman in *Rhone v. Stephens* at 72j.

¹² [1980] 1 All E.R. 380f-g.

¹³ See Preston & Newsom, *Restrictive Covenants affecting Freehold Land* (8th ed. 1992), para. 1-05.

¹⁴ *i.e.* “touching and concerning the land” (see [1980] 1 All ER 379c-d).

¹⁵ [1980] 1 All E.R. 381b-c.

ones as well). These are replaced with a statutory inevitability which is possibly (although not clearly) subject to contrary intention. Section 78 does not refer to the contrary clearly appearing (unlike section 79, which refers to an “expressed” contrary intention). However, especially after *Roake v. Chadha*,¹⁶ this element of “the contrary” clearly appearing is probably part of the law. If it is not already quite clear why this interpretation of section 78 is unsatisfactory, it should become very much more so from the following discussion, which considers the rules in their historical and modern context. In relation to section 79, Lord Templeman in *Rhone v. Stephens* reiterates the view of Brightman L.J. that section 79 is to be read differently from section 78. Whilst unsurprising, this is to be greeted with relief. (It will be recalled that counsel for Mr. and Mrs. Rhone had argued in the House of Lords that section 79 had the identical effect in relation to the *burden* that *Federated Homes* held section 78 had in relation to the *benefit*!)

A number of further observations might usefully be made at this juncture on the modern statutory background. Section 77(5) of the Law of Property Act 1925, which relates to conveyances of land subject to a rentcharge, is in the following terms:

(5) The benefit of a covenant implied as aforesaid [*i.e.* in section 77] shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

Setting aside the question of the covenant being *implied* in section 77, if section 78 had been intended to have the effect which it is held to have in the wake of the *Federated Homes* case, why was it not drafted along the lines of section 77? The answer is that it was not intended to have such an effect and that is just one reason why section 78 is drafted differently from section 77. Even more telling in this context is section 141 of the Law of Property Act 1925 (“Rent and benefit of lessee’s covenants to run with the reversion”). Here are virtually identical words to those of section 77 but in relation to the benefit of covenants in *leases*, namely that the benefit “. . . shall be annexed and incident to and shall go with the reversionary estate”. It might, therefore, be thought to be beyond argument that the heterodox interpretation in *Federated Homes* is incorrect, which is the way in which the controversy is presented by the learned authors of Preston & Newsom’s

¹⁶ [1983] 3 All E.R. 503.

Restrictive Covenants affecting Freehold Land (8th ed., 1992). Greatly as their view is to be respected, this article is not quite so categorical. It says that, though perhaps not the *natural* interpretation of section 78, the orthodox view is consistent with legislative history (as will be seen), current economic conditions and with the drafting of other provisions of the 1925 legislation.

Finally, in this preliminary survey, consider section 62(1) of the 1925 Act. The learned and scrupulously accurate (though unfortunately placed) first instance judge in *Roake v. Chadha*, his Honour Judge Paul Baker Q.C., was careful to point out that section 62(1), which deals with “General words implied in conveyances” is not apt to annex automatically the benefit of a covenant to the relevant land in the manner contended for by the heterodox interpretation of section 78. Very simply, this is because easements and profits *etc.* are *eiusdem generis* and there is a section, the benefit section itself, which deals expressly with the benefit of covenants. A contrary view had been held by the trial judge in *Federated Homes*, who seems to have used section 62 as the basis of his decision and this view has been supported by at least one writer.¹⁷

IV. ARGUMENT

The reader may already have guessed that there is implicit in this article something of the resignatory tone of “Doubtless God could have made a better berry, but doubtless God never did”.¹⁸ The point is simply that unjustifiable distortion of the rules (statutory or otherwise) will shatter the delicate strands of their internal logic. The same is true of any sophisticated regulatory system. The internal logic of the running of the benefit and burden, heavily dependent as it was for almost a hundred years (at least in relation to the benefit), on the expressed or, at common law, implied intention of the parties, is capable of working well – once appreciated, preserved and possibly judiciously modified. Working well, that is, on an interim basis. Few would doubt the improvement to be ushered in by the land obligation *in the long term*. Meanwhile what is needed is a consistent and properly defensible approach from the courts to the existing system in what is referred to in this article as “the interim period”. The point being made here is thus a somewhat different one from the general need for

¹⁷ Hayton (1971) 87 L.Q.R. 539 at 570-571. Section 62 as a means of automatic annexation is not considered further in the present article.

¹⁸ Walton and Cotton, *The Compleat Angler*, quoted in *National Carriers Limited v. Panalpina Limited* [1981] 1 All E.R. 161 at 169.

reform highlighted in the Law Commission report, for example in relation to flats, where the existing law is unsuitable for dealing with the practical issues involved.¹⁹

There is a clear recognition of the need to respect the orthodox position in *Rhone v. Stephens*. It does no harm to reiterate here that the abandonment of orthodoxy has destroyed the basis of the law relating to benefit. The rejection of the orthodoxy is the main adverse criticism to be made of the *Federated Homes* decision because the result was retrospectively to reinterpret the effect of section 78 as from 1 January 1926. However, central also to the divergence of views on *Federated Homes* is the continued significance of the historical distinction between law and equity in this area. This is a distinction rightly preserved by Megarry and Wade's *The Law of Real Property*²⁰ but rejected by at least one eminently learned commentator.²¹ Rightly preserved because it is important to recognise, on the one hand, that the common law rules were obscure and unhelpful. On the other hand, there are rules of equity which, subject to the points made elsewhere in this article, are capable of operating satisfactorily to show whether it was the intention of the original covenanting parties that the burden or benefit of a covenant should run. As will be seen, the Court of Appeal in *Federated Homes* used two dubious cases on annexation at common law to support a dubious conclusion about the effect of section 78. So that it is known precisely *which* is the relevant set of rules, the distinction between law and equity in this area is vital if, as is argued, *Federated Homes* is wrongly decided and redundant if it is correct.

V. THE RULES BEFORE 1926

A. History

The development of the equitable rules during the second half of the nineteenth century and beyond took place, of course, against a background of massive property development, industrial expansion and the emergence of “. . . a middle class with rising expectations of a commodious existence”.²² It is almost axiomatic therefore that in origin the equitable rules are “concerned first and last with land *use*”.²³ This was the

¹⁹ See Law Com., note 4 above, para. 4.5.

²⁰ 5th ed., 1982.

²¹ Hurst, “The Transmission of Restrictive Covenants” 2 Legal Studies 53.

²² Gardner, “The Proprietary Effect of Contractual Obligations” 98 L.Q.R. 279 at 319.

²³ Gardner, *op. cit.* at 320.

²⁴ (1846) 15 Sim. 377 (a decision which enabled the burden to run in equity but for which no reported reasons were given).

background to the development of equity from *Mann v. Stephens*²⁴ onwards. There was a steady increase after 1850 in the number of houses of large or moderate size in the Home Counties, Midlands and North (witness, for example, the facts of *Cooke v. Chilcott*),²⁵ within reach by rail of the large towns, a development lamented by, among others, the poet Hopkins in relation to Oxford. The figures in the census report for 1871, for example, show that the increase in the number of new houses built during this period was proportionately greater than the increase in the population.²⁶ Indeed, it could be convincingly contended that it was during this period that land in the United Kingdom first acquired *development* value. Interestingly, this is reflected in the facts of the leading building scheme case of *Elliston v. Reacher*²⁷ which, although they were not considered by the Court of Appeal until October 1908, involved covenants not to build any hotel imposed on purchasers of land divided into lots in 1861 by trustees for a building society.

The fact that the equitable rules were, after *Haywood v. Brunswick Permanent Benefit Building Society*,²⁸ limited to covenants in substance restrictive can also be placed in this historical context. (It must be remembered that the nineteenth century had no town and country planning legislation in the sense recognised today.) Quite apart from the technical considerations referred to below, Victorian judges feared that the effect of making the burden of positive covenants run in equity would be the crippling of the national economy. Rising before their eyes also must have been the spectre of sterilising the market in real property, by then apparent from the effects of settled land and later a cause of grave concern to the framers of the 1925 property legislation. By 1882, this limitation was settled, possibly based upon a value judgement as to the comparative usefulness of positive and restrictive covenants. It is easy to see, in an era of industrial expansion, why the burden of restrictive covenants should have been made to run and equally easy to see why the usefulness of allowing the burden of a positive covenant to run should have been doubted.

That the policy of the age was to create a free market in land is clear from the pattern of nineteenth century legislation from the Settled Estates Drainage Acts 1840 and 1845 (which gave limited powers to charge the cost of improvements on settled land) via the Settled Estates Acts 1856 and 1877 (by which the court was enabled to authorise certain dealings with settled land) through to the Settled Land Act 1882. All of this legislation

²⁵ (1876) 3 Ch.D. 694.

²⁶ Sir Llewellyn Woodward, *The Age of Reform 1815-1870*, 2nd ed., Clarendon Press, Oxford, 1962, p. 599.

²⁷ [1908] 2 Ch. 374.

²⁸ (1881) 8 Q.B.D. 403; *Austerberry v. Oldham Corporation*, below.

was intended to mitigate the effects of the process of settlement and re-settlement of settled land and to make land freely marketable. Since this was the temper of the times, would not the running of the burden of positive covenants have flown in the face of it? Yes, in effect, said Cotton and Lindley L.J.J. in *Haywood's* case, because it would be wrong to require a purchaser to incur expenditure in compliance with a covenant to which he was not an original contracting party. Over a century later, Lord Templeman gives a more purely doctrinal rationale when he says in *Rhone v. Stephens* that "Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable on a contract unless he was a party to it". A dissentient voice, over a century ago, was Sir Richard Malins V.-C. in *Cooke v. Chilcott*, who expressly said that to do so would merely give rise to a market adjustment. The purchaser would consider the amount of expenditure involved in compliance and offer a reduced purchase price accordingly.

Just as it is therefore easy to understand the distinction drawn by Victorian judges between positive covenants (the burden of which, after 1881, would not run) and restrictive covenants, it is difficult to see why universal annexation of the *benefit* of restrictive covenants should continue today to be part of the law at a time when development land values have fallen, the housebuilding industry is in recession and the industrial base of the country is acknowledged to have been eroded dramatically. What social or economic necessity is served by *Federated Homes* continuing to be part of our law? Little or none is the unassailable reply. There is a morass of town and country planning legislation which, as recognised by the Law Commission, whilst doing little to "arm" an individual owner or occupier of land, underpins the whole of the rules about *restrictive* covenants. There is at present no land development comparable with the Victorian one or even the "boom" of the 1980s. If the creation of restrictive covenants is as popular a pastime as the Law Commission revealed it to be, then why not make people do it properly? In 1994, looking with an Olympian perspective at the history of this area, the conclusion must be that there is no reason why not.

B. The Position at Law

Any observation that the common law rules by themselves were, by 1850, hardly adequate to deal with the aspirations of the prosperous to commodious living would surely be superfluous. Above all, this was because the burden of any covenant (positive or restrictive) could not be made to run with the freehold at law. By the 1830s, when *Keppel v.*

Bailey,²⁹ a case in which it was sought to make the burden run, came before Lord Brougham L.C. as a suit *in equity*, there was a very tenuous line of authority to show that perhaps the burden *did* run (although he concluded that it did not do so). The “conditional benefit principle” of benefit and burden, a principle of construction of deeds used much later by Upjohn J. in *Halsall v. Brizell*³⁰ does not generally seem to have been considered an exception to this rule.³¹ The *locus classicus* of the Victorian thinking on the running of the burden of a covenant at common law was, of course, *Austerberry v. Oldham Corporation*,³² an interesting case, not least because, in order for the plaintiff to have succeeded, he would have to have shown both that the benefit and the burden had run (plaintiff and defendant both being purchasers from the original covenantor and covenantee). Two members of the Court of Appeal (Cotton and Lindley L.J.J.) held that the plaintiff failed because the common law rules for the passing of the *benefit* were not satisfied. The third judge, Fry L.J., concluded in effect that the real reason was that the *burden* could not have run to the defendant.³³

However, apart from the uncompromising stance on the issue of the *burden* (decisive in *Rhone v. Stephens*), *Austerberry*’s case was clear as to how the burden might have been made to run. *Per* Lindley L.J.:³⁴

If the parties had intended to charge this land for ever, into whosoever hands it came, with the burden of repairing the road, there are ways and means known to conveyancers by which it could have been done with comparative ease; all that would have been necessary would have been to create a rent-charge and charge it on the tolls, and the thing would have been done.

Although this looks like a kind of beguiling Gilbertian logic, the relevant issue here is that it reflects a clear understanding by Victorian conveyancers of how the burden of a positive covenant could be made to run at common law. Technical it may be - artificial perhaps - but the rule is clear and would have been no less well known for its sophistication. Briefly what was (and is) involved, to secure the running of a positive covenant, is to reserve a rentcharge and to annex to it a right of entry which allows the rentcharge owner to enter and make good any breach of covenant, charging the cost to the owner in possession.³⁵ Lindley L.J.’s discussion gives this

²⁹ (1834) 2 My. & K. 517.

³⁰ (1957) Ch. D. 169. See below.

³¹ But see Lord Romilly M.R. in *Morland v. Cook*, below.

³² (1885) 29 Ch. D. 750.

³³ at 784.

³⁴ at 783.

³⁵ One of two ways in which the rentcharge can be used. See Law Com., note 4 above, paras. 3.35ff.

practice an “implied blessing”, as does the Rentcharges Act 1977.³⁶ Why was not the covenant in *Rhone v. Stephens* protected in this way, one wonders? If it had been, then the House of Lords would not have been drawn into its unfortunate and frustrating discussion of the running of the burden of positive covenants in equity.³⁷

In relation to the benefit, the position was clear and generally remains so, with one slight modification. The covenant needed to touch and concern the covenantee’s land although, after section 78, the successor claiming the benefit need not have acquired the same legal estate in the land as that originally held by the covenantee. Contrary to what is sometimes contended, this remains the position *at law*. The authority given to the contrary is hardly satisfactory, based as it is on an interpretation of section 78 which is difficult to sustain. This is discussed further below, where the point is made that *Smith and Snipes Hall Farm v. River Douglas Catchment Board*³⁸ did not decide that the benefit was annexed automatically by section 78 but applied only to covenants already annexed by intention (express or implied) of the covenanting parties.³⁹ The change, such as it was, made by section 78, was a far more subtle one. It was simply that, *once thus annexed*, the benefit could be enforced by a tenant of the benefited land.

Another change to the old common law position relevant here (but not directly concerned with the running of benefit or burden) had been made towards the middle of the last century and was retained by section 56 of the Law of Property Act 1925. This was the abolition of the rule in *Lord Southampton v. Brown*,⁴⁰ that a person could not sue on a deed *inter partes* (as opposed to a deed poll) who was not a party to it. This was section 5 of the Real Property Act 1845, which has a legislative history traceable to section 56 and which, in effect, enabled successors-in-title of adjoining owners to take the benefit of a covenant at common law.⁴¹

C. The Position in Equity

The history of the equitable doctrine for the running of the burden of restrictive covenants (referred to below as “the doctrine of *Tulk v. Moxhay*”)⁴² is reasonably well-known. Again, the thesis here is that, by

³⁶ Subsections 2(3)(c), (4), (5).

³⁷ It will be recalled that this issue was rightly not addressed before the Court of Appeal.

³⁸ [1949] 2 K.B. 500.

³⁹ See Newsom, “Universal Annexation” (1981) 97 L.Q.R. 32.

⁴⁰ (1827) 6 B. & C. 718.

⁴¹ Section 56 allows original neighbours to claim the benefit; section 78 allows successors in title of covenantees and neighbours to sue.

⁴² (1848) 2 Ph. 774.

1907, it was clearly recognisable as a coherent body of rules. Part of the thesis is that, although there is nothing in the doctrine of *Tulk v. Moxhay* in itself to confine it to restrictive covenants, there was good reason to prevent the House of Lords on the facts of *Rhone v. Stephens* extending the doctrine of *Tulk v. Moxhay* to positive covenants. It might have been possible for the House of Lords so to rule in 1894 but it was clearly impossible for them to do so in 1994.

Historians may speculate as to the policy underlying the doctrine of *Tulk v. Moxhay* to the burden of *restrictive* covenants. Possible explanations have been hazarded above. Prior to 1882, however, there had been at least two cases where the burden of positive covenants had been made to run in equity.⁴³ The first was *Morland v. Cook*,⁴⁴ an intriguing case because, although the remedy granted was equitable, the reasoning might be seen as drawing on some “pure principle” of benefit and burden. The second was *Cooke v. Chilcott*,⁴⁵ a decision of Sir Richard Malins V.-C. There, a purchaser of a piece of land with a water-source covenanted with the vendor, a property developer, to erect a pump and reservoir and to supply water from the source to the vendor’s land. The Vice-Chancellor could not grant a decree of specific performance because “the courts [would] not superintend performance of such works.” However, said the learned judge, “. . . though I cannot directly make him [*i.e.* the defendant] lay down the pipes, I can and will make an order by means of which he will be guilty of contempt of Court if he does not lay them and provide the supply of water”. Perhaps it is a matter of semantics as to whether this amounted to ordering the very thing which the Vice-Chancellor said he could not order. However, *Haywood’s* case is not convincing the other way either. Brett L.J. said in *Haywood* that to allow the burden of a positive covenant to run would be “making a new equity which we cannot do”. Oh really? What about the common law on the burden of positive covenants in leases (see *Spencer’s* case)⁴⁶? What about the original statement of the doctrine in *Tulk v. Moxhay* itself? Had the fact that the burden of a positive covenant could run in a lease sterilised the market in leases? The rule was nonetheless affirmed enthusiastically in *London and South Western Railway v. Gomm* by a court including Sir George Jessel M.R. and Sir James Hannen, who thought that negativity was “... a wholesome restriction upon the application of *Tulk v. Moxhay*”.⁴⁷ It is significant that, having been referred to the cases, Lord

⁴³ See Gardner, *op. cit.*, generally here.

⁴⁴ (1868) L.R. 6 Eq. 252.

⁴⁵ Note 25, above.

⁴⁶ (1583) 5 Co. Rep. 16a.

⁴⁷ at 586-587.

Templeman, in *Rhone v. Stephens*, simply says that *Morland* and *Cooke* “did not survive” *Haywood*’s case. In brief compass, his Lordship explains why: “Equity prevents the successor from exercising a right which he never acquired . . . Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property”. And so on to the passage quoted under heading II above. Whatever reservations one may have about the effect of *Re Nisbet and Potts’ Contract*,⁴⁸ referred to later in Lord Templeman’s speech, this is a precise statement of the doctrine of *Tulk v. Moxhay* in its developed “Jesselian” form. And impeccably correct as it is there is an element of the *ex post facto* justification in it. No other conclusion was possible, thought the Victorian judges, for the reasons discussed above. No other conclusion was possible in 1994 because a century had rolled over their heads.⁴⁹

In relation to such restrictive covenants, the original policy position taken before *Mann v. Stephens* by Chancery judges had been very simple. Simple and unhelpful. It was that equity follows the law and, since the burden did not run at law, it should not do so in equity either. This was *Keppel v. Bailey*. (Something of the same reasoning is to be found in *Rhone v. Stephens*.) There were technical reasons, of course, see below, but the principle of the matter in Lord Brougham L.C.’s words, was that “It must not be supposed that incidents of a novel kind can be devised and attached to land at the fancy and caprice of the owner”. The compelling argument from the point of view of a Whig Lord Chancellor is revealed by his use of the word “incidents” – indeed what did Lord Brougham seem to be saying but that to allow the burden to run would give rise to a sort of feudal tenure as between covenantee and the covenantor/purchasers from the covenantor? What is significant for the purposes of this article is that there is an unwillingness here to favour the principle even of allowing the *burden of restrictive covenants* to run. (Much less to strain the wording of legislation in order to let the *benefit* run automatically.)

Since the doctrine of *Tulk v. Moxhay* tackles the question of the running of the burden from a different perspective, it may be presumed that Lord Cottenham L.C. wished to side-step the Brougham-type objection with a more fundamental and possibly more commercial one.⁵⁰ (The plaintiff in

⁴⁸ [1905] 1 Ch. 391.

⁴⁹ For cases based on notice, see Gardner, *op. cit.*, generally, and *Luker v. Dennis* (1877) 7 Ch. D. 227; *De Mattos v. Gibson* (1858) 4 De G. & J. 276; *Lord Strathcona S.S. Co. Limited v. Dominion Coal Co. Limited* [1926] A.C. 108.

⁵⁰ The author would like to acknowledge his indebtedness to the relevant discussion in A.W.B. Simpson, *A History of the Land Law*, 2nd ed., Clarendon Press, Oxford, 1986.

Keppel v. Bailey was, after all, tainted by illegality.) In its original form, the doctrine depended on notice only.⁵¹ If a purchaser buys with express notice of a covenant, it is inequitable, so the doctrine runs, to allow him to act in defiance of it. That way a purchaser could buy the land burdened for a lower price and sell it *unburdened* for a higher one. Later, such notice was seen as creating an equitable charge on the land. In doing so, *Tulk v. Moxhay* adopted (in its developed Jesselian form) the language of easements, the dominant land being the land benefited by the restrictive covenant, the servient land being that subject to it. This reasoning will apply to both positive and restrictive covenants. However, although the Victorian policy reasons for confining the running of the burden to restrictive covenants may have run their course, for the House of Lords to have reinterpreted the equitable rule as applicable equally to both would have had a devastating retrospective effect. Nonetheless, it is strange to read the House of Lords in *Rhone v. Stephens* stating that to allow the burden of a positive covenant to run in equity "... would destroy the distinction between law and equity and to convert the rule of equity into a rule of notice" (*per* Lord Templeman).⁵²

Two late Victorian cases established with clarity that there was an annexation formula for the *benefit* of a restrictive covenant which would work (*Rogers v. Hosegood*)⁵³ and at least one which would not (*Renals v. Cowlshaw*).⁵⁴ *Renals's* case, it will be remembered, involved a covenant with trustees "their heirs, executors, administrators and assigns" (which did not annex the benefit to the land) whereas in *Rogers v. Hosegood*, the covenant was made "... with intent that the covenants ... might so far as possible bind the premises thereby conveyed and every part thereof, and might enure for the benefit of [the covenantees (*i.e.* the vendors)] ... their heirs and assigns and others claiming under them to all or any of their lands adjoining or near the said premises", which *did* annex the benefit to the land in equity. As discussed below, section 58 of the Conveyancing Act 1881 was plainly not intended to make efforts like that in *Renals v. Cowlshaw* operate to make the benefit run. It is true that there are problems with identification under *Rogers v. Hosegood* but, again as mentioned below, they can be resolved.

The years after the turn of the century brought two other major developments. First, the need to register the burden of a restrictive covenant, as appropriate as a class D(ii) land charge or as a notice, which is unexceptionable. The second was the possibility of making the benefit run

⁵¹ See note 49 above.

⁵² at 72b.

⁵³ [1900] 2 Ch. 388.

⁵⁴ (1878) 9 Ch.D. 611.

by express assignment (see *Miles v. Easter*)⁵⁵ as opposed to annexation. So long as *Federated Homes* continues to be the law, then there is after 1925 seemingly no separate category of assignment distinct from annexation; the benefit simply runs automatically because of section 78 (unless the “gloss” in *Roake v. Chadha* applies).

Critically, it was clear by 1900 that the benefit could be annexed to the land in equity and there was a precise formula for doing it. The next eight years would also bring, with *Elliston v. Reacher*, a second method via the building scheme. Despite the criticism of the building scheme requirements in the Law Commission report,⁵⁶ the requirements were found to be possible to state briefly and clearly in the *Jamaica Mutual Life* case and, even more recently, to apply in another Privy Council decision, *Emile Elias & Co. Limited v. Pine Groves Limited*.⁵⁷

D. Statute

The importance of the distinction between law and equity was apparent not merely in its relevance to available remedies but also because of the perceived distinction in the minds of the architects of the modern law. The statute law of the nineteenth century and prior to the 1925 legislation reflected the distinction and casts much light on the correct interpretation of sections 78 and 79. The important point is that the *corpus* of law referred to at the beginning of this article as the “orthodox rules” has plenty of support in the nineteenth and early twentieth century origins of section 78. However, there is a misleading reference in the *Federated Homes* case to the wording of section 78 being “significantly different” from the wording of “its predecessor”, section 58(1) of the Conveyancing Act 1881.⁵⁸ As Newsom points out,⁵⁹ in a wonderful exposition, sections 78 and 79 replaced not only section 58, as amended by section 3 and paragraph 11 of Part I of the Third Schedule to the Law of Property (Amendment) Act 1924 but also subsections 96(2), (3) and (4) of the Law of Property Act 1922, the last of which was clearly designed to achieve a “conveyancing shorthand”.

It is a truism that consolidating statutes are presumed not to change the law (see Lord Upjohn in *Beswick v. Beswick*).⁶⁰ The Law of Property Act 1925 is a consolidating Act. Section 58 is confusing because it is drafted for doctrines (e.g. that referred to as “special occupancy”) abolished in 1922. In abolishing the doctrines on which the wording of section 58 depended,

⁵⁵ [1933] Ch. 611.

⁵⁶ Law Com., note 4, para. 4.10.

⁵⁷ [1993] 1 W.L.R. 305.

⁵⁸ [1980] 1 All E.R. 371 at 379e-f.

⁵⁹ (1981) 97 L.Q.R. 32, note 39 above.

⁶⁰ [1968] A.C. 58 at 104-105.

the 1922 Act embodied a provision, in section 96(3), which contains a very clear suggestion indeed that the benefit of covenants is not annexed to land merely by virtue of references to successors being implied by statute into a deed: "The benefit of a covenant relating to land entered into after the commencement of this Act may be made to run with the land without the use of the word 'heirs' if the covenant is *of such a nature that . . . an intention that the benefit shall pass to the successors in title of the covenantee appears from the deed containing the covenant.*" [Emphasis added.] The Law of Property Act 1925 consolidated this with section 58 and the relevant provisions of the Law of Property Act 1924. This is entirely consistent with the expressed views of Wolstenholme, one of the draughtsmen of the 1925 Act.⁶¹

Of course, the presumption about a consolidating Act can, like any presumption, be rebutted. The rebuttal must be clear, however. The problem with section 78 is that it is not clear that it does have the effect of changing the law in favour of automatic annexation. Neither Lord Templeman in *Rhone v. Stephens* nor even Brightman L.J. in *Federated Homes* has any doubt about the true meaning of section 79 – can the construction of section 78 really be according to such radically different principles? An implicit *no* is to be found in *J. Sainsbury plc. v. Enfield London Borough Council*.⁶² In construing section 58 of the 1881 Act, Morrit J. there held that section 58 did not annex the benefit, there being no reference in the covenant to the covenantee's land or to his successors in title other than his assigns.

VI. DISTURBING THE RULES

A. Law

The period from January 1926 to *Rhone v. Stephens* has involved at least one significant inroad into basic principles recognised by Victorian judges. This part of the article seeks to show that the common law position has been substantially preserved by curtailing that inroad (see *Rhone v. Stephens*). It also involved the rise, in the cases of *Smith and Snipes Hall Farm v. River Douglas Catchment Board* and *Williams v. Unit Construction Co. Limited*,⁶³ of a misapprehension about the effect of section 78, which should also be dispelled during the interim period.

As will be recalled from the discussion of *Keppel v. Bailey*, the Victorian position was that the burden of a covenant does not at common

⁶¹ See Hurst, *op. cit.*

⁶² [1989] 1 W.L.R. 590.

⁶³ See (1951) 19 Conv. (N.S.) 262.

law run with the land in any circumstances.⁶⁴ This remains true, although, since *Halsall v. Brizell* and *Tito v. Waddell* (No. 2)⁶⁵ (referred to below as the “*Ocean Island* case”), at least one method of circumvention had gained ground which in *Rhone v. Stephens* was significantly restricted and, for practical purposes, excluded – the so-called “pure principle of benefit and burden”.

It will be recalled that *Rhone v. Stephens* involved the question of the running of the burden of a covenant to maintain part of the roof of Walford House. As also noted, it seems to have been conceded by counsel for Mr. and Mrs. Rhone in the Court of Appeal – understandably – that the doctrine of *Tulk v. Moxhay* does not apply to the burden of positive covenants. Because clauses 2 and 3 were separate,⁶⁶ Mr. and Mrs. Rhone’s case in the Court of Appeal therefore rested on the “pure principle” of benefit and burden. In *Halsall v. Brizell*, Upjohn J. seemed to have held “by some unexplained alchemy distilled from an ancient and narrow rule”,⁶⁷ that the burden of a covenant by purchasers of plots on behalf of themselves and their successors ran at common law. This was apparently because they wished to have the benefit of using certain roads and it was ancient law that no-one could take the benefit under a deed without subscribing to its obligations. Reliance was placed by Upjohn J. on *Coke on Littleton*⁶⁸ and comments of Sir H. H. Cozens-Hardy M.R. in argument in *Elliston v. Reacher*.⁶⁹ In the *Ocean Island* case, Sir Robert Megarry V.-C. purported to apply *Halsall v. Brizell*, deriving from it the so-called “pure principle” of benefit and burden. This “pure principle” could apparently be applied where the burden was not expressly or impliedly annexed to the benefit and was allegedly subject to three (possibly four) requirements,⁷⁰ one of which was that the benefit must not be “technical or minimal”. The benefit relied on in *Rhone v. Stephens* by Mr. and Mrs. Rhone was an easement/quasi-easement of eavesdrop and an easement/quasi-easement of support (*i.e.* clause 2). Nourse L.J. thought the easement of support “both technical and minimal and that of eavesdrop, if not technical, then certainly minimal”. In the House of Lords, Lord Templeman did not disapprove the *result* in *Halsall v. Brizell* but said: “. . . I am not prepared to recognise the ‘pure principle’ that any party deriving any benefit from a conveyance must

⁶⁴ See Law Com., note 4 above, para. 3.18.

⁶⁵ [1977] 2 All E.R. 129 at 280-298.

⁶⁶ See above for details of each; Gravells, *op. cit.*; Snape, *op. cit.* Lord Templeman [1994] 2 All E.R. 65 at 73e-f, “. . . In the present case cl 2 of the 1960 conveyance imposes reciprocal benefits and burdens of support but cl 3 which imposed an obligation to repair the roof is an independent provision”.

⁶⁷ See Wade, “Covenants – A ‘Broad and Reasonable View’” [1972B] C.L.J. 157.

⁶⁸ 230b, 373. A reading of Coke shows how specific a context was originally intended.

⁶⁹ [1908] 2 Ch. 665 at 669.

⁷⁰ See Nourse L.J. in the Court of Appeal and Gravells, *op. cit.* at 348.

accept any burden in the same conveyance . . . Conditions can be attached to the exercise of a power [*sic*] in express terms or by implication. *The condition must be relevant to the exercise of the right*". [Emphasis added.] This was apparently the true basis of *Halsall v. Brizell* and is a welcome exclusion of the "pure principle". The condition must be relevant to the exercise of the right [*sc.* power], and the person seeking to take the benefit must have a choice as to whether to be subject to the burden.⁷¹ Although *Halsall v. Brizell* was in its result "wholeheartedly" approved and although the *Ocean Island* case was not unequivocally declared to be bad law, Lord Templeman contented himself with the contextually unconvincing rationalisation that, in *Halsall v. Brizell*, the defendant could choose between "enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money".⁷² In the result, the "pure principle" must be regarded for practical purposes as having been expunged from this area of law.

Other methods of circumvention are listed in the Law Commission report.⁷³ None of them meet with wholehearted approval there but that is not the issue for the purposes of this article. As long as these methods (such as the use of a rentcharge - see *Austerberry*, *per* Lindley L.J.) are well known then, artificial as they may seem, they can stand. The objectionable exception may still be the *Halsall v. Brizell* doctrine with its internal inconsistency. Discussing *Rhone v. Stephens* in the Court of Appeal, one commentator⁷⁴ has stated that, in cases where the burden has not been made to "run" at common law, the courts will "with sympathy" have to hold that it does not. But, with respect, this is surely not the real issue. The real issues are that no-one would ever have thought that the burden of the covenant in *Rhone v. Stephens* would have run and that to rule that it did would have involved the House of Lords in retrospective "judicial legislation". It may not even have been necessary for the House of Lords to go so far as to say that the burden of a positive covenant would never run in equity; the covenant in *Rhone v. Stephens* disclosed only an imperfectly expressed intention that it should do so.

The misapprehension about section 78 which arose since 1926 was this. Because of the fact that *Smith and Snipes Hall Farm* was incompletely reported, it seemed to be possible to say that, at common law, section 78 had the effect of annexing the benefit automatically. Indeed Brightman L.J. seized on this in *Federated Homes*. The fact was that the *Snipes Hall Farm*

⁷¹ Presumably also a continuing interest in taking the benefit (Law Com., note 4 above, para. 3.40).

⁷² at 73.

⁷³ Note 4, above.

⁷⁴ Say Hak Goo (1993) Conv. 234.

case could not bear this construction. Indeed, Tucker L.J. fairly clearly stated that the decision was based upon a construction of the documents which revealed an implied *intention* that the benefit should run.⁷⁵ In short, the intention could be implied at common law but not in equity; intention, however, there had to be. Insofar as *Federated Homes* attempted to suggest that the basis of *Smith's* case was automatic annexation at common law, it must be held to be wrong.

B. Equity

With minor aberrations,⁷⁶ the body of equitable rules which had built up prior to the *Federated Homes* case in relation to the running of the benefit and burden in equity were fairly clear. This part of the article aims to isolate the objectionable areas to enable a clear statement of the position in equity.

Setting aside the question of negativity, the Law Commission attacked the development of the equitable rules on the basis of complexity and uncertainty. These issues need to be faced in the interim period. The Commission's chief targets, so far as complexity was concerned, were the separate existence of common law and equitable rules for the running of the benefit and burden and the greater complexity of the benefit over the burden rules. The examples given were the rules for the annexation of the benefit and the rules about building schemes. As to the annexation of the benefit, there is certainly a need for an approach which would prevent from running the benefit of those covenants where the land intended to be benefited cannot be identified without extrinsic evidence. In relation to building schemes, it has been seen that in fact the courts do not seem to find the rules difficult to apply. More difficult to deal with is the question of the equitable remedy for enforcing the running of the burden of a positive covenant. It will be remembered that the Victorians thought that there were sound policy reasons for not allowing this. Technically, the reason was similar to that for refusing specifically to enforce contracts for personal services and contracts for the performance of continuous services. However, even after *Rhone v. Stephens*, it might still be possible to argue for a new type of order provided for by legislation to deal with this situation with prospective, as opposed to retrospective, effect.

The rules for annexation need not be complex if *Rogers v. Hosegood* is taken to state the formula for annexing the benefit, subject to the benefited property being clearly identified on the face of the covenant. Is there any

⁷⁵ [1949] 2 K.B. 500 at 506.

⁷⁶ See *Newton Abbott Co-operative Society Limited v. Williamson and Treadgold Limited* [1952] 1 Ch. 286 (a case of "implied assignment" of benefit).

good reason why the benefit of covenants which do not do this should be made to run? The answer must be no, since the intention of the original parties which, as we have seen, is the fundamental rationale, has not been clearly expressed in that type of case. This is an obvious area for tightening up the rules in the interim period. At present, the position is fairly relaxed, merely requiring that the deed so define the land as to make it “easily ascertainable”.⁷⁷ This can lead to evidential nightmares where the court is struggling to uphold expressions such as “the Wrotham Park Estate in its broad and popular sense”.⁷⁸ Would it be too much for there to be a rule that the land to which the covenant is annexed should be expressly identified in the deed itself? (The Law Commission would answer this in the negative.) It is, however, possible to state briefly⁷⁹ the equitable position as it had developed prior to the *Federated Homes* case. Namely, that the *benefit* of a restrictive covenant could be annexed to the land to be benefited; or it could be expressly assigned; or it could be transmitted to a purchaser under a building scheme.

Ultimately, there might be two alternative paths for a process of reasoned and careful development to follow. Either to continue to hold, as *Rhone v. Stephens* has done, that it is in the nature of a covenant that its burden, if the covenant is positive, will not run in equity (and this, as we have seen, is questionable when the doctrine of *Tulk v. Moxhay* is examined) or to extend the equitable rules by statute once more to positive covenants, developing the principles on which orders for specific performance of the covenant could be awarded against purchasers from the original covenantor. Legislation will be required to achieve the latter. For the reasons discussed, it could not have been achieved in *Rhone v. Stephens* itself.

C. The Benefit - A Coach and Horses

The background to the decision in *Federated Homes* was, in terms of academic debate, such as to make the decision itself and its reasoning in some ways rather unsurprising. Since 1972 there has been a position taken pre-eminently by Megarry and Wade⁸⁰ that section 78 can be used to effect automatic annexation of the benefit in exactly the same way eventually provided for by *Federated Homes* itself. This was Professor Wade’s “broad and reasonable view”. In 1972 Professor Wade⁸¹ wrote that “why the

⁷⁷ See Farwell J. in *Zetland v. Driver* [1939] Ch 1 at 8.

⁷⁸ *Wrotham Park Estate Co. Limited v. Parkside Homes Limited* [1974] 1 W.L.R. 798.

⁷⁹ See Preston & Newsom, *op. cit.* paras. 2-01 to 2-03.

⁸⁰ 5th ed. at 785.

⁸¹ See note 67 above.

decided cases make no reference to section [78] is a mystery". In fact, in view of the true effect of section 78, there is no mystery. The statement is in fairness slightly misleading, taking account of the implications of Lord Wilberforce's comments in *Tophams Limited v. Sefton*⁸² in relation to section 79.

Professor Wade's article identified the fact referred to earlier, that section 78 does not refer to intention. His point seemed to be that, whilst section 78 could be said to be word-saving only, it was intended to give effect to a form of words used by conveyancers which was, strictly speaking, nonsense, since it is generally legally impossible to covenant with successors in title as yet unascertained. The article went on to say that it was significant that section 78 did not run "expressed to relate to some land of the covenantee". In view of the points considered in the present article, it is significant but its significance is a different one (see above, especially section 96(3) of the Law of Property Act 1922). In support of this contention, Professor Wade criticised the *Rogers v. Hosegood* annexation formula as being "void of identificatory meaning". This may well be so but it does not *of itself* provide a reason for taking the heterodox interpretation of section 78 which became the *Federated Homes* rule. That particular problem with *Rogers v. Hosegood* could have been solved merely by tightening up the identification rules. If the land intended to be benefited is not adequately identified, it should not be benefited. The rule should be as simple as that. (A case for section 62 was also made out in the same article, although its use by the trial judge in the *Federated Homes* case was not only not followed but also not commented upon by the Court of Appeal.)

The plaintiffs in *Federated Homes* were claiming the benefit of a covenant entered into by the defendants and restricting housebuilding on the land retained by them. The benefit was claimed by them in relation to each of two plots ("the green land" and "the red land") purchased by them from the defendants. The green land did not present a problem but the red land did because the benefit had not been continuously expressly assigned and it was not validly annexed. As has been seen, the solution was seen to lie in the heterodox interpretation of section 78 so this omission was not important. Why, one may ask, did the Court of Appeal go to such trouble to make this covenant run?

The aftermath of this unmeritorious conclusion has been sufficiently rehearsed above. The worrying factor is that there is evidently an air of general resignation⁸³ to the effect of the case which has now stood for

⁸² at 82.

⁸³ Preston & Newsom being the pre-eminent exception.

almost fourteen years. Perhaps its days are numbered if the orthodoxy of *Rhone v. Stephens*, which stands in contrast to it, in relation to burden, is to be reflected in a future decision of the House of Lords on the running of the benefit. The internal inconsistencies of the case are apparent from a close reading. For example, why is Brightman L.J.'s reasoning subject to the contrary being clearly shown (as it was held to be in *Roake v. Chadha*)? For insurance purposes, how is the dominant land to be identified? (Contrast the importance obviously attached to this factor in *Jamaica Mutual Life Assurance Society v. Hillsborough*, Jamaican law apparently having no equivalent of section 78⁸⁴ (and see also *Emile Elias & Co. Limited v. Pine Groves*).

Perhaps the most forceful adverse criticism to be made of *Federated Homes* is, however, its destruction of the delicate internal reasoning of the orthodox rules. This inhibits its satisfactory development over what could be a considerable interim period. If *Federated Homes* is held to be correct in the longer term, it will have the effect of destroying any distinction between the rules of law and equity, the importance of which has been discussed, and which was recognised in the context of the burden in *Rhone v. Stephens*. This flies in the face of clear authority that both at common law and in equity the running of the benefit has always depended on *intention*.

VII. THE BENEFIT - THE JAMAICA MUTUAL LIFE CASE

This case, the relatively recent Privy Council decision referred to at the beginning, helps to illustrate many of the things wrong with *Federated Homes*. Since there was no equivalent to section 78 in Jamaica, *Federated Homes* was mercifully not relevant. Very briefly, there was in the relevant transfer no statement that the restrictive covenants were intended to benefit the land retained by the vendors (such as in *Rogers v. Hosegood*) and there was no express assignment (such as in *Miles v. Easter*). With crystal clarity, the members of the judicial committee were therefore able to hold that the covenants did not run with the land. Why should they have held otherwise? Lord Jauncey, delivering the opinion of the board, emphasised that the absence of words of annexation meant that⁸⁵ "There were in the instrument of transfer . . . no words stating that the restrictions therein *were intended* for the benefit of any land retained . . ." (thus emphasising the primacy of

⁸⁴ Preston & Newsom, *op. cit.*, para. 2-03, note 2.

⁸⁵ [1989] 1 W.L.R. 1101 at 1105C.

manifested *intention*). The board went on to consider whether there was a building scheme (since there was no express assignment) and concluded that there was not. For the reasons discussed elsewhere in this article, all of this is intelligible and consistent with principle. However, had the facts of the *Jamaica Mutual Life* case been decided under section 78 as interpreted by *Federated Homes*, the benefit would have run even though it was clearly the intention of the original covenanting parties that the covenant should be personal to the original covenantor and covenantee. This would surely have been at the least inappropriate.

VIII. THE BURDEN – *RHONE* v. *STEPHENS*

It may be thought that, in view of the Victorian dicta and in the light of Lord Templeman's comments in *Rhone* v. *Stephens*, finding a rationale for enforcing the running of the burden of positive covenants in future by appropriate legislation would be a difficult task. This would be to ignore the discretionary nature of the equitable remedy, however. As long ago as 1796, Lord Loughborough in *Moseley* v. *Virgin*⁸⁶ had expressed the view that specific performance could be granted of a building contract if the work to be done was sufficiently clearly defined. (Perhaps an element of judicial amnesia underlay *Cooke* v. *Chilcott*.) Howbeit, there had developed during the earlier years of this century an uncomplicated corpus of equitable rules under which a court could order specific performance of a *building* contract. Following *Carpenters Estates Limited* v. *Davies*,⁸⁷ in which Farwell J. considered an earlier decision of the Court of Appeal in *Wolverhampton Corporation* v. *Emmons*, the principles seemed broadly to be: (a) that the building work must be sufficiently defined by the contract (*i.e.* the court must be able to see the exact nature of the works performance of which it is being asked to order); (b) the plaintiff must have a substantial interest in having the work performed and so damages would be an inadequate remedy; and (c)⁸⁸ the defendant must be in possession of the land on which the work is to be done.

Some, if not all, of this reasoning could be imported by statute into the law relating to the running of the burden of covenants in freehold land. The remedy would be discretionary and would be subject to the other bases of

⁸⁶ (1796) 3 Ves. 184.

⁸⁷ *Wolverhampton Corporation* v. *Emmons* [1901] K.B. 515; *Molyneux* v. *Richard* [1906] 1 Ch. 34; *Carpenters Estates Limited* v. *Davies* [1940] Ch. 160.

⁸⁸ *Per* Farwell J. in *Carpenters Estates* at 164-165.

specific performance. Such reasoning has already been applied by Pennycuik V.-C. in the context of a repairing covenant in leasehold property⁸⁹ and to a landlord's covenant to provide and maintain a lift for the use of tenants.⁹⁰ It should be noted, however, that it would not have been open to the House of Lords to have applied the same principles in *Rhone v. Stephens*, even had it been conceded that the doctrine of *Tulk v. Moxhay* could be applied to a positive covenant. One can imagine an argument that, had the application of the doctrine been considered in this way in *Rhone v. Stephens*, the case would have been more satisfactorily decided, whether or not the House had concluded it to be inapplicable there. But this would be to ignore the magnitude of what was being asked of their Lordships. The covenant in *Rhone v. Stephens* had been entered into in 1960 - such a ruling would have had a retrospective effect. On the other hand, for their Lordships to have ruled that the burden of a single positive covenant made in 1960 *did* run, as would the burden of positive covenants made in the future, would have been a rather obvious example of judicial lawmaking almost certainly without parallel in this jurisdiction.

However, rather different might have been the result if the court had been asked to rule prospectively on a positive covenant to be entered into after the hearing, where the principles just discussed might have been considered and applied to regulate the running of the burden of positive covenants from that date until the advent of the land obligation. Bearing all this in mind it is difficult to avoid the conclusion that the covenant in *Rhone v. Stephens* was an unsuitable vehicle for testing the development of the doctrine of *Tulk v. Moxhay* and that the scope and effect of what was being sought was insufficiently analysed. Certainly the brevity with which Lord Templeman dealt with the arguments put by counsel for Mr. and Mrs. Rhone to the House of Lords would suggest this. However, none of this would prevent the enacting even now of a brief provision in legislation to the effect that, in relation to positive covenants entered into after a certain date, a court should have a power to make an order for their enforcement against successors in title of the original covenantor.⁹¹

⁸⁹ *Jeune v. Queens Cross Properties* [1974] 1 Ch. 97 (and see now the Landlord and Tenant Act 1985, section 17).

⁹⁰ *Francis v. Cowcliff Limited* (1976) 120 S.J. 353.

⁹¹ Alternatively, such a provision could draw on the statutory exceptions to the rule in *Rhone v. Stephens* for local authorities, etc. (e.g. Town and Country Planning Act 1990, ss. 71-72 and 106).

IX. CONCLUSION

Federated Homes has been unwelcome for its retrospective and uncertain effect. *Rhone v. Stephens* is good for its respect for orthodoxy. The result of *Rhone v. Stephens* may well be unsatisfactory for covenants created today, however. The essence of orthodoxy is gradual and carefully reasoned development. It does not necessarily mean blind adherence to ancient law. So perhaps the time has come, after *Rhone v. Stephens*, to consider interim legislative intervention along the lines suggested.

In relation to the benefit, two main conclusions are inevitable, namely that:

- a. *Federated Homes* should, even at this late stage, be over-ruled and the orthodox rules for the transmission of the benefit reinstated - this is consistent with the economic needs of the present and with principle and authority, statutory and otherwise; and
- b. a new, stricter rule for the identification of the land intended to be benefited be introduced, which would have the effect of hastening the annihilation of ambiguous covenants in anticipation of the introduction of the proposed system of land obligations.

In relation to the burden, *Rhone v. Stephens* suggests that:

- a. active legislative consideration should be given to the discretionary enforcement in appropriate cases of positive covenants to be created in the future. The problem which *Rhone v. Stephens* could not have solved was that of positive covenants entered into before it was decided. That would have involved a retrospective reinterpretation of the doctrine of *Tulk v. Moxhay* of a *Federated Homes* kind;
- b. the decision leaves intact the enforcement of positive covenants by rentcharge (this not having been considered). This is not undesirable since it is a long-established (though bizarre) means of making the burden of a positive covenant “run” and is consistent with *Austerberry* (per Lindley L.J.), the Rentcharges Act 1977 and *Rhone v. Stephens*; and
- c. For practical purposes, the “pure principle” of benefit and burden has rightly been removed from this area of law.⁹²

Generally, *Rhone v. Stephens* should not be viewed as a missed opportunity. Legislation would be needed to disapply the rule in *Rhone v. Stephens* in relation to future covenants. The disapplication of the rule could not, however, have been achieved in *Rhone v. Stephens* itself. One may feel a sense of vicarious disappointment for Mr. and Mrs. Rhone and

⁹² See above.

their advisers. (They went to the House of Lords backed up by the spirit of two reports, a Law Commission working paper and clear expressions of judicial disbelief at the state of the law in the Court of Appeal.) How much more confident could they have been in embarking on this potentially ruinous course?⁹³ How much more convinced could their Lordships have been that action was required? And yet – how difficult would any other decision have been!

It may be said that there is an element of selectivity in the arguments raised here in relation to benefit and burden. The approach suggested, however, has its unifying factor in its emphasis on the primacy of the *intention* of the original covenanting parties and the notice with which a purchaser buys the land in question. If you intend to buy a property subject to the burden of an enforceable positive covenant, you will offer less for it than you might otherwise have done. But this is for the future. Suffice it to say that it was not open to the House of Lords in *Rhone v. Stephens* to make it as simple as that. First, such a ruling would have had a retrospective effect. Secondly, although in practice the enforceability of covenants is dealt with by insurance, the contrary ruling in *Rhone v. Stephens* might have made such insurance unavailable for many. The roof of Walford House, presumably unrepaired against winters to come, is a monument to this unfortunate but inevitable aspect of English land law.

⁹³ Albeit cushioned by legal aid, see [1994] 2 All E.R. 65 at 73f-g.

POWERS OF INVESTMENT – A GAP BETWEEN THE LAW AND PRACTICE?

*Angela Latham**

By statute, all trustees have powers to invest the funds that are from time to time under their control, unless those powers are expressly excluded by the trust instrument. Pre-eminent is the Trustee Investment Act 1961 (the “Act”). When it was passed in 1961, it was considered to set out the current best practice.¹ As the years have gone by, however, the courts have become more sceptical as to the benefits of the Act (see, *e.g. Mason v. Farbrother*² and *Trustees of the British Museum v. Attorney General*).³ Irrespective of the attitude of the courts, however, the legal profession both before and after the Act adopted the practice of inserting express investment clauses in wills and settlements which widen the statutory rules for the time being in force. This article (i) examines the statutory rules; (ii) investigates how they have been applied; and (iii) questions the current practice of widening the statutory rules as a matter of course and urges a more thoughtful and careful approach to the drafting of investment powers.

I. THE STATUTORY RULES

The scheme of the Act is to divide trustee investments into three types, namely:

1. *Narrower range not requiring advice*:⁴ These are items such as National Savings Certificates. They are very secure investments which can be bought over the counter at Post Offices. They are obviously suitable for cases where there is a very small sum of money to invest and where it is important that that small sum should not be lost. Although the National Savings movement has shown more initiative in recent years, it is, in the writer’s view, fair to say that this type of investment would have little appeal to the larger investor;
2. *Narrower range requiring advice*:⁵ These are investments that many people would regard as being as secure as those in Part I. They include various types of government securities (gilts); fixed interest securities issued by local authority or by inter governmental organisations such as the EU; debentures issued by UK companies; unit trusts investing

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¹ See, *e.g.*, the comments of Buckley J. in *Re Cooper’s Settlement* [1961] 3 All E.R. 636.

² [1983] 2 All E.R. 1078.

³ [1984] 1 All E.R. 337.

⁴ First Schedule, Part I.

⁵ First Schedule, Part II.

in gilts; mortgages of land in the UK, up to two-thirds of the value of the land (see Trustee Act 1925, s. 8); and

3. *Wider range requiring advice*:⁶ Building Society accounts; certain unit trusts; certain shares quoted on a UK Stock Exchange.

Section 2 of the Act states that, if the trustees wish to invest in wider range items, they must first divide the fund into two equal parts. One half may be invested in wider range investments, but the other must be confined to narrower range investments.

Section 6(1) states that a trustee shall have regard to the need to diversify investments and that he or she must also consider whether any investment proposed is suitable for the trust. It is generally agreed that this subsection applies to all trustees investing in all circumstances. By contrast, the rest of section 6 applies only to investments made using the powers conferred by the Act. It requires the trustees to take advice from a person “qualified by his ability in and practical experience of financial matters” before investing and from time to time when considering whether to retain investments.

The legislation must be set against the general principles of equity, which are considered below.

II. HOW THE STATUTORY RULES HAVE BEEN APPLIED

A. *Criticisms of the Act*

When the Act passed into law in 1961 it was considered, on the whole, to be sound. However, attitudes to personal finance and to investment have changed a lot over the last 33 years. Increasingly the Act has been described as unduly restrictive and obsolete. Indeed, the Law Reform Committee in their 23rd Report⁷ concluded that the Act was “tiresome, cumbrous and expensive in operation” and that “the present statutory powers are out of date and ought to be revised”. The main criticisms are as follows:

1. The Act does not allow investment in many fields that have become increasingly popular among financial specialists in recent years. Often cited are investments abroad in economies perceived as growing more quickly than the UK. Other investments which ought to be allowed include unquoted or newly quoted shares, financial instruments such as Eurobonds, options, commodities and items that are non-income producing but are bought and sold for a capital gain, such as antiques.

⁶ First Schedule, Part III.

⁷ 23rd Report, *The Powers and Duties of Trustees*, Cmnd. 8733.

2. The Act does not allow a house to be purchased as a residence for a beneficiary. This power is needed so that, for instance, a home can be bought for the minor children and their guardian. Neither the Act nor the Trustee Act 1925 authorise such a purchase which can therefore only be made if an express power has been included in the trust deed.
3. The requirement to divide the fund into two equal parts is too restrictive. All the fund may be invested in narrower range investments, but not more than half may be invested in the wider range. Therefore, at the most, only one-half of the fund may initially be invested in equities. This argument is reinforced by the fact that for most of the last 30 years the value of capital invested in equities has increased far more than capital invested in banks, building societies and gilts.
4. It is tiresome to comply with the Act's requirement to keep the fund in two parts.

B. The Approach of the Courts to the Act

In the case of *Trustees of the British Museum v. Attorney General*, Sir Robert Megarry V.-C. extensively reviewed the Act. The trustees of the British Museum, a charity, had applied to the court for wider investment powers. His Lordship concluded that “in the last twenty years significant changes in investment practice have occurred”⁸ and that therefore the Act should no longer be treated by the courts as the final word on the investment powers of trustees. He went on to approve what he described as “extremely wide” powers of investment for the trustees. He added that a number of factors had influenced his decision and would be of importance in considering future applications. They can be summarized as follows:

1. In his Lordship's words, “the eminence and responsibility of the trustees, the machinery for obtaining highly skilled advice, and the success that this machinery has achieved over the past twenty years”;⁹
2. “[The] obvious advantage in there being freedom to invest in any part of the world. At the same time, there is due recognition of the prudence of maintaining a solid core of relatively safe investments while setting free a substantial part for investments which, though less ‘safe’, offer greater opportunities for a substantial enhancement of value”;¹⁰

⁸ [1984] 1 All E.R. 337 at 342b.

⁹ *Ibid.* at 342b.

¹⁰ *Ibid.* at 342c.

3. "... the large size of the trust fund [about £5 million] . . . A fund that is very large may well justify a latitude of investment that would be denied to a more modest fund; for the spread of investments possible for a larger fund may justify the greater risks that wider powers will permit to be taken."¹¹

He concluded:

The width of the powers in the present scheme seems to me to be at or near the extreme limit for charitable funds. Without the fractional division of the fund and the assurance of effective control and advice I very much doubt whether such a scheme could have been approved. What the court has to judge is the combined effect of width, division, advice and control, which all interact, together with the standing of the trustees.¹²

It can clearly be seen that, although the Vice-Chancellor was prepared to approve wide investment powers, it was only with a number of safeguards.

That case was decided in 1984. In 1988 judgment was given in another case on the powers of investment of charity trustees, *Steel v. Wellcome Custodian Trustees Ltd.*¹³ There the fund was far larger – a staggering £3,200 million. The trust had arisen under a will of 1932 whereby Sir H.S. Wellcome bequeathed the entire share capital of his pharmaceutical company, the Wellcome Foundation. Ninety per cent. of the fund was still invested in those shares and the trustees applied to the court for wider powers to invest the remaining ten per cent.

Hoffman J. agreed to the request, but, it will be noted, only on the basis of safeguards built into the scheme as follows:

The foundation of the scheme is a perfectly general power to apply the fund in the acquisition of any property whatever as if the trustees were absolutely and beneficially entitled. But that power is qualified by various restrictions as to the way in which it can be exercised. First, the trustees are required either to obtain and consider the advice of qualified external advisers before making an investment themselves or to delegate the power to choose investments to such

¹¹ *Ibid.* at 343b.

¹² *Ibid.* at 343a.

¹³ [1988] 1 W.L.R. 167.

advisers pursuant to the power of delegation which also forms an important part of the scheme. Secondly, the trustees or external advisers are required to observe certain guidelines . . . They must try to diminish the risk of losses in the market even if this means giving up a chance of speculative gain and to strike a reasonable balance between obtaining income and growth on their investments . . . The advisers may invest in very broadly defined classes of securities and other assets which cover more or less every form of investment now known to man but may not invest in any ‘new forms of investment which shall be devised’ unless the trustees after taking advice shall declare that such form of investment is suitable for the trust.¹⁴

III. EXPRESS INVESTMENT POWERS

A. Interpretation

The response to the criticisms of the Act has been to abandon entirely the scheme of investment prescribed by it. Instead, a power is inserted to invest “with as much freedom as an absolute beneficial owner”¹⁵ or “in all respects as if they were absolutely entitled beneficially to the money liable to be invested”.¹⁶ Barlow, King and King in *Wills, Administration and Taxation*¹⁷ conclude “Because [the Act] provides for only a limited range of investments and because the rules on division make administration of the trust rather complicated it is usual for wills to confer on trustees an unfettered discretion in their choice of investment giving them the power to invest as though they were absolute beneficial owners”. It is the writer’s contention that wording of this type confers powers that are far too wide for funds of an average size and for smaller trust funds. For good reasons the pendulum has swung away from the earlier practice of granting narrow investment powers to trustees – but it has swung too far in the direction of giving them no guidance at all as to what they should do.

What does the phrase to invest “. . . with as much freedom as an absolute beneficial owner” mean? The writer has not been able to find much authority. It is quoted but not much analysed in the textbooks. Should it be seen as a special power to invest under section 3 of the Act or as excluding the Act altogether? It is usually treated as meaning the latter.

It is usually assumed that this wording is apt to by-pass the First

¹⁴ [1988] 1 W.L.R. 167 at 170B-G.

¹⁵ Butterworth’s *Wills Probate and Administration Service*, Will Form 1A. 30.1.

¹⁶ *Encyclopaedia of Forms and Precedents*, 5th ed., vol. 42, Form 347.

¹⁷ 5th ed., p. 252.

Schedule to the Act (dealing with permissible types of investment) and sections 2 to 4, requiring division of the fund, so that these provisions do not apply. It is also usually assumed that this wording does not exclude section 6(1), which requires the trustees to diversify investments. The general opinion seems to be that this wording excludes the rest of section 6, which requires trustees to take advice, but that they should do this anyway! The whole approach seems to be an object lesson on how to treat a statute selectively.

Let us turn to the case law. One of the difficulties is that the cases on investment that have come before the courts in recent years have all dealt with large funds. Difficulties have no doubt arisen with investment of smaller funds, but perhaps the sums involved have been such that efforts have been made to avoid litigation. So there has been no opportunity for the judges to clarify the effect of short, express investment clauses of the type under discussion.

In *Learoyd v. Whiteley*¹⁸ it was stated that a trustee, when investing, must “take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally obliged to provide”. Could it be said that a power to invest “as if they were absolute beneficial owners” overrode this duty? There seems to be scope for argument. Their actual capacity (and therefore duties) as trustees are overruled by the express words of the clause stating that they are to act as absolute beneficial owners.¹⁹ Obviously someone investing for himself may choose any investment that he pleases, no matter how speculative or foolish. His “investment” may be in the National Lottery or in starting a new and untried business. Can a trustee who is enjoined to act as “an absolute beneficial owner” do the same? Further, someone investing for himself is expected so to do for his own reward. Can a trustee acting as “an absolute beneficial owner” obtain a collateral advantage for himself from the trust funds, such as using the trust funds as working capital in his own business? However, it is hard to imagine any court accepting that a short phrase such as this could displace such a well-established rule as the one enunciated in *Learoyd v. Whiteley*. The duty of a trustee to act with prudence would, it is submitted, be seen as being so fundamental to the concept of trusteeship that it would be very difficult, if not impossible, to devise a form of words that would exclude that duty.

An analogy can be drawn with the case of *Re Power's Will Trust*²⁰ where

¹⁸ (1887) 12 App. Cas. 727.

¹⁹ This point has been raised by Professor D.J. Hayton in a footnote to p. 550 of Nathan and Marshall's *Cases and Commentary on the Law of Trusts*, 7th ed.

²⁰ [1947] Ch. 572.

the investment clause was of just the type that we are discussing, namely “all moneys requiring to be invested under this my will may be invested by the trustee in any manner in which he may in his absolute discretion think fit in all respects as if he were sole beneficial owner of such moneys including the purchase of freehold property in England and Wales”.

The trustee wished to purchase a house for occupation by the beneficiaries. It was held the word “invested” required the purchase of property to produce an income yield and that as the house would not produce income, it was not covered by the clause. Perhaps a court would consider that the concept of prudence was inseparable from the concept of trusteeship, just as the judge found the requirement of income was inseparable from the idea of investment.

On the other hand, the case of *Re Harari's Settlement Trusts*²¹ shows that the courts give express investment clauses their ordinary meaning and no longer artificially restrict them. Jenkins J. said:

I am left free to construe this settlement according to what I consider to be the natural and proper meaning of the words used in their context, and, so construing the words ‘in or upon such investments as to them may seem fit’ I see no justification for implying any restriction. I think the trustees have power, under the plain meaning of those words, to invest in any investments . . . they ‘honestly think’ are desirable investments for the investment of moneys subject to the trusts of the settlement.²²

This approach was followed by Buckley J. in *Re Peczenik's Settlement*.²³

Therefore it is at least arguable that the phrase “to invest with as much freedom as an absolute beneficial owner” does, in its ordinary meaning, appear to say that the trustees can invest in anything at all, and without being bound to observe the “prudent man” test.

In *Khoo Tek Keong v. Ch'ng Joo Tuan Neoh*²⁴ the Privy Council had to interpret a narrower clause than the one that we are discussing. There the trustees had power invest “in such investments as they in their absolute discretion think fit”. It was held that this wording authorised the trustee to make interest bearing loans on the security of jewellery but not simply upon the borrower's promise to repay. It is submitted that a power to invest as if

²¹ [1949] 1 All E.R. 430.

²² [1949] 1 All E.R. 430 at 434F.

²³ [1964] 1 W.L.R. 720.

²⁴ [1934] A.C. 529.

one were “the absolute beneficial owner” is wider than the power in that case. So would a trustee with such a power have power to make unsecured loans?

It has been accepted in a number of cases that the absolute beneficial owner wording authorises the making of any *type* of investment.²⁵

B. Current Practice

It is often thought in practice that wide investment powers should be included in wills and trusts as a matter of routine. But it seems to the writer that not enough thought has been given to the types of people who in practice have to operate these powers.

The types of funds that are invested are very diverse. Very loosely, they can be divided into three categories:

1. Large multi-million pound funds such as pension funds, benevolent funds, *etc.* Funds of this size will employ full time professional managers. Although, as the Maxwell saga has shown, such funds do need protection, the protection that they require is not the protection afforded by the Act.
2. Substantial family funds where the people in charge are sophisticated investors. These are also the type of funds for which the Act is too restrictive.
3. Smaller family funds. The purpose of this article is to show that these are exactly the funds that can benefit from the Act, in virtually its original form.

Let us think of the situations in which such smaller family funds arise. A husband and wife come to make their wills. He leaves everything to her; she leaves everything to him. Then the solicitor says, “What if you are both killed together?” A lengthy clause is added to say that, in that situation, everything is to go to the couple’s young children at the age of 18 or 21. Administrative powers are added, including a power to invest. The clients themselves have no particular views upon investments and it is left to the solicitor to advise.

Suppose that that power has to be used. Who is likely to be operating the power? What sum of money will be available? If the executors are family members, they are unlikely to have a background in investment finance. Even if the family solicitor is appointed, it cannot be assumed that every solicitor has the inclination, or the time, to investigate sophisticated investment schemes. The Law Society’s regulations on investment business make it clear²⁶ that not every solicitor is entitled to advise upon investments

²⁵ See, *e.g.* the *Wellcome* case.

²⁶ Solicitors’ Investment Business Rules 1990, rules 2, 4 and 5.

and that authorisation must be obtained by each firm individually.

What will be the size of the fund? It will comprise, say, the proceeds of sale of the family home (assuming that the young children are to live elsewhere). There will also be the proceeds of an insurance policy or two and perhaps a pension scheme lump payment. The family's main debt, the mortgage on the family home, may have been discharged so that there will be no debts, but nor will there be a vast sum for investment.

What investments will in practice be chosen for the fund? A Building Society account for ready cash. A mixture of gilts and unit trusts for income and another mixture of gilts, unit trusts and shares for capital growth.

All these are authorised by the Act. Why then is the Act excluded as a whole by giving the trustees powers to invest as if they were "absolute beneficial owners"? Let us look again at the criticisms of the Act and see how far they are justified *in relation to the smaller family fund*:

1. The Act excludes many types of investment. But are sophisticated financial instruments such as Eurobonds suitable for a smaller family fund? Investments abroad usually incur higher dealing costs. A larger investor, dealing in large sums, hopes to make a large gain that will compensate for those higher "overheads". Those with a smaller sum to invest will find it harder to justify the higher expenses. In addition, investing abroad can be riskier. For instance, some of the faster growing economies are troubled by political uncertainties (Hong Kong, South Korea). Commodities and options are notoriously risky investments. Antiques are only for a specialist who knows what he or she is doing. The average family trustee cannot be expected to be such a specialist.
2. The requirement to divide the fund into narrower range and wider range investments is cumbersome, and leads to too much of the fund being invested in government stocks and the like.

Attitudes to investing in equities vary as the stock market goes up and down. Equities were all the fashion in the heady days of 1986 when it seemed that the only way for values of shares to go was up. The crash of October 1987 led to a more cautious view. In 1988 the best-performing sector of the market was government stocks – exactly the sector that had been derided two years before as hopelessly old-fashioned.

The trustees of the smaller family fund should not be put in a position where they have to sell and reinvest the fund frequently as the market changes from month to month because this will result in higher dealing-costs which will prove an undue burden on the smaller fund. Also the trustees are less likely to be financial experts. They will be less aware of changes in the market and more likely to "miss the boat". They will find it

harder to come to a decision to reinvest the portfolio. Trustees of the smaller family fund are to be encouraged to adopt a stable investment policy, one that will not only keep up with the market at its best, but also one which will not lose too much in value in the next slump. If the investments in the fund are changed infrequently then it is less difficult to comply with the Act's requirement to divide the fund into the narrower range and the wider range.

With all this in mind, the scheme of investment prescribed by the Act does not seem so unrealistic. A suitable investment clause might be: "My trustees shall have the powers of investment contained in the Act save that [the whole] or [three quarters] of the fund may be invested in the wider range" [and continue to give power to purchase a residence for a beneficiary]. Remember that the original reason given for construing powers of investment narrowly was to protect the trustees. Restrictions prevent the trustees from speculating unwisely and give them guidance on what they should and should not do. This is important for inexperienced trustees. It also can protect them against beneficiaries who demand a speculative policy.

On the other hand, why give them to trustees if there is no intention that very wide investment powers should be used?

What would be the position of a trustee with a very wide investment power who invested the trust fund in an adventurous manner and lost? If a particular investment was found by the court to be of a "speculative" or "hazardous" character, then the trustee would be in breach of trust whether or not the investment was within the terms of the investment clause. If the investment was deemed by the court not to be of that character, there would be no breach of trust and no cause of action against the trustee. If the beneficiaries objected that the investment in question was not suitable for the trust as required by section 6(1) of the Act then the trustee could argue that, as the testator had chosen to give him such an unlimited power, any investment was "suitable". In *Nestlé v. National Westminster Bank plc.*,²⁷ the Court of Appeal rejected Miss Nestlé's complaint that her trustee had failed to use the wide investment powers given to it. It would be interesting to see how the court would deal with an application by a beneficiary who was worried that his or her trustee was making too adventurous a use of a very wide power. Presumably the beneficiary would have no remedy.

Restricting investment powers is more in line with the attitude of the courts as shown in *Trustees of the British Museum v. Attorney General* and *Steel v. Wellcome Custodian Trustees Ltd.* In both cases the judges were

²⁷ [1993] 1 W.L.R. 1260.

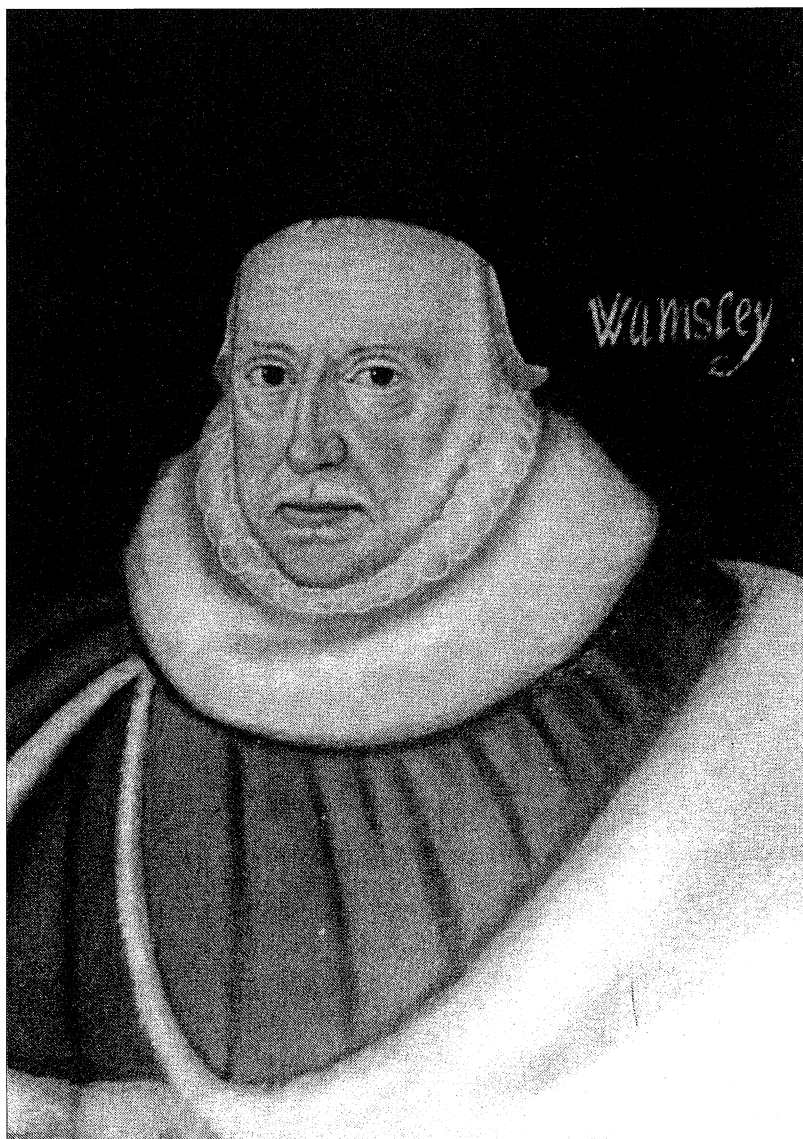
only prepared to grant wide investment powers on the basis that, first, skilled advisers would be employed and secondly that part only of the fund would be so invested. In contrast, there is no requirement to take advice in investing in reliance upon an express power, as the relevant part of the Act (section 6(2)) only applies to investments made under the Act. In *Trustees of the British Museum v. Attorney General*, Sir Robert Megarry V.-C. expressly ordered that part of the fund be confined to narrower range property. In the *Wellcome* case there was a *de facto* division as 90 per cent. of the fund had to be kept in the shares of the Wellcome Foundation. In contrast, there is no requirement to divide the fund when investing as “an absolute beneficial owner”. Admittedly, both these cases concerned charities, to which more conservative policies are applied by the courts. It is submitted that a similarly conservative, or more conservative, policy would be adopted to a smaller family fund which involved a comparatively small sum.

Would a solicitor who routinely inserted a wide investment clause in family wills, without pausing to consider the investment experience and competence of the proposed trustees, be held negligent? Can this possibility be excluded in the light of *Ross v. Caunters*?²⁸

IV. CONCLUSION

The meaning of the phrase “to invest with as much freedom as an absolute beneficial owner” is unclear. It seems that it could be interpreted as authorising investment in anything at all, however unsuitable the item in question may generally be considered to be as an investment for trustees. There is a tension here between the law’s policy of allowing a testator or settlor to do as he or she wishes and the need to protect beneficiaries from foolish or incompetent trustees. While the law is unclear, it is surely time to reconsider the current practice of inserting such wide powers to invest as a matter of routine in wills that create *small family* trusts. Instead, it is suggested that the provisions of the Act should be used, widened only as mentioned above.

²⁸ [1980] Ch. 297.



Sir Thomas Walsley (1537–1612)

Justice of the Common Pleas

Portrait by kind permission of Professor J. H. Baker

SIR THOMAS WALMESLEY – AN ELIZABETHAN JUDGE

by John Snape*

INTRODUCTION

On 4 May 1589, Sir Christopher Hatton,¹ Queen Elizabeth's reliable and trusted Lord Chancellor, wrote to the most prominent lawyer in Lancashire, the only one, possibly, with a reputation throughout England:

[Her] Majestie for very good respecte, And for the gracious good opinion she conceavethe of your learning and upright proceeding in matter of justice hath been pleased to appointe you to the place and calling of a Judge, in the Cowrte of Common Pleaze: I am comaunded by theise my letters to signifie this her good pleasure unto you, And to requier you withall, to dispose your other business, And to prepare yourself to passe unto that service accordingly: Her Majestie not dowbting but she shall receive contentment, in having made this choice of you, to the relief and cumforte of her Subjectes, for whose good you ar especially called to this place.²

The new justice of the Common Pleas was Thomas Walmesley,³ serjeant at law,⁴ of Dunkenhalth⁵ Hall, Clayton-le-Moors, in Blackburn Hundred. The appointment was the culmination of a lucrative career, which had propelled him from the minor rural gentry of Lancashire to London, and the rarefied *coterie* of the Elizabethan bar.

In our own day, Mr. Justice Walmesley's re-emergence as a familiar figure to legal historians of the sixteenth century is inextricably linked with the re-investigation of *Slade's Case*,⁶ a milestone in early contract law. A veil of anonymity was lowered on Walmesley's dissenting judgment in the

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¹ (1540-1591.) Appointed Chancellor in 1587. His apparent patronage of Walmesley may be significant (see J.S. Cockburn, *History of English Assizes 1558-1714* at p. 216 and below). The superscription of the letter is "To the R. Worshipfull my verie good ffrende Mr. Serjeant Walmysley geveth".

² G.A. Stocks and J. Tait, ed., *Dunkenhalth Deeds 1200-1600*, Chetham Society (N.S.) LXXX, at pp.101-102, no. 223. See also below. (Elegance of written expression does not seem to have been Hatton's strong point (see D.M. Palliser, *The Age of Elizabeth*, Longman (1983), p. 6, and the word "ask").)

³ The spelling adopted throughout is one of a number (listed by Whitaker in *A History of the Parish of Whalley* (1876 ed., vol. II). A frequent spelling is "Walmesley".

⁴ Serjeants were already by the 1580s a select group of pleaders in the Common Pleas organised into a guild known as the order of serjeants at law. They were recognised as a separate estate ("*status et gradus servientis ad legem*"): J.H. Baker, *Serjeants at Law*, at pp. 28-29, 25 (Selden Society).

⁵ Pronounced "Dunkenhalth".

⁶ *Slade v. Morley* (1597-1602) 4 Co. Rep. 91a, a report which is highly problematic. The case was argued four times between 1596 and 1602 by, among others, Bacon and Coke.

case by his long-time rival, Sir Edward Coke,⁷ which has only quite recently been lifted by modern scholars.⁸ However, he has been reasonably well known to constitutional lawyers for his part in the *Case of the Postnati* (1609)⁹ and somewhat less well known for his contribution to *Dr. Bonham's Case*.¹⁰ In a biographical note, Walmesley is described as "... the most conservative judge in a conservative court [*i.e.* the Court of Common Pleas. H]is judgments are characterised by well-argued justifications of doctrines regarded by many of his contemporaries as outdated".¹¹ This may well be so; history is written by the victors. But to this perhaps doctrinaire and meticulous mind is owed, at the very least, the existence of two documents virtually unique in sixteenth century terms – an account of the day in 1580 when Walmesley was admitted to the order of serjeants¹² and a written reserved judgment, prepared in advance for delivery in open court.¹³ However, behind such tangible relics lies an enigma. Throughout his long career,¹⁴ a period of bloody religious turmoil, Walmesley was periodically denounced for his allegedly Catholic leanings;¹⁵ yet his appointment as a judge followed by barely eight months the defeat of Philip II's Armada, at a time when the Elizabethan persecution of Catholics was at its height. This article seeks to begin to unravel the enigma and, in doing so, to attempt something quite new for a major sixteenth century judge – a study of the career of an important figure of the Elizabethan state in his regional and religious context.

CAREER

Thomas Walmesley was born at Showley Hall, Clayton-le-Dale, in Lancashire, in 1537. His father was a man of some wealth and education, rated in the 1574 general levy of arms at a "coat of plates, a longbow, a

⁷ To whom Walmesley was evidently, in later life at least, a considerable source of annoyance (see Hatfield MSS. 36/28; 41/91).

⁸ J.H. Baker, "New Light on *Slade's Case*" [1971] C.L.J. 51; D. Ibbetson, "Sixteenth Century Contract Law: *Slade's Case* in Context" [1982] O.J.L.S. 295.

⁹ *Calvin's Case* (1609) 7 Co. Rep. 1; *State Trials*, vol ii, 599-696. (1610) 8 Co. Rep. 114.

¹⁰ A.W.B. Simpson, *Biographical Dictionary of the Common Law* (1984), at p. 523.

¹² On the flyleaf of a commonplace book ("Commonplace A"), Free Library of Philadelphia, MS. L.C. 14/30, p. 2 (J.H. Baker, *English Legal Manuscripts in the USA*, Part II (1558-1902), Selden Society 1990, para. 1213).

¹³ MS. Hale 80ff, 92-99v. (J.H. Baker, *English Legal Manuscripts*, above, at p. 36).

¹⁴ On his tomb at Blackburn Parish Church, destroyed by Parliamentary troops in the civil war, was originally recorded the fact that he died "... having lived lxxv yeares complete under v several princes – King Henry VIII, King Edward VI. Queene Mary, Queene Elizabeth, and oure souveraine lord King James." (Whitaker, *op. cit.*, at p. 280.)

¹⁵ See, e.g., Foss, *Judges of England 1066-1870*, John Murray, 1870, at p. 698 and below, *passim*.

sheaf of arms, a caliver, a scull and a bill”,¹⁶ Although someone of local influence,¹⁷ the judge’s father, who died in 1584, seems to have had no close connection with the law. He did, however, provide well for his ten children, including Thomas,¹⁸ managing to secure influential local marriages for his daughters.¹⁹ Thomas’s brother, John, was eventually a barrister of Gray’s Inn and Nicholas a merchant in London.²⁰ Nothing is known for certain of Thomas’s early education. It is possible that he was educated at Blackburn, where there was a *schola cantorum* even before the grammar school founded in Elizabeth’s time.²¹ He may even have been educated abroad. There is evidence of his knowledge of Roman law, which may suggest that he spent time at Oxford or Cambridge.²² What is known is that, having been admitted as student aged 22 at the beginning of Elizabeth’s reign, he was called to the bar of Lincoln’s Inn on 15 June 1567.²³ Fourteen benchers were present and his contemporaries included George Kingsmill.²⁴

His practice must have flourished quickly because, in 1571, he bought Dunkenhalth Hall and married Anne Shuttleworth, sole heiress²⁵ of Robert Shuttleworth of Hacking. Three years later, when about to be elected a bencher of the Inn, there is the first mention of suspect religious adherence. A minute of 24 June 1574 noted that “The Autumn Reader shall call Mr Davys and Mr Atkyns to the Bench at the first moot. Mr Puckering and Mr Kingsmill shall be called in Hilary Term; and *also Mr Wameslowe if he for his zeale in Religion shalbe thought meete*”.²⁶ The same year saw the birth of his son, Thomas, and religious matters were evidently so far arranged as to enable him to be elected reader in 1576, 1577 and 1580. As a reader, his duties would have involved discoursing on legal subjects and extending hospitality to other members of Lincoln’s Inn. He was certainly active in the

¹⁶ D.N.B., vol. LIX, at p. 159.

¹⁷ With his neighbour, Sir Richard Shireburn, he was assessor of the Trawden Forest Bridge reparation rate in 1576 (*Dictionary of National Biography* (“DNB”)).

¹⁸ M. Brigg, “The Walmesleys of Dunkenhalth: A Family of Blackburn Hundred in the Elizabethan and Stuart Periods”, *Transactions of the Lancashire and Cheshire Antiquarian Society*, LXXV, 72. The author would like to acknowledge his indebtedness throughout to this very informative paper.

¹⁹ R. Trappes-Lomax, *A History of the Township and Manor of Clayton-le-Moors*, Chetham Society (N.S.) LXXXV, at pp. 120, 121.

²⁰ *The Victoria County History of Lancashire*, at p. 421. John also became M.P. for Clitheroe (1586). He died unmarried in 1588.

²¹ Lansdowne MS., vol. 46, no. 47 (1585).

²² If so, there is no record of his taking a degree at either university. See his comments in *Dr. Bonham’s Case*, below.

²³ He may have begun his professional study at Barnard’s or Staple Inn (*Victoria County History*, at p.421).

²⁴ As a judge a supporter of Walmesley’s dissent in *Slade’s Case* (Ibbetson, *op. cit.*, at 303); *Lincoln’s Inn Black Books*, vol. 1, p. 356.

²⁵ But, *per Victoria County History*, above, a “not very considerable” one (at p. 421).

²⁶ *Black Books*, above, vol. 1, p. 393. (Emphasis added and spelling, except for Walmesley’s name, modernised.) The use of the word “religion” is unusual: “obstinate Papists” were usually contrasted with “zealous professors of religion” (Collinson, *The Elizabethan Puritan Movement*, at pp. 406-407).

Inn and February 1577 also saw him “added to the committee on apparels”. 1580 seems to have been the date of his first official appointment, when he was Queen’s Commissioner in Lancashire for the general military muster.²⁷

The law reports suggest a very heavy caseload, particularly between 1580, the year of Walmesley’s admission as a serjeant, and his appointment to the bench in 1589. His name is a constantly recurring feature of the sets of manuscript reports in Lincoln’s Inn spanning these years.²⁸ Even a brief reading of the early nominate reports reprinted as the *English Reports* discloses his considerable prominence.²⁹ As Mr. Serjeant Walmesley, he appears for one or another party in a whole range of actions. Lack of processed data makes it impossible to say as yet with certainty the exact proportions, one to another, of the types of actions in which he appeared. The writ actions, mainly those involving real property, seem to preponderate,³⁰ but there are significant numbers of actions on the case³¹ in which he appears too. His reputation as a pleader in London was obviously such as to mean that his own religious allegiances and those of his family were of secondary importance to his “learning”. In 1585, he is recorded as making strenuous efforts to avoid being appointed Chief Justice of Ireland, Ireland being the destination of many English Catholic barristers in the 1580s.³² He was, however, appointed to an important office in his native Lancashire (that of Master Forester of the forest of Wyresdale and Quernemore) in November 1587.³³ Against this background, it is easy to detect a ring of sincerity, possibly even genuine admiration, in the formulaic prose of Hatton’s letter of appointment to the common bench.³⁴

Walmesley’s appointment as a justice of the Common Pleas lasted uninterrupted from 1589 until his death in 1612. It followed a brief period from 1588 to 1589 as member of parliament for Lancashire, which is not insignificant, considering that parliament sat for only three of Elizabeth’s

²⁷ Lancashire had a higher proportion of soldiery in its population than any county except Middlesex (Haigh, *op. cit.*, at p. 52).

²⁸ The author is currently completing an analysis of this material.

²⁹ See the reports *sub nom.* e.g. Godbolt, Croke and Gouldsbrough. (Although Plowden’s reports are generally earlier, it is difficult to find any reference in *The Reports* to Walmesley.)

³⁰ e.g. debt, covenant, trespass (see J.H. Baker, *An Introduction to English Legal History* (3rd ed.), Butterworths, 1990, especially at pp. 63-83).

³¹ i.e. where a cause of action was not covered by one of the established writs; developed from trespass on the case (see Baker, *op. cit.*, *passim*). Walmesley was very much involved with the question of whether a particular form of action on the case for breach of contract, *assumpsit*, was available as an alternative to debt where debt was available on the same facts. He strongly held the view that it should not be (see below).

³² W.R. Prest, *The Rise of the Barristers – A Social History of the English Bar 1590-1640*, Clarendon Press, Oxford, 1986, at p. 81.

³³ R.C. Shaw, *The Royal Forest of Lancaster*, Preston, 1956, at p. 201.

³⁴ Hatton’s views on religious conformity were very much those of his prince’s, that “in matters of religion neither fire nor sword was to be used”, see Palliser, *op. cit.*, at p. 327.

44-year reign. During the years to 1612, he rode every circuit in England except that of Norfolk and Suffolk,³⁵ a fact which must have made him known to most of the important families of the realm. In 1596, when he and Mr. Justice Fenner arrived at Winchester, on the Western and Oxford circuit, they were given presents by the mayor, the sheriff, Winchester College, the Marquess of Winchester and members of the Hampshire gentry;³⁶ in February of the previous year, the freedom of Southampton had been conferred on him. Other appointments followed, beyond his judicial duties.³⁷ The most obvious sign of the trust in which he was held by the ageing Queen was the fact that he was a member of the special commission for the arraignment of the Earl of Essex in June 1600 and was present at the Earl's trial in Westminster Hall the following year.³⁸ On the accession of James I in 1603, he was immediately reappointed a servant of the Stuart crown and knighted by the king in the garden at Whitehall before the coronation.³⁹ He seems to have suffered some ill-health in old age⁴⁰ and he died at Dunkenhalth, aged 75, in November 1612. The verses inscribed on his tomb at Blackburn Parish Church recorded that King James, far from being disgruntled by Walmesley's dissent in the *Case of the Postnati* (1609), withdrew "no grace he showed before" and in fact increased the royal bounty:⁴¹

For when as old age, creeping on apace,
Made him [*i.e.* Walmesley] unable to supply his place,
Yet he continued by the King's permission
A judge until his death still in commission,
And still received by his special grace
His fee as full as when he served the place.

All of which, far from being merely quaint, tells us a good deal about reputed judicial independence at a time when it might not perhaps have been expected. Independence of mind and, as we shall see, sound

³⁵ See the epitaph, below.

³⁶ Brigg, *op. cit.*, 75; W. Durrant Cooper (ed.), *The Expenses of the Judges of Assize riding the Western and Oxford Circuits, 1596-1601*, Camden Society (1858), Miscellany, IV.

³⁷ Assistant to the House of Lords in Committee on Certain Bills (1597); on the Ecclesiastical Commission for Chester (January 1598).

³⁸ Brigg, *op. cit.*, 74; the report in *State Trials* shows him to have seemingly remained silent throughout.

³⁹ *Victoria County History*, above, at p. 421. Walmesley was one of over 900 knights dubbed in the first four years of James's reign.

⁴⁰ "Judge Walmesley's commonplace book" (Lancashire Record Office DD Pt/46/1) ("Commonplace B") contains notes of cures for various ailments, *e.g.*, "A powther that will dryve wyndes out of the stomache, help digestion, shortnes of breathe and kepe the kydneyse cleane . . ." (at p. 238). There is also a cure for the plague.

⁴¹ *Bishop Kennett's Collections*, vol. xxxix, at p. 456; later editions of Whitaker, *op. cit.*, include the complete text of this epitaph, with spelling modernised as above.

commercial sense, were notable characteristics of Walmesley. Such independence is perhaps the more surprising if we look a little further into the background.

LANCASHIRE

Why should it have been significant that Walmesley originated from the part of Lancashire by the River Ribble? Why were his religious allegiances considered to be important by his contemporaries? To what extent were the two questions related? Lancashire in the mid-sixteenth century was among the poorest of English counties. In 1557, the Earl of Derby drew attention to the “poore estate” of the palatinate.⁴² It was also isolated, violent and highly militarised.⁴³ Perhaps its backwardness and isolation were the reasons why the process of religious upheaval known as the Reformation made such little headway there. Walmesley’s life spanned the period of this upheaval. The change in “greater” England had begun a little before Walmesley’s birth, with Henry VIII’s breach with the Pope over the annulment of his marriage to Catherine of Aragon. This led to the statutory recognition of Henry as “only supreme head in earth of the Church of England called *Anglicana Ecclesia*”.⁴⁴ In the successive religious settlements of the first Act of Uniformity (1549) of Edward VI⁴⁵ (with the relatively brief interruption of Mary’s reign (1553-1558)) and Elizabeth’s Acts of Uniformity and Supremacy (1559), doctrinal changes were introduced which remained unacceptable to many people in England. These Catholic dissenters divided into “recusants”, who refused to attend Anglican services at all, and “church-Papists” who *did*, but also attended Catholic services.⁴⁶ In England as a whole, there were also Protestant dissenters, such as anabaptists, of whom however there were a very few in Lancashire.

When the scribe of 1574 noted Walmesley’s suspect religious adherence, the probability is that he was referring to his being a member of one of the group of Catholic dissenters.⁴⁷ Recusancy, both Catholic and

⁴² C. Haigh, *Reformation and Resistance in Tudor Lancashire*, Cambridge University Press (1975), at p.20. This work provides a wonderful general insight into sixteenth century Lancashire.

⁴³ Haigh, *op. cit.*, at p. 51.

⁴⁴ 26 Hen. VIII, c. 1 (*Statutes of the Realm*, iii, 492).

⁴⁵ Introducing compulsory public use of the first Prayer Book, with its beautifully-cadenced Cranmerian prose.

⁴⁶ “Church-Papistry” became untenable after about 1563, by which time both the Inquisition at Rome and a committee of the Council of Trent had ruled that in no circumstances was it lawful for English Catholics to be present at Anglican services (Haigh, *op. cit.*, at p. 249).

⁴⁷ Although the use of “religion” to refer to Catholicism is unusual. See n. 26 above.

Protestant, was rife in the Inns of Court.⁴⁸ Lincoln's Inn was itself a favourite meeting-place for clerical and lay Catholics.⁴⁹ If he arrived from Lancashire in London at the beginning of Elizabeth's reign, the traditionalism of Walmesley's religious observance would have been very noticeable. In 1574, Lancashire was ranked by the Privy Council as "... the very sincke of Poperie, where more unlawfull actes have been committed and more unlawfull persons holden secret then in any other parte of the realme".⁵⁰ Walmesley's father was described, in 1575, as a "recusant and obstinate". His grandfather seems to have acted as a lay arbitrator in disputes at the Ecclesiastical Court of Whalley Abbey, some years before its dissolution under Henry VIII.⁵¹ All of this would have been highly significant to those of Walmesley's contemporaries who embraced the "new" religion and who knew of his family's allegiances.

WALMESLEY IN LANCASHIRE

"Never," said Sir Edward Coke writing in 1602, "... shalt thou finde any that hath excelled in the knowledge of these Lawes, but . . . by the goodnesse of God hath obteyned a greater blessing and ornament then anie other profession, to their family and posteritie". Others thought that the worldly success of common lawyers "could best be understood as an example of the devil giving his own their due and the wicked spreading abroad like the green bay tree".⁵² On either view, the rise in status of the common lawyers is "a truism of social comment" in the sixteenth century. As can be imagined, Walmesley is an outstanding example. Religious controversy was hardly a feature of his life in Lancashire, but the acquisition of real property *was*. Whether or not one attributes this to Walmesley's reputed "rapacity in the practice of law",⁵³ for which, incidentally, there is no direct evidence,⁵⁴ it is clearly the case that much of his life both in Lancashire and in London was spent in acquiring and

⁴⁸ G. de C. Parmiter, *Elizabethan Popish Recusancy in the Inns of Court* (Bulletin of the Institute of Historical Research, special supplement no. 11, Nov. 1976).

⁴⁹ W. Prest, *The Inns of Court*, at p. 180.

⁵⁰ *Acts of the Privy Council*, vol. viii, pp. 276-277 (Public Record Office).

⁵¹ *Act Book of the Ecclesiastical Court of Whalley*, citation for adultery of Robert Spensour and Alice Robert, May 1524, Chetham Society, at pp. 92, 93. With Fountains Abbey, Whalley was, at its height, one of the largest monastic foundations in the North.

⁵² W.R. Prest, *Counsellors' Fees and Earnings in the Age of Sir Edward Coke*, at p. 165.

⁵³ Entry in DNB.

⁵⁴ One might, however, wonder how he acquired Dunkenhall so swiftly (above). It is possible that further research would clarify whether this was due to comparatively high fees. Many "books of account" belonging formerly to Walmesley were unfortunately destroyed by troops under the command of General Lambert on a visit to Dunkenhall in the Civil War (Whitaker, *op. cit.*, at p. 282).

consolidating the title to a great deal of land in the North.

This aspect of his life has been researched in some detail.⁵⁵ His first major acquisition was that of Dunkenhalgh Hall and its demesne in June 1571, from the ailing Rishton family. He went on to purchase land in adjacent townships and in Yorkshire, his lands there eventually being twice the value of his land in Lancashire. Over forty-five years at the bar and as a judge, he invested over £32, 000 in land.⁵⁶ This produced a large income in addition to his legal fees, as also did interest on money lent out on bond, *etc.* (the judge's accounts for 1589⁵⁷ show that amounts of anything between six pounds and £200 were then being lent). Significantly, a third source of his income was tithes, Walmesley having acquired a number of rectories in Lancashire and Yorkshire.⁵⁸ His commonplace book, recording the extent of his property,⁵⁹ reflects his preoccupation with establishing good title to his land, containing, as it does, a number of marginal additions, presumably in Walmesley's hand, on points of conveyancing detail. Land acquisition, together, no doubt, with an awareness of his growing reputation, made him a prominent figure in Lancashire. The name "Thomas Walmesley" appeared with that of Gilbert Gerard, the Attorney-General, and John Clench (Mr. Justice Clench) as one of the first governors of Blackburn Grammar School.⁶⁰ Mr. Serjeant Walmesley was one of those in Lancashire called upon in 1588 to lend £25 to the crown to raise a total of £1,725 from the County Palatine ("wch we . . . mynd alwaies to repay") for the defence of the realm against the Spanish Armada, the crown " . . . having made choyce in the severall ptes of our Realme of a number able to do us this kinde of service".⁶¹

In some cases, it was necessary to establish title to land by litigation. In 1570, Walmesley was the plaintiff in at least four actions as to the "messuage and lands called the Hackinge" and other lands in Billington, two involving his wife's claim to the Hacking Hall estate.⁶² On one occasion at least, he was acting on the monarch's behalf. This was at the end of April 1588, when a plea was entered in the Duchy Court of Lancaster in which the Attorney-General, by the relation of Thomas Walmesley,

⁵⁵ Brigg, *op. cit.*, generally.

⁵⁶ Brigg, *op. cit.*, 75.

⁵⁷ Commonplace B.

⁵⁸ Brigg, *op. cit.*, 77.

⁵⁹ *i.e.* Commonplace B.

⁶⁰ Eastwood, *Queen Elizabeth's Grammar School Blackburn*, 1967, App. III. Although this reference may be to his father, Mr. Serjeant Walmesley and Edward Fenner, *inter alia*, advised on the tenure of the school lands (S.P. 12/185, no. 92, Public Record Office). The annual meeting of the board of governors was at some stage fixed for St. Thomas's day, in the Christmas vacation.

⁶¹ *Burghley Lansdowne MS.* (Lancashire and Cheshire Antiquarian Society.)

⁶² W.A. Abram, *A History of Billington*, at p. 49.

serjeant-at-law, opposed John Calvert and Richard Woodworth. It was alleged that they had entered the Forest of Wyresdale and Quernemore without Walmesley's authority,⁶³ “. . . with one or more gunes and also grewhoundes, crosbowes and other things meate and apte for kyllynge of deare [and that they] did then *hunte and chase* her Majesties deare”. In 1574, Walmesley had a dispute with his neighbour, Sir Richard Shireburn, over fishing rights (Shireburn's steward went to Manchester for a writ of *replevin*).⁶⁴ The Shireburn accounts record that:

. . . the xv day of Julye 1574 payed for a repleave iis. iiiid. for the charges of my mare and hys horsse from Stonyhorste to Manchester the space of two dayes xvid. for my lether botte padelle and netts that Thomas Wamsseley cawessed hys mane to take upon the warthe near Rebelle beyng hys lande but where the sayd Sir Richard and hys ansetores hathe allwayes ben acustomed to fesse as lords of alle wayteres in the maner of Aghton Baley and Chagley.

Such a dispute is a clear symptom of the endemic sixteenth century rivalries between families in Lancashire. Walmesley's obvious desire to achieve pre-eminence among his Lancashire neighbours seems to have been a compelling motivation to profit. What is, perhaps, unusual however in this particular case, is the recourse of the parties to law rather than force.

Perhaps surprisingly, Walmesley had judicial duties, at least earlier in his career, in Lancashire. In 1571 with only four years' call, Thomas Walmesley of Lincoln's Inn, “learned in the law”, is recorded as acting as an arbitrator in a local dispute.⁶⁵ His name is endorsed as a justice of the peace, on orders respecting the Lancaster Assizes, as early as 1578 and 1586.⁶⁶ In 1586, the justices were preoccupied with the licensing of alehouses and taking measures against “rogues and valiant beggers”. On hearing licensing applications, the “. . . abiletie and Conversacion” of would-be alehouse-keepers was to be considered and all “. . . strandge beggers of forren shiers” were to be prevented from begging in Lancashire.⁶⁷

Weightier matters followed his return as a commissioner of assize in 1591. As a beginning to his judicial career, it seems to have been a disaster.

⁶³ See above.

⁶⁴ The steward recorded a journey of two days (W.F. Rea S.J., *Shireburn Rental*, at pp. 52-53).

⁶⁵ *Dunkenhalgh Deeds*, above, p. 95.

⁶⁶ Surprisingly because of his practice in London. It is possible that his father is the “Thomas Walmisley” referred to in 1578; but he had died by 1586.

⁶⁷ Lancashire Record Office, DDF 2437, at pp. 1-4.

Unfortunately, it coincided with an incident arguably too big for Elizabeth's judiciary to resolve. With Mr. Justice Clench, Walmesley was commissioned with trying Thomas Langton and his associates for the murder of Thomas Houghton. Since the sheriff was thought not "indifferent in that cause", the Privy Council also instructed Walmesley to supervise the composition of the jury. In a letter, the Queen was outraged, however, that Walmesley had allowed the accused bail contrary to her express wish. She wondered how the judge dared to presume thus far, showing both contempt for her commandment and little regard for the due administration of justice. She ordered Walmesley and Clench to return Langton to prison, making it clear that they would fail at their peril.⁶⁸ However, the killing had been a large-scale incident, seemingly quite beyond the powers of an assize judge to deal with. Houghton had been besieged at Lea Hall by Langton and 80 of Langton's men; intimidation surrounded the proceedings which were eventually dropped.⁶⁹ Perhaps it was this or perhaps Walmesley's apparent attitude to Catholic recusancy which meant that he seems to have ridden the Northern circuit only once more, in 1602/1603.⁷⁰ A rumour that he was to return in 1606 provoked the Archdeacon of Durham to write "God avert it! What act he did when he came last all that are religious know!"⁷¹ The Queen never travelled so far North as Lancashire; complete reliability rather than independence of mind were evidently the qualities she required from the assize commissioners on the Northern circuit.

WALMESLEY IN LONDON

It was Lord Burghley⁷² who, in 1603, described Walmesley as one of the three "learnedest judges". This learning is a striking feature of the wide range of issues on which he argued or pronounced judgment.⁷³ It was certainly the product of the experiences of a busy professional career. Walmesley's legal career took shape across a period of an unprecedented increase in litigation in the Queen's Bench and Common Pleas.⁷⁴ By 1580,

⁶⁸ S.P. 12/241, 52 (Public Record Office). This is in fact a draft.

⁶⁹ Haigh, *op. cit.*, at p. 53.

⁷⁰ There is evidence that he was proposed as Vice-Chancellor of the County Palatine of Lancaster in 1593 or 1594 but he does not seem actually to have held the office.

⁷¹ Quoted in Cockburn, *op. cit.*, at p. 216.

⁷² Thomas Cecil, 1st Earl of Exeter and 2nd Baron Burghley (1542-1623).

⁷³ As serjeant, he argued *e.g. audita querela* (*Hyde v. Morley* (1584) Cro. Eliz. 40); *assumpsit* (*Crispe v. Golding* (1586) Cro. Eliz. 50); debt on a bond (*Norris v. Salisbury* (1587) Godb. 133); *replevin* (*Peeke v. Wyrall* (1587) Cro. Eliz. 60); trespass (*Lord Anderson v. Wild* (1587) Gould. 40); waste (*Anon.* (1586) Gould. 1); and debt (*Sir Thomas Cecil v. Harris* (1587) Cro. Eliz. 140).

⁷⁴ C.W. Brooks, *Litigants and Attorneys in the King's Bench and Common Pleas 1560-1640*, from which come the statistics in this part.

the year of Walmesley's taking the coif, there were about 9,300 cases per year in the Common Pleas and about 4,000 in the Queen's Bench. This was about six times more cases than at the end of the fifteenth century. The increase continued for much of Walmesley's professional life, rising to a total in both courts of around 16,000 in 1606.

Contemporaries clearly wondered about this "multiplicity of suits", even though they may not have known its exact extent. It is a reasonable inference from what is known about *Slade's Case* (1606) that Walmesley ultimately feared this increase, although it had been instrumental in his considerable financial success. Some observers blamed uncertainty in the law.⁷⁵ The Jesuit, Fr. Robert Persons, blamed people's covetousness;⁷⁶ an Elizabethan law reform bill referred to "... the multitude of contentions which for lack of charity rise upon the smallest occasions betwene neighbours";⁷⁷ and, somewhat ironically, given Walmesley's landed interests, Coke attributed the increase to a greater prosperity and the breaking up of monastic lands into many hands.⁷⁸

Whatever the *reasons* for the multiplicity of suits, Walmesley's days in Westminster Hall, both as advocate and judge, must have been extremely busy ones. To the general reader, the overall value to be assigned to the many cases in which his name appears is problematic. How representative are they of the far greater tracts of material reflected in them? How relevant are they to modern law? *Chudleigh's Case* (1595),⁷⁹ a decision of "all the judges of England", including Walmesley, was once an important authority as to the effect of the Statute of Uses 1536 on the "shifting use"; but its central question of whether there could be a fee on a fee⁸⁰ and, if so, how, ceased to be arguable in about 1670. On the other hand, *Corbet's Case* (1599),⁸¹ the fictitious nature of which Walmesley was probably unaware, is an example of a case where, although the subject-matter is arcane, the issue is clear and the law still good, *i.e.*, that anything which tends to make an entail unbarrable is bad.⁸² A "tort law" case,⁸³ *Mulgrave v. Ogden*

⁷⁵ Brooks and Sharpe, "History, Law and the Renaissance" (1976) *Past and Present* 72, 135. See below.

⁷⁶ Rev. Robert Persons S.J., "A Memorial of the Reformation in England", *The Jesuits' Memorial* (ed. E. Gee, London, 1690), at p. 244. Quoted in Brooks, *op. cit.*, at p. 57.

⁷⁷ "Reformacions Proposed in Parliament" (1576) S.P. 12/107/96.

⁷⁸ Bodleian Library, Ashmole MS. 1159, at p. 78. (Quoted in Brooks, *op. cit.*, at p. 46.) A number of reported cases involving Walmesley as an advocate concern monastic property (*e.g.* *Nelson's Case* (1586) Gould. 3; L.I. Misc. 361(b) R 218, f. 65r – trespass and rights of common on monastic land).

⁷⁹ (1595) 1 Co. Rep. 113b. (This became the rule in *Purefoy v. Rogers* (1671) 2 Wm. Saund. 380.)

⁸⁰ *i.e.* in its real property sense, as in "fee simple".

⁸¹ (1599) 1 Co. Rep. 83b.

⁸² Other Walmesley cases of questionable modern relevance are *Watson v. Smith* (1600) Cro. Eliz. 723 (trover does not lie for a bond) and *Francis Throgmorton's Case* (1597) Cro. Eliz. 564 (Walmesley doubts whether it is necessary to have more than one malicious prosecutor).

⁸³ S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd ed., 1981), at p. 5.

(1591)⁸⁴ is another example of a case which is both intelligible and good law as it stands in 1994. It is authority for the proposition that, for a conversion, there must be a positive user by the converter. *Per* Mr. Justice Walmesley:

... no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten; or if one finds a horse, and giveth it no sustenance: but if a man find a thing and useth it, he is answerable, for it is conversion: so if he of purpose misuseth it; as if one finds paper, and puts it into the water, *etc.*, but for negligent keeping no law punisheth him.⁸⁵

Relevance to modern law is not really a fair criterion of worth where, as here, the material is four centuries old. Intellectual integrity and learning might be, however. There is much evidence of this. Perhaps the best known is that of Walmesley's position on debt and *assumpsit*. This was the centre of a jurisdictional battle between the Queen's Bench and the Common Pleas.⁸⁶ The central issue was simple, however obscure it may seem to the minds of modern lawyers. (There were implications of this, such as the traditional right of a defendant to "wage his law".)⁸⁷ It was whether *assumpsit* would lie on the contract which generated a debt action or whether a separate express promise was needed. In other words whether debt and *assumpsit* were alternatives. Coke, who won the argument in *Slade's Case*, and others, thought they should be; Walmesley thought not. The essence of the objection seems to have been that there should be no *assumpsit* action where the writ of debt already provided a remedy. It is this view which perhaps the commentator has in mind when he describes Walmesley as justifying doctrines regarded by many of his contemporaries as outdated. Recent scholarship has shown that a good argument could be made for Walmesley's view.⁸⁸ It was a view which he seems to have held religiously. As early as 1586, in *Potts v. Millworth*,⁸⁹ Mr. Serjeant Walmesley's argument on the point was rejected by the Queen's Bench. If the reader analyses the facts of *Potts v. Millworth*,⁹⁰ however, setting aside modern notions of contract, the argument does not seem fanciful or

⁸⁴ (1591) Cro. Eliz. 219.

⁸⁵ *Street on Torts*, 9th ed. 1993, at p. 49.

⁸⁶ Baker, *op. cit.*, at p. 215.

⁸⁷ Baker; Ibbetson, *op. cit.*

⁸⁸ Baker *op. cit.*, 397; but see Ibbetson, above, where the argument is put that the Common Pleas view as a whole was seriously flawed.

⁸⁹ B.L. MS. Lansd. 1068 p. 68v. Discussed in detail in Ibbetson, *op. cit.*

⁹⁰ Set out in Ibbetson, *op. cit.*

fictitious even today. The plaintiff pleaded that he had paid the defendant £20 and, in return, the defendant *promised* to deliver to him 30 quarters of malt. Verdict was given for the plaintiff but Walmesley, on a motion for arrest of judgment, argued that the action should be dismissed *since the plaintiff could have brought an action of debt for the corn*. In rejecting this argument, the court distinguished between an express and an implied *assumpsit* (i.e. an express and implied promise), “. . . on an *implied assumpsit* where a man may have an action of debt, he may not also have an action on the case on *assumpsit*; it is otherwise with an express *assumpsit*”.⁹¹

Walmesley’s knowledge of Roman law, which may indicate some residence at least in one of the universities,⁹² points to an awareness of contemporary political thought, even if it seems to have left the courts unimpressed. In *Wood v. Ash and Foster* (1586),⁹³ which is still authority for the proposition that, during a lease of livestock, their progeny belong to the tenant,⁹⁴ Mr. Serjeant Walmesley attempted to argue the opposite. He said “. . . that agreeing with his opinion was the opinion of all the civil lawyers”. Unfortunately, “. . . the Court was angry and rebuked him, that he did in such manner crosse their opinions, and that he cited the opinion of civililians in our law”. There is no question that a re-awakening interest in Roman law in Europe was beginning to make itself felt in English legal and political thought, however.⁹⁵ There is an element of it, as will be seen, in Walmesley’s dissenting judgment in *Dr. Bonham’s Case*.

Dr. Bonham’s Case is still used as a means of illustrating how the supremacy of Acts of Parliament was recognised only comparatively recently. Walmesley’s contribution to it is highly significant. The case is chiefly cited in the report by Coke,⁹⁶ usually for Coke’s comment that “. . . in many cases, the common law will controul acts of parliament and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void”.⁹⁷ By “void”, Coke seemed to mean, simply capable of being ignored.

⁹¹ This reasoning is only apparent from the Yale MS. G.R. reference given in Ibbetson, *op. cit.*, at 298.

⁹² See above.

⁹³ (1586) Owen 139; 1 Leon. 42.

⁹⁴ i.e. in the absence of contrary stipulation.

⁹⁵ D.L. Keir, *The Constitutional History of Modern Britain* (8th ed., 1965), at p. 4; W.S. Holdsworth, *History of English Law*, vol. iv., at pp. 217 ff.

⁹⁶ (1610) 8 Co. Rep. 114.

⁹⁷ at 118a.

However, there is another report by Brownlow,⁹⁸ who would have been present in the later part of the case as prothonotary of the court. That contains a report of a dissenting judgment by Mr. Justice Walmesley.

The facts were reasonably straightforward. Thomas Bonham had been found by the Royal College of Physicians to be wanting in knowledge of medicine. The College fined him and forbade him, under pain of imprisonment, to practice until he had been admitted by it. When he ignored this, a warrant was issued for his arrest. However, he refused to submit to re-examination on the basis that he was a Doctor of Medicine of the University of Cambridge and therefore that the College had no jurisdiction over him. The College imprisoned him in the Fleet. When he brought an action for false imprisonment, the College claimed to have acted under statutory powers. It pleaded that it had been incorporated as the Royal College of Physicians by letters patent dated 1519, confirmed by two statutes, those of 1523/24 (Henry VIII) and 1553 (Mary), with general powers to govern all physicians in London by fine and imprisonment.

After lengthy argument, the court (Chief Justice Coke, Mr. Justice Daniel, Mr. Justice Warburton (Justices Walmesley and Foster dissenting)) found in the plaintiff's favour. Two factors were particularly significant for the Chief Justice, *i.e.* (a) that the College did not possess their alleged powers over unlicensed as opposed to incompetent doctors; and (b) even if they did, there were procedural irregularities here in their exercise. The famous pronouncement of Coke on the controlling of acts of parliament was given in support of (a). Modern scholarship has shown that Coke's pronouncement was "... in the nature of an antiquarian revival of obsolescent law with a view to applying it to current needs ...".⁹⁹ In a limited sense, Walmesley's dissent seems more modern, in that he did not claim this power for judges to "controul" acts of parliament. Instead he seemed to put his trust in "Tudor paternalism". He said:

... it is the Office of a King to survey his Subjects, and he is a physician to cure their Maladies, and to remove Leprosies among them, and also to remove all fumes and smells, which may offend or be prejudicial to their health, as it appears by the several Writs in these several Cases provided, and so if a man be not right in his Wits, the King is to have the Protection and Government of him ... It is a marvellous thing that when good Laws shall be made for our Health and Wealth also, yet we will so pinch upon them, that we will not be

⁹⁸ 2 Brownl. 255 (see T.F.T. Plucknett, *Bonham's Case and Judicial Review*, Studies in English Legal History, XIV, 1983).

⁹⁹ Plucknett, *op. cit.*

tried by men of Experience, Practice and Learning, but by the University, where a man may have his Degree by grace without merit.¹⁰⁰

Leaving aside a certain preoccupation with health¹⁰¹ and the veiled contempt for the University's basis for awarding degrees,¹⁰² this is notable for at least three reasons. First, it says something about the source and actuating spirit of the writs in the *Registrum Brevium*; they are almost holy writ, it would seem.¹⁰³ Secondly, it may disclose either a medieval respect for the paternalism of the monarch or, what is more likely, a discreet exaltation of the king in parliament. Henry VIII *in parliament* was "prodigiously industrious", passing close to 700 statutes; he established, *inter alia*, the legislative supremacy in England of parliament against the universal church.¹⁰⁴ (If this is so, it is possible that Walmesley may have felt strengthened in this view by the absolutist ideals of Roman law.) Walmesley's reasoning here is a deduction from the preamble of the letters-patent; such reverence for the written text is a concomitant of respect for "humanist legislators confident in their ability to improve things by the right use of power".¹⁰⁵ Thirdly, it is spiritually close to the divine right of kings, something which would certainly have endeared Walmesley to King James.¹⁰⁶

That Walmesley was no Stuart time-server is, of course, illustrated by his dissent in the great *Case of the Postnati (Calvin's Case)* (1609).¹⁰⁷ The writer of the judge's epitaph singled this out for special mention:¹⁰⁸

For well appeared it by his bold opinion
In that great Case stiled of the Union,
Delivered openly in Parliament,

¹⁰⁰ 2 Brownl. 255, at p.262.

¹⁰¹ See above.

¹⁰² *q.v.* Contrast with Coke in the same case, who delivered a eulogy on Cambridge. See above as to Walmesley's education.

¹⁰³ There is evidence of this in relation to the debate in *Slade's Case* (see *Williams v. Williams* (1596), Baker, *op. cit.*, at 218). *Registrum Brevium* was a collection of writ precedents, the precise formulation of which came to be regarded by many lawyers as sacrosanct.

¹⁰⁴ J.H. Baker, *op. cit.*, n. 30 above, at p. 237.

¹⁰⁵ J.H. Baker, *op. cit.*, n. 30 above, at p. 237. Tudor legislation is notable for its specific preambles. An obvious example is the preamble to the Statute of Charitable Uses 43 Eliz. 1, c.4.

¹⁰⁶ Who, in 1598, published his *Trew Law of Free Monarchies*, where he said that a king who abused his accountability to God alone would be punished the greater "for the highest bench is sliddriest to sit upon" (see B. Lenman, *The Jacobite Risings in Britain 1689-1746*, Methuen 1980, at p. 13).

¹⁰⁷ (1609) 7 Co. Rep. 1.

¹⁰⁸ Whitaker, *op. cit.*, at p. 280.

How free his heart and tongue together went,
 When against all the judges he alone
 Stood singular in his opinion.

In Walmesley's opinion, individuals born in Scotland after the accession of James VI to the throne of England were to be regarded as aliens in England and not as natural born subjects.¹⁰⁹ In the Star Chamber in May 1608, the majority opinion (ten judges to one) was that they *were* natural born subjects.¹¹⁰ The defendants were alleged to have disseised the plaintiff of land in London and the defendants pleaded that:¹¹¹

. . . the Plaintife is an Alien, and that in the third yeare of his Majesties raigne of England, and in the nine and thirtieth yeare of his Majesties raigne of Scotland, hee was born in the Realme of Scotland, within the ligeance of his said Majestie, of his Realme of Scotland, and out of the ligeance of our soveraigne Lord the King of his Realme of England.

The action was a fiction, set up against two individuals who, by collusion, were supposed to have deprived the plaintiff Robert Calvin, born in Edinburgh in 1606, of his free tenement in Shoreditch. It was merely in order to settle, both at law and in equity, what Coke called of all points of law " . . . that ever we argued in this Court . . . the weightiest for the consequent, both for the present and for all posterity". The majority view was that anyone born in England was generally a subject of the king. For someone born in Scotland after 1603 to be a subject, the judges needed to be satisfied that the duty of allegiance (and thus his or her status as a subject rather than as an alien) was owed to James Stuart personally and not to the king in his corporate capacity. The majority held that this was indeed the position. Mr. Justice Walmesley disagreed. "[Li]geancia ys not bound to the naturall person but Conteygned in a litle roome, . . . [kings of England and Scotland] are twooe bodyes & as twooe Corporatyons."¹¹² On Walmesley's argument, a Scottish subject of James the man would not be a subject of James of England because, not being subject to English law, he

¹⁰⁹ W.P. Baildon (ed.), Hawarde, *Les Reportes del Cases in Camera Stellata 1593 to 1609* (1894), at pp. 349 to 354. This seems to be the fullest report of Walmesley's judgment, which is suppressed in Coke.

¹¹⁰ Scotsmen born before 1603 remained aliens in England (Baker, *op. cit.*, at p. 530).

¹¹¹ L.A. Knafla (ed.) *The Tracts of Lord Chancellor Ellesmere* ("The Speech of the Lord Chancellor of England, in the Eschequer Chamber, touching the Post-nati"), at p. 204. The more fundamental objection that the defendant would appear to have been aged two at the date of the report does not seem to have weighed heavily on the judges' minds (with the possible exception of Walmesley himself).

¹¹² at pp. 350, 352.

would not owe allegiance to the English corporation who occupied the English throne. Lord Ellesmere¹¹³ was pointed about Walmesley's dissent, playing on his name as a "doubting Thomas":¹¹⁴

The Apostle Thomas doubted of the Resurrection of our Saviour Jesus Christ, when all the rest of the Apostles did firmly beleieve it: But . . . this doubting confirmed, in the whole Church, the Faith of the Resurrection. The two worthie and learned Judges that have doubted in this Case, as they beare his Name, so I doubt not but that their doubting hath given occasion to cleare the doubt in others.

Viewed pragmatically, Walmesley's "solitary" dissent¹¹⁵ is intriguing. Perhaps it was an embittered gesture by an old man worn out by political battles and religious change. And yet – to cross a king, who no doubt took great interest in the proceedings, was no light undertaking. The argument has a technical air and possibly, just possibly, there is an impatience with the fiction involved: ". . . yf this demaundante beginne to purchase at twooe yeares of age [he said] . . . what he will do by that time he shall be 70 yeares olde"! Technical as Walmesley's position was, news of it made him almost legendary in Lancashire, where Flodden was fresh in the collective memory and the Scots were still seen as potential invaders. As Walmesley said, "To come ouer the wale to plucke an apple ys holden no greate offence, but to take orcharde, apples, appletrees & all, were not tollerable".¹¹⁶

Cases in the life of a practising lawyer are, by their nature, isolated dooms. To attempt to *impose* a consistency, particularly in view of the vastness of the material, would of course be wrong. As has been shown, it should however be possible to make certain valuable general points, centred on the consistency of Walmesley's approach. This is on the basis of what is known, or can be reasonably speculated, about his regional and ideological background. In addition, there were two vastly important cases, those of *Dr. Bonham* and the *Postnati*, the implications of which were felt generally, even in Walmesley's own day, far beyond the confines of Westminster. It is appropriate next, however, to look a little more closely at the religious question, which clearly underlies much of the surviving commentary on his life.

¹¹³ (1540-1617.)

¹¹⁴ Knafla, *op. cit.*, at p. 231ff. The other Thomas was Mr. Justice Thomas Foster.

¹¹⁵ See n. 114 above.

¹¹⁶ at 352.

THE RELIGIOUS QUESTION

Weaving an intriguing web around his law is Walmesley's religious adherence. This is not surprising because deeply adversarial Christian language and lurid controversialist imagery were the vocabulary of everyday life in the late sixteenth century. There are quotations from, or references to, 42 books of the Bible in Shakespeare's plays, for example. As has been seen, Lord Chancellor Ellesmere in *Calvin's Case* likened the doubting Walmesley to the doubting Thomas of the Gospels. Lord Burghley used a prophetic passage from the psalter to attack the Earl of Essex: "The bloodie and deceitfull men shall not live out half their dayes".¹¹⁷ Never far below the surface was the then bitter rivalry of Catholicism and the church by law established; the rivalry of adherents to the institutionalised reformed religion with "Popish" recusants. In Lancashire, as has been seen, the reformed religion had gained very little support by the beginning of Elizabeth's reign.¹¹⁸ In London and, in the face of legislative disability,¹¹⁹ the great recusant lawyer of the previous generation, Edmund Plowden,¹²⁰ had sacrificed permanent judicial office to an adherence to the old faith. What was the position of Mr. Justice Walmesley, the suspected Papist, twenty years later?

The answer must be, an ambiguous one. His name is generally absent from the venomous polemic of the State Trials of the 1580s and 1590s. This was not true of certain of his contemporaries, the intemperate Sir Edmund Anderson, Sir John Popham (both virulently anti-Catholic)¹²¹ and Sir Thomas Egerton (Lord Ellesmere), for example.¹²² There would at this stage appear to be only very tenuous evidence of a *caucus* of Catholic clients.¹²³ However, there were various attempts made to denounce Walmesley on religious grounds. The earliest, as shown above, was in 1574. In 1580, Mr. Justice Wyndham seems to have tried to head-off Walmesley's admission as a serjeant by writing to Lord Burghley,¹²⁴ suggesting that two of the names in Chief Justice Dyer's list of proposed serjeants, one of whom

¹¹⁷ Read, *Lord Burghley and Queen Elizabeth*, at p. 545.

¹¹⁸ Haigh, *op. cit.*, at p. 225.

¹¹⁹ G. de C. Parmiter, *Edmund Plowden, An Elizabethan Recusant Lawyer*, C.R.S. 1987.

¹²⁰ (1518-1585.)

¹²¹ Early in his career, Anderson was also a zealous persecutor of Puritan (*i.e.* Protestant) dissenters.

¹²² All involved in the prosecution of the Jesuit, Fr. Edmund Campion, in 1581.

¹²³ *Mildmay v. Standish* (1584) 1 Co. Rep. 175a; Cro. Eliz. 34; *Dolman v. The Bishop of Salisbury* (1583) Moore 120. The Standishes were a prominent Lancashire recusant family; *Mildmay v. Standish* is an action on the case for slander of title about a manor of Lacock Abbey in Wiltshire (see Coke's *New Booke of Entries* (1614), 30a.) *Dolman's Case* is intriguing (Strype, *Annals of the Reformation in England*, vol III, Part I, at p. 280 and see text of report).

¹²⁴ (1520-1598.)

was Walmesley, should be spared “ . . . in respect of suspicion of their religion”.¹²⁵ (In the British Library, there is a letter to Lord Burghley regarding the religious delinquencies of “Mr Wamslow”, who was “not thought a Protestant”, and his family.)¹²⁶ Much of the suspicion appears to have been drawn around him by his wife in Lancashire and, possibly, a brother in London.¹²⁷ It would at any time from about 1580 onwards, no doubt, have been quite common for the whole of a gentry family to practice the old faith while the head, a “church-Papist”, attended Anglican services, in order to avoid recusancy fines.¹²⁸ However, the recusancy of the families of *justices of the peace* was a perennial concern to the Privy Council; how did Walmesley, as a justice of the Common Pleas, avoid close scrutiny? On a personal level, how did he reconcile it with his conscience?

For a judge of Catholic leanings in Elizabeth’s reign,¹²⁹ this second question posed a problem on two levels at least. The first was the Oath of Supremacy. The second was the plethora of treason legislation introduced from 1581 which Walmesley, as a commissioner of assize, was charged with enforcing. An act of that year made it treason to attempt to reconcile the Queen’s subjects to Rome. It also introduced a £20 fine for “ . . . every person above the age of sixteen years which shall not repair to some church, chapel, or usual place of common prayer”. (This was designed to sweep up Catholic and Protestant dissenters alike.) The harshest piece of legislation of the period was an act of 1585 “ . . . against Jesuits, seminary priests and such other like disobedient persons”. The penalty for being a Catholic priest present in the realm and for receiving, relieving, comforting or maintaining him was, in each case, death. There were 123 executions under indictments on this statute between 1586 and 1603.¹³⁰

One such case was tried at the Dorchester Assizes in July 1594.¹³¹ Indicted was the Rev. John Cornelius, S.J., and a number of others. The commissioner of assize was Mr. Justice Walmesley. A disturbing scene took place. After passing sentence of death, the judge could not restrain his tears or praises for the prisoners’ piety. He seems to have delayed the execution,

¹²⁵ Quoted in Foss, *op. cit.*, at p. 698. The denunciation seems to have succeeded against the other.

¹²⁶ B.L. La. cxlv. 9.

¹²⁷ There are records of recusancy fines paid by Walmesley’s widow from 1614 onwards (Lancashire Record Office). Was the Walmesley of the Inns of Court called before the Bishop of London for suspicion of his religion, John Walmesley? Parmiter *Popish Recusancy, op. cit.*, at p. 23 gives his Christian name as “Robert”.

¹²⁸ A. Dures, *English Catholicism, 1558-1642*, at p. 28.

¹²⁹ Chief Justice Wray presided impartially and, in the circumstances, considerably at the trial of Edmund Campion, above.

¹³⁰ Dures, *op. cit.*, 30.

¹³¹ H. Foley, *Records of the English Province of the Society of Jesus (1878)*, “The Life of Father John Cornelius, Martyr”, vol iii, at pp. 435-474. Quoted in Brigg, *op. cit.*

promising the prisoners' lives if they would but conform and go to the Church. This was the culmination of a train of events which shows how this incident came about and gives good ground for "speculation on the identity of [Walmesley's] patrons".¹³²

Four years previously, Justices Walmesley and Clench at the Summer Assizes in, significantly, Lancaster, had been directed by the Queen to "... bestowe some good time with some extraordinary care ... concerning the proceedings against" recusants in the county. However, Mr. Serjeant Fleetwood had written to Lord Burghley, when it seemed that, instead of doing this, Walmesley had focused attention on *Protestant* recusancy. He seems to have punished even trivial acts as "high points of Martinism", whilst dealing leniently with Catholic recusants.¹³³ Walmesley had been removed from the Northern circuit, something in which the Houghton murder and his own family's recusancy must have played a part. This had not been the end of the matter, however. In Lent 1593, he had appeared on the Midland Circuit. This was at a time when the Earl of Shrewsbury had been denounced to Elizabeth for finding "... means to keep notable recusants from appearing at sessions and from being indicted at the assizes".¹³⁴ The only evidence that Walmesley was implicated in this seems to be a note on a *liber pacis* among the Burghley papers. This suggests that Burghley ensured his transfer from the Midland Circuit to the Western and Oxford, at the time of the denunciation of Shrewsbury, where Walmesley could be supervised by Chief Justice Anderson.¹³⁵

The Cornelius execution thus seems to have been the culmination of a process ensuring that Walmesley would have stepped out of line at his peril after 1593. There may have been no scope for him to resign. Even if he were to have done so, he may have been unwilling because of the peril to his family and landed estates. This is all speculation, however. Lord Burghley's map of Lancashire in 1590¹³⁶ does not show Dunkenhalth as a recusant house.¹³⁷ There seems little clear evidence for Gillow's assertion that Walmesley "died a Catholic".¹³⁸ The most likely explanation is that, as Gillow says, he "temporised to a considerable extent" but that he was eventually unprepared to make the sacrifices made by others. It is interesting that the only comment which the author has been able to unearth

¹³² Cockburn, *op. cit.*, at pp. 214-215, from which the following account is taken and where the train of events is discussed at length, with full reference to the manuscript sources.

¹³³ Collinson, *op. cit.*, at pp. 406-407.

¹³⁴ Cockburn, *op. cit.*, at p. 216, n. 3 (manuscript sources).

¹³⁵ Cockburn, *op. cit.*, at p. 217 (Hatf. MS. 278/1-2).

¹³⁶ J. Gillow (ed.), *Lord Burghley's Map of Lancashire in 1590*, C.R.S. 1907.

¹³⁷ These were usually marked with a cross.

¹³⁸ Gillow, *op. cit.*, at p. 26.

on Walmesley's views on Catholicism is his judgment in the *Postnati*, where he speaks, possibly for the benefit of his Star Chamber hearers, of the policy of England always having been “. . . to keepe straungers out, as the pope and his beneficed men . . .”. Could it even be that this is a reflection of the reality of Walmesley's view? If so (and it is very much speculation at this stage), his reported reaction in the Cornelius case would simply reflect an humanitarian distaste and nothing more. (“Religion” was a term used mainly for new ideas and action against Walmesley on religious grounds usually seems to have gone nowhere.)

CONCLUSION

Looking back over the pages of Walmesley's commonplace book,¹³⁹ a steward of the Walmesley family from a slightly later generation inscribed the words *in memoria aeterna erit justus*.¹⁴⁰ He noted that the judge's memory was “. . . pretious not onely to his owne kindred and relations, but to the whole country and kingdome”.¹⁴¹ He noted also that the judge's acquisition of land was the means by which he built up the wealth and prominence of his family. Details survive of a lavish funeral at Blackburn¹⁴² and a magnificent tomb in Blackburn Parish Church.¹⁴³ Then, virtually until 1971 or thereabouts, the waves of legal, though not local history, closed over the judge's head.

Much of what is known at this stage from likely sources is speculation. As Professor J.H. Baker, reinvestigating *Slade's Case* in 1971 wrote, “. . . an enormous mass of unpublished material stands in urgent need of detailed analysis and study, and when this has been done, a good deal of legal history as now written will require modification”.¹⁴⁴ Even as this article is being written, scholars are unearthing details which may involve significant adjustment of the facts of his life as they are now known or thought to be known. This is why legal history is vibrant and alive and the collective understanding moves forward, even as sources lie undisturbed.

¹³⁹ i.e. Commonplace B.

¹⁴⁰ From the Gradual of the Requiem Mass. (“The just shall be in everlasting remembrance”).

¹⁴¹ Commonplace B, p. 104.

¹⁴² Brigg, *op. cit.*, 79-81.

¹⁴³ Modelled on the Duchess of Somerset's in Westminster Abbey and unusually splendid (see Phillips and Smith, *Lancashire and Cheshire from A.D. 1540*, Longman, 1994, at p. 18, where comparatives are given). Its destruction (*q.v.*) is one of the slightly regrettable events of history, since it apparently depicted “. . . seaven pictures of Allabaster representing the life uppon seaven pedestalls . . .”.

¹⁴⁴ Baker, *op. cit.*, n. 8.

The aim of this paper has been to make a modest contribution to the process of investigation of a major figure in the Elizabethan judiciary. Tempting as it is to regard the subject as quaint and antiquarian (especially since he did not express himself in the way in which lawyers do today), this should be resisted. Although notes such as that about his alleged impoliteness to Sir Walter Raleigh's solicitor¹⁴⁵ are fascinating *per se*, what emerges from even such a brief study of his life as this, is the work of a pressurised life as a commercial lawyer,¹⁴⁶ dealing with a system of regulation in its own way as complex and nuanced as anything lawyers grapple with today. When he gave judgment in the *Postnati*, the reporter tells us, "... he argued Confydentelye and boldlye; he was well lyked and much Commended ..."¹⁴⁷ yet, if the speculation surrounding his religion and that of his family was correct,¹⁴⁸ much of his career must have been spent in grave peril. The complex legal issues with which he dealt cannot be isolated from the arbitrary violence of the age in which he lived. It is recorded that he regarded innovation as dangerous;¹⁴⁹ even this is useful however because his view of the law "as it appeared by the books" is that of a sophisticated and erudite legal mind. Here is not a Coke but here is neither a medieval mind. As he told the judges and peers assembled in the Star Chamber, "... he could tell them no newes, but some olde thinges wch. he had rede".¹⁵⁰

¹⁴⁵ Noted in Birks, *Gentlemen of the Law*, p. 109, (Camden Society vol. 99).

¹⁴⁶ Cases at *nisi prius* (i.e. on circuit) seem to have lasted about twenty minutes. The reports give the impression of many at least of the hearings in Westminster Hall being similarly swift.

¹⁴⁷ at 354.

¹⁴⁸ As to the doubts and inconsistencies in which see above.

¹⁴⁹ *Postnati*, at 353, "... all innouations are daungerous, & in all good gouernementes much Condemned".

¹⁵⁰ at 354.