The Trent Law Journal

Journal of the Department of Legal Studies
Volume 6 1982

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THE TRENT LAW JOURNAL

THE CASE-LAW OF ADMINISTRATIVE LAW

by D G T Williams*

In his inaugural lecture delivered at the University of London just over twenty-one years ago, the late Professor de Smith appeared to recognise a turning-point in attitudes to administrative law.(1) After noting that "the study of administrative law in England got off to a bad start." he then suggested that by 1960 "the occupation of an administrative lawyer is at least recognised as being a respectable one by those who understand what it means." Respectability, he feared, might have taken some of the fun out of the subject, and perhaps "radical spirits" might prefer "to attach themselves to more adventurous causes." True enough, some "radical spirits" did detach themselves from administrative law in the years after 1960, but the subject as a whole burgeoned - in case-law, in legislation, and in literature - far beyond what de Smith might have anticipated. Today one might write of our administrative law much as Professor Frank Newman wrote of administrative law in the United States in 1959:

"The literature of administrative law is monstrous, cavernous, gargoyloid, unconfined and vagrant. It comprehends most official adjudicating, most law making, most governing in general. Its raw material (including mountains of documentary material) bulk larger than those of any other "law subject". It includes practice and theory, report and speculation, diatribe and reform."(2)

Administrative lawyers, of course, should avoid delusions of grandeur. Their subject is large because it feeds, often arbitrarily, on countless other areas of law such as planning, social security, rating, contract, tort, corporations, labour, taxation, and much else. The so-called principles of administrative law, derived in the main from judicial rulings on the scope of and remedies available for judicial review of administrative action, are easier to expound than to apply. Indeed, exposition is sometimes all the easier because some of the well-known principles are much more than merely lawyer's law. "That no man is to be judged unheard," noted de Smith, "was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature,

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asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden."(3)

Nor is the right to be heard unique in its general acceptance. The concept of "improper purpose" or "ulterior motive" is frequently raised, both in specialised areas of law (such as company law) and in ordinary political assessments. A few examples will suffice. In 1961 a leading article in **The Times** referred to the T.U.C.'s offer of a £50,000 loan to the Belgian Federation of Labour, the transfer of which needed Treasury approval. The Chancellor of the Exchequer, it was urged, should apply the ordinary standards of the Exchange Control Act and approve the transfer; for, despite the political and diplomatic implications, "it is a good principle of administration as of law to exercise controls strictly in relation to matters to which they are intended to apply..."(4) **The Times** adhered to the same view in 1977 over the issue of blacklisting and wage restraint: it was claimed in a leading article that it is "contrary to constitutional practice to use legislation with restricted economic purposes for quite other ends... There are serious dangers in combing through the statute book to find laws that can be pressed into action for purposes quite undreamt of by those who conceived them."(5) And, to take an example not without contemporary interest, Mr Macmillan (as Prime Minister in 1962) was asked to set up an inquiry into the circumstances in which Guy Burgess and Donald MacLean were in 1957 and 1956 respectively - designated as non-resident British subjects. He refused, adding that the "only question ... is whether machinery which is intended to maintain the strength of sterling should be used for another purpose, namely to punish men of whom we do not approve."(6)

Amid all the technicalities of judicial review of administrative action, based principally as it is on the doctrine of ultra vires, the courts of law are often in effect struggling to apply principles of universal acceptability. The man on the Clapham omnibus would presumably agree that no man should be judged unheard, or that issues should not be prejudged, or that those who decide should act fairly, or that discretionary powers should be unfettered in their exercise, or that the ambit of powers should be reasonably assessed. So would central and local officials, the chairmen and members of administrative tribunals, inspectors at public local inquiries, the Parliamentary Commissioner for Administration, Ministers of the Crown, politicians in Parliament and in local authorities, and indeed many people involved in private decision-making in companies, clubs and every variety of group or association. They would also concede, on reflection, that the real difficulties arise when agreed principles have to be applied in particular circumstances.

The cases which come before the courts represent only a tiny proportion of these difficulties. It goes without saying that administrative law is much wider than the law administered in the courts, where the cases - for reasons of cost alone - arise only through the accidents of litigation. With all the accidents and arbitrariness of litigation, however, it is right that the study of administrative law should concentrate chiefly on judicial decisions: for it is through an analysis of judicial decisions, argued in public and resulting in reasoned judgments, that the lawyer or the prospective lawyer is able to appreciate the wide gulf between the statements of general principles and the application of general principles. Administrative law is nothing if not a study of variables; and the administrative lawyer has to indulge in a juggling exercise in seeking either to interpret what has gone on in the past or to predict what may happen in the future. Few cases can be accepted at face value, and every law report in the area of administrative law ought to carry a warning that the case may, if inadequately assessed, be dangerous to your client.

In the first place, in looking at an administrative law case, there is the statutory context; and the process of statutory interpretation demands both technical skill and a sensitivity to the wider implications of the statute in question. Many cases on judicial review are, without needing to bring in marginal issues of natural justice or abuse of discretion, straightforward instances of statutory interpretation, but they require use of common law presumptions (in favour of rights of property or personal freedom or access to the courts)(7) together with a readiness to adapt to new conditions and legislative intentions.(8) The courts were severely criticised in the inter-war years for their over-literal approach to such legislation as the Housing Acts,(9) but in recent decades there is a more balanced attitude - extending to the so-called "purposive" approach described by Lord Diplock and enthusiastically adopted by Lord Denning.(10)

The application of special facets of the ultra vires doctrine, such as abuse of discretion and natural justice, likewise depends on the statutory context. In a 1972 case, for instance, the Court of Appeal rejected a simple application of the rules on abuse of discretion set out in **Associated Provincial Picture Houses Ltd** v **Wednesbury Corporation**(11) to circumstances where a local authority had referred 22 agreements on property to a Rent Tribunal for consideration. Salmon L.J. observed that "the object of the legislation in giving the local authority the power to refer the tenancy agreements to the rent tribunal was clearly conferred so as to take care of cases in which

tenants, perhaps of working-class dwellings, were not in a position to look after themselves, or were afraid of making a reference to the tribunal;" and Edmund-Davies L.J. - noting the local authority's limited power to obtain information explained that it would be wrong if their bona fide reference could be impeached "simply by pointing out that they appeared to have taken into consideration a factor which was not properly relevant, or that they had omitted to take into consideration every relevant factor."(12) In a 1977 case involving a challenge to a deportation order made against Mark Hosenball, the Court of Appeal held that the rules of natural justice were liable to be modified where national security was involved; and Lord Denning stressed that under the Immigration Act 1971 it was the Home Secretary rather than the courts who was entrusted with balancing the interests of national security on the one hand and the freedom of the individual on the other.(13)

Not infrequently the courts have to consider several facets of the ultra vires rule in a single statutory context, and the process of statutory interpretation can be especially demanding. Recently the Court of Appeal of New Zealand, in a case arising under the National Development Act 1979, had to consider inter alia submissions based on the right to be heard, prejudgment, procedural requirements, "Crown privilege", abuse of discretion, and misdirection in law.(14) The careful judgments of the Court of Appeal are of unusual value in demonstrating the need to consider the statutory context before seeking to invoke otherwise well-understood principles of judicial review. What was at stake was the validity of an Order in Council applying the National Development Act to an aluminium smelter and associated works proposed at Aramoana by South Pacific Aluminium Ltd and the Otago Harbour Board. As to allegations of breach of natural justice, the appellate judges stressed that the rights of objection under planning legislation "are as broad and as narrow as the statute that confers them", (McMullin J.), that "a streamlining of procedures is the very purpose of the National Development Act" (Cooke J.), and in the words of Richardson J. - that the Act is unique: "There is no similar legislation in New Zealand. So far as counsel's researches have extended it seems that there is no parallel or even broadly similar legislation in other countries. Thus there are no immediate analogies with the situations in the present case and little assistance is to be gained from traversing the facts and reasoning in other cases."(15)

A second factor in administrative law cases, closely allied to that of the statutory context, is the institutional context. The manner in which the courts apply the ultra vires rule is inevitably influenced by

the nature of the body or official whose actions are challenged. One of the arguments pressed in the New Zealand case was that of failing to take into account relevant considerations: the plaintiffs raised the **Wednesbury** principle, the judges agreed that the **Wednesbury** principle was applicable, but they saw difficulty in its "practical application" to decisions of the Executive Council in the same way in which it would apply to other administrative bodies.(16) At a broad level in administrative law one is often aware of apparent differences in approach to central as opposed to local authorities with the doctrine of ministerial responsibility as a justification for judicial restraint operating more effectively at central level than the equivalent justification at local level of the principle expressed in **Kruse v. Johnson** (namely, that the actions of democratically elected local bodies should be benevolently interpreted).(17) The courts from time to time exercise judicial restraint because of the special expertise or high standing of a particular body; and the principles of judicial review are necessarily adapted for bodies such as tribunals created to exercise adjudicative powers.(18)

An interesting example of the institutional aspects of a decision is to be found in the recent case of **R v. Secretary of State for the Environment, ex p. Powis.**(19) A local council sought to recover possession of land previously rented to the applicant, a car breaker and scrap metal dealer, under the Landlord and Tenant Act 1954; and the Secretary of State issued a certificate in their favour. In seeking judicial review of the Secretary of State's certificate, the applicant contended inter alia that there was no evidence put forward by the council to justify the claim that the land was "requisite" for the purposes of the authority. The applicant cited a well-known statement by Lord Denning in **Coleen Properties Ltd v. Minister of Housing and Local Government,**(20) in a case where there had been a public local inquiry and the inspector had reported to the Minister. In the **Powis** case, however, as Dunn L.J. pointed out in the Court of Appeal, there had been no inquiry or hearing and the applicant had to proceed perforce by written representations. "The nature of the material on which a minister is entitled to rely in reaching a decision," his Lordship said, "must depend on the statutory provisions and the circumstances of each case. It may well be that where there is a public hearing the minister should not rely on bare assertions unsupported by evidence. But where as here there was no public hearing, the minister must assess the submissions and reach his conclusion as best he can on the material put before him."(21) The case would seem to confirm Professor Wade's doubts about being able to fit allegations of 'no evidence' into the regular categories of judicial review;(22) and it is also a reminder of the varying statutory and

institutional factors in the case-law.

A third background factor in the cases is the chronological context: in other words, the mood and circumstances of the period in which a case is decided. There are entire lines of cases which are understood properly only against some degree of knowledge of the political or social or economic background. These would include some of the earlier cases on private clubs and other voluntary bodies, where in one case in which natural justice had been denied the Master of the Rolls expressed his astonishment "than any body of English gentlemen, who, if they are supposed to be distinguished for one thing more than another, are generally distinguished for their good common sense, should imagine that any other inquiry was intended";(23) they would include many of the byelaw cases of the late nineteenth century and early twentieth century, including cases where under review were byelaws directed against musical and other activities of the Salvation Army (which could be interpreted either as decisions on public order or early litigation on the subject of noise pollution)(24) or, in a different sphere, concerned with the cleanliness duties of landlords or requirements of ventiliation imposed in the interests of public health;(25) and they include more familiar lines of cases concerned with slum clearance and similar developments in the inter-war years, cases concerned with post-war reconstruction, or - much more recently - cases concerned with efforts by central government to impose financial constraints on local authorities.(26)

Individual cases can in themselves represent a much wider and more controversial background than detached legal judgments would suggest. Take for instance, the well-known decision of Sargant J. in **Attorney-General v. Fulham Corporation,**(27) where the local authority was denied power under the nineteenth-century Baths and Wash-houses Acts to run a public laundry. Apart from the quaint references in the judgment to such instruments as "hydro-extractors" (his Lordship preferred "wringers"), the case gives one little sense of the immense social importance of the old wash-houses. Yet, as late as 1960, **The Times** could inform us that those "cheery, steam-laden resorts of industrious womanhood, Liverpool's public wash-houses, have become in Corporation documentation, "public laundries"," pointing out that public wash-houses in Liverpool had a history of 130 years since Kitty Wilkinson opened the first one there in the interests of public health. Apparently the wash-houses had acquired an astonishing protocol over the years, with religious differences strictly observed, booking systems applied (in order to avoid terrifying fights for particular stalls), and all sorts of conventions and rules.(28) Just as the

Fulham Corporation case can be best understood with some appreciation of such a general background, so one has to take into account the specific background of other cases. **Roberts** v. **Hopwood,**(29) for instance, is but one incident, albeit the best-known, of the struggles over so-called Poplarism in the poorer parts of the East End after the First World War;(30) **Urban Housing Company** v. **Oxford Corporation,**(31) concerning the famous Cutteslowe Walls erected between a private housing estate and a council estate in North Oxford (walls which the Corporation sought to remove as the Master of the Rolls put it by "a judicious combination of the provisions of the Private Street Works Act 1882 and the city's steamroller"), was but an early battle in a dispute which lingered on until 1959;(32) **Franklin** v. **Minister of Town and Country Planning**(33) reflects the strains imposed by the post-war New Towns movement;(34) **Ridge** v. **Baldwin**(35) arose out of one of several incidents in the late 1950s which, in the words of the Royal Commission of 1962, "touched an important aspect of police activities and engendered misgivings about the state of the police;"(36) **Webb** v. **Minister of Housing and Local Government,**(37) concerned inter alia with alleged abuse of discretion in the erection of coastal protection works, was one incident only in a complex series of events in Bognor Regis;(38) and **Bushell** v. **Secretary of State for the Environment,**(39) a challenge on grounds of natural justice to a motorway authorisation, arose in the context of what Lord Denning in the Court of Appeal described as "a deplorable loss of confidence" in motorway inquiries during the new environmental mood of the 1970s.(40)

Other factors to be considered in judicial review include the arbitrariness or unpredictability of the inclination to litigate. This is not simply a matter of cost: it may also be a matter of choice (where citizens, for instance, prefer to use political or other non-legal remedies) or a matter of coming round belatedly to the possibility of litigation. In the area of administrative tribunals, supplementary benefit appeal tribunals were for several years (after the legislation of 1966) subject to no appeal and at the same time effectively free from judicial review. Then, amid growing controversy, challenges for error of law on the face of the record began; the courts responded with caution, lest they be accused of usurpation; and finally SBATs were made subject to an elaborate system of appeal, initially to the social security commissioners and thence to the Court of Appeal and the House of Lords.(41) The period of judicial review was merely an interlude, but that it occurred at all was attributable to the initiative of particular individuals: and some individuals have shown remarkable pertinacity either in pursuing one dispute or in raising a variety of disputes in

the courts. The famous case of **Local Government Board** v. **Arlidge**(42) was not the first or the last venture by William Arlidge of 83 Palmerston Road. Some years earlier, in a case involving Islington Corporation, he had successfully challenged a byelaw which imposed cleanliness duties on landlords on grounds of unreasonableness, with counsel for Islington in pre-gentrification days arguing that a byelaw as to houses let as lodgings "which may be reasonable in Islington may be unreasonable in Mayfair."(43) Then, represented by the same King's Counsel, Alexander Macmorran (who was himself a Fellow of the Sanitary Institute and a Fellow of the Institute of Hygiene), he took on Hampstead over the issue of designating a house as unfit for human habitation; and this time he lost, though in the process he achieved immortality in the annals of administrative law. The battle with Hampstead rumbled on, however, and in 1917 a Hampstead borough councillor sympathetic to Arlidge's cause sought mandamus to compel the council to permit him to inspect certain documents. He lost again; and it is perhaps significant that Alexander Macmorran now appeared on the other side.(44) It would be misleading to compare the persistence of someone like William Arlidge with the much more varied and sometimes imaginative efforts of the late Ross McWhirter(45) and, of course, of Raymond Blackburn;(46) though a judge in South Australia did suggest some years ago that a litigant alleged to have carried on a "one-man crusade against Adelaide City Council" was perhaps seeking "to emulate the formidable and swashbuckling efforts of Mr Blackburn in England."(47) Crusaders or not, individual litigants can produce the unexpected case, not least because they are often prepared to tread where others fear to tread.

All these background factors in administrative law cases serve to isolate individual cases or lines of cases. Precedent is only sporadically important, and binding precedent is rare. Nevertheless, the individual disputes and the manner in which they are resolved are important, both because they illustrate the problems of administration on a case-by-case basis and because cumulatively they enable the courts to enunicate principles or guidelines within the compass of judicial review. The judges, aware of the difficulty of citing precedents in the ordinary way, tend to rely not so much on the ratio of a previous decision as on an appropriate dictum from a previous case enunicating particular principles as the starting-point for their analysis of problems, so much so that one could describe judicial review of administrative law as pre-eminently an area of dictum rather than precedent. Leading dicta are taken from such cases as **Howard** v. **Bodington** (on procedural requirements);(48) **Kruse** v. **Johnson** (on byelaws and the "benevolent interpretation" rule);(49) **Board of Education** v. **Rice** (on the duty to

act fairly);(50) R v. **Port of London Authority, ex p. Kynoch** (on rules of policy);(51) **Ayr Habour Trustees** v. **Oswald** (on contracts and statutory discretion);(52) **Attorney-General** v. **Great Eastern Railway** (on the "reasonably incidental" rule);(53) R v. **Commissioners for Special Purposes of the Income Tax** (on "jurisdictional facts");(54) R v. **Electricity Commissioners** (on the meaning of "judicial");(55) **Russell** v. **Duke of Norfolk** (on the variability of the audi alteram partem rule);(56) and, above all, **Associated Provincial Picture Houses Ltd** v. **Wednesbury Corporation** (on abuse of discretion).(57)

The **Wednesbury** dictum is a remarkable phenomenon in administrative law. In the aluminium smelter works case in New Zealand, to which I have already referred, one of the challenges was based on alleged failure to take into account relevant considerations. Cooke J. paused in his judgment to say: "A point about the legal principle invoked by the plaintiffs should be underlined. It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene M.R. in **Associated Provincial Picture Houses Ltd** v. **Wednesbury Corporation...**"(58) Indeed, **Wednesbury** is also widely cited for taking into account irrelevant considerations, acting unreasonably, bad faith, and other features of the ultra vires rule applied to discretionary power. In recent cases alone Lord Greene's words have been described, with varying emphasis, as most "relevant" as a "guide",(59) as setting out "the well-established principles",(60) as appearing in "the best-known case",(61) as "the familiar test",(62) and at least twice as "the classic judgment".(63) In fact, the **Wednesbury** case itself was concerned only with the validity of conditions attached to a cinematograph licence, Lord Greene's judgment was unreserved (so much so that, at one point, he referred to bad faith, dishonesty, unreasonableness, attention given to extraneous circumstances, disregard of public policy, "and things like that"), and the words he used were wide enough to provide an "umbrella" (the metaphor adopted judicially)(64) which, opened up, protects the administration but which on occasion may be folded to lessen protection against the elements. That the **Wednesbury** umbrella is poised to open was implicitly accepted by Lord Greene himself, when he commented that the case before him did "not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something prima facie within the powers of the executive authority..."(65)

One should not quarrel with a presumption in favour of the administration, bearing in mind that the courts are exercising powers of review rather than appeal. What should be recognised, however, is that the

judges rely on many hallowed statements of principle such as that provided by Lord Greene in the **Wednesbury** case and that these statements, while appearing to give a measure of consistency through frequency of citation, are in truth employed to allow the judges considerable flexibility on a case-by-case basis.

Flexibility of approach, of course, is often desirable in administrative law. The injection in the early 1950s of the concept of error of law on the face of the record into the control of administrative tribunals(66) was, as de Smith points out, "a new application of a long-established principle,"(67) but it was an innovation all the same and an important stimulus to providing a statutory right of appeal from many tribunals. In a less-publicised area of flexibility, that relating to planning conditions and caravan site licences, the courts found it convenient to bring into play the familiar tests of unreasonableness, uncertainty and repugnancy which had been refined over many years for byelaws but had fallen from public view as challenges to byelaws (at least in this country) had become fewer and fewer.(68) The byelaw analogy was evidently regarded as valuable in justifying an extension of judicial review; and, once the extension had been achieved, the analogy could be forgotten. Another well-known area where flexibility is doubtless inevitable arises over express procedural requirements and the distinction between mandatory and directory provisions. There are so many factors which can influence the decisions that de Smith could describe the law on procedural requirements as "an inextricable tangle of loose ends;"(69) and the guidelines, such as they are, offered in dicta from such cases as **Howard** v. **Bodington**(70) are very general in nature.

Nevertheless, flexibility can be overdone, even if one accepts that precedent as normally understood has little part to play in decisions on judicial review. There are lessons to be gleaned from previous cases and there is a need in judicial decisions for greater particularity than that sometimes offered by the mere recitation of broad dicta. Obviously particularisation can make it more difficult to reconcile one case with another, but such reconciliation is unlikely in any event when one bears in mind the statutory, institutional and chronological context of each decision. The judges deserve our sympathy when, in an application for judicial review, they may be faced with several grounds of challenge, some of which may obviously lack merit. In such circumstances the citation of well-known dicta here and there may be a polite and shorthand way of disposing of unmeritorious claims. Arguments of some substance, however, ought to be met with reasons appropriate

for the case in question. Such reasons ought not to be looked upon as hostages to fortune exposing the courts to allegations of inconsistency but rather as attempts to explain a process of statutory interpretation in a particular context.

The task of administrative lawyers - whether as students or as academic teachers or as practitioners - is to monitor the judicial approach and the evolving patterns of judicial review. Indeed it is a tribute to the greater sophistication of legal writing on administrative law in recent years reflected especially in the works of Professor de Smith and Professor Wade - that many judgments in the courts are nowadays much fuller and properly hedged with qualifications and exceptions appropriate for the context. The statement of general principles is still important, for the courts have to start somewhere, and well-known dicta are doubtless helpful - provided they are employed as a prelude to analysis rather than as a substitute for analysis. Even the principles themselves may change as case after case demonstrates how difficult they are to apply - a notable example being the area of estoppel in statutory discretion(71) - and we are perhaps a long way from being able to formulate a list of heads of judicial review appropriate for legislative codification. Moreover, administrative law is constantly having to be adapted to take account of changes in administration and administrative practice. As long ago as 1927 Felix Frankfurter, then a professor at Harvard Law School, wrote:

"In administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalization unnourished by the realities of "law in action" ..."Judicial review" is not a conception of well-defined scope operative wherever the courts review the action of administrative bodies... Therefore, a subject like "judicial review", in any scientific development of administrative law, must be studied not only horizontally, but vertically, e.g., "judicial review" of Federal Trade Commission orders, "judicial review" of postal fraud orders, "judicial review" of deportation warrants."(72)

The case-law in administrative law is often easier to understand and appreciate, even where one disagrees with the results in particular decisions, when one bears in mind the interaction of the horizontal approach, meaning the statements of general principles, and the vertical approach, meaning the application of those principles in specific contexts. I was reminded of Frankfurter's words when Lord Diplock, in the Rossminster decision, referred to the famous war-time

case of **Liversidge** v. **Anderson**(73) where the House of Lords by a majority interpreted the words "reasonable cause" (in the context of detaining persons of alleged hostile associations) subjectively rather than objectively. Most law students over the past forty years have responded to the eloquence of Lord Atkin's dissent in **Liversidge** v. **Anderson**, with its criticisms on his fellow judges ("who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive")(74) and with its strictures directed against the Attorney-General ("arguments which might have been addressed acceptably to the Court of King's Bench in the times of Charles I")(75) so severe that Viscount Maugham, the senior judge in the majority, wrote to **The Times** to dissociate himself from such a statement.(76) In **Rossminster**(77) Lord Diplock suggested that the time had come "to acknowledge openly that the majority of this House in **Liversidge** v. **Anderson** were expediently and at that time, perhaps, excusably wrong and the dissenting speech of Lord Atkin was right."(78)

However, to say that the majority were "expediently" and "excusably" wrong could be interpreted as meaning that they were right in the context and circumstances of the case, even if the only genuine authority for their interpretation might - as Lord Atkin suggested come from **Alice Through the Looking Glass**, ch. 6. A re-reading of the judgments of Viscount Maugham, Lord Wright, Lord Macmillan and Lord Romer indicates that it may be unfair to take a retrospective and one-sided view of their approach. Lord Wright, for instance, declined to accept that "reasonable cause" is a term of art to be applied irrespective of the context; he recognised that they were dealing with extraordinary, emergency powers; and he emphasised the Home Secretary's political accountability to Parliament. In a powerful passage Lord Macmillan pointed out that for reasons of the public interest the Home Secretary would frequently be unable to disclose the facts and reasons behind his decision and that it would be absurd to infer from failure to disclose information that the detention was unlawful; and his Lordship added that elaborate provision was made in the regulations for safe-guarding a detained person's interests through extra-legal mechanisms. The more one reads the majority judgments, the more one suspects that on 3rd November 1941 - as opposed to 3rd November 1981 - their decision was right. It is not simply a question of bending over backwards in the name of national security; it is rather that, when all allowance has been made for general principles and the previous interpretations of the words "reasonable cause", the case was properly considered in its statutory context of emergency regulations, in its

institutional context of Ministers' powers and political accountability, and in its chronological context of one of the bleakest periods of the Second World War. In addition, the careful and extensive reasoning in all the judgments, combined with the public attention which the case attracted, is impressive in retrospect, illustrating in a vivid way the unique importance of administrative law in exposing the complexities of administrative action.

(1) **The Lawyers and the Constitution.** An Inaugural Lecture (delivered on 10 May 1960) by S.A. de Smith.

(2) Frank C. Newman, "The Literature of Administrative Law and the New Davis Treatise" (1959) 43 Minn. L.R. 637, 638.

(3) S.A. de Smith, Judicial Review of Administrative Action (4th Edn. 1980), at 157-58.

(4) **The Times,** 7 January 1961, at p. 7.

(5) **The Times,** 23 September 1977, at p. 13.

(6) HC, Vol. 659, cc. 1145-46, 15 May 1962.

(7) See Willis, "Statutory Interpretation in a Nutshell" (1938) 16 Can. B.R. 1, 20-23.

(8) See Lord Evershed, "The Impact of Statute on the Law of England" (1956) XLII, Proceedings of the British Academy 247, 263.

(9) See Jennings, "Courts and Administrative Law The Experience of English Housing Legislation" (1936) 49 Harv. L.R. 426; Llewelfryn Davis, "The Interpretation of Statutes in the Light of their Policy by the English Courts" (1935) 35 Columbia LR 519.

(10) See Lord Denning, **The Discipline of Law** (1979) at ch. 2.

(11) (1948) 1 K.B. 223, CA.

(12) **R v Barnet and Camden Rent Tribunal, ex p. Frey Investments Ltd** (1972) 1 All E.R. 1185, 1187, 1194, CA.

(13) **R v Secretary of State for the Home Department, ex p. Hosenball** (1977) 3 All E.R. 452, CA.

(14) **Coalition for Rational Economic and Environmental Development in New Zealand (CREEDNZ) Inc. v Governor-General** (1981) 1 NZLR 172. See also, **Environmental Defence Society Inc v South Pacific Aluminium Board,** (1981) 1 NZLR 146 (also for No. 2 at 153 and No. 3 at 216).

(15) (1981) 1 NZLR at 206, 177, 187, respectively.

(16) See Richardson J. at 197-98. The **Wednesbury** principle, of course, was that stated by Lord Greene MR in **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** (1948) 1 KB 223, 228.

(17) See generally, Williams, "The Control of Local Authorities" in **Welsh Studies in Public Law** (ed. J.A. Andrews, 1970), ch. 8, esp. at 126 ff. See **Kruse v Johnson** (1898) 2 QB 91.

(18) See generally, Williams, "Judicial Restraint and Judicial Review: the Role of the Courts in Welfare Law" in **Welfare Law and Policy** (ed. Partington and Jowell, 1979), esp. at 108 ff.

(19) (1981) 1 All E.R. 788.

(20) (1971) 1 All E.R. 1049, 1053.

(21) (1981) 1 All E.R. at 796, 797.

(22) H.W.R. Wade, **Administrative Law** (4th Edn. 1977), at 275.

(23) **Labouchere** v **Earl of Wharncliffe** (1879) 13 Ch. D. 346, 350.

(24) See e.g., **R** v **Powell** (1884) 51 L.T. (n.s.) 92; **Munro** v **Watson** (1887) 57 L.T. (n.s.) 366 (see also, **The Times**, 24 August 1885, p. 5); **Johnson** v **Mayor etc. of Croydon** (1886) 16 Q.B.D. 708; **Slee** v **Meadows** (1911) 75 J.B. 246; and presumably **Kruse** v **Johnson** (1898) 2 Q.B. 91. See also **The Times**, 15 December 1885, p. 10 (Home Office considers proposed byelaws in Colchester) and **The Times**, 8 October 1886, p. 9 (case under Torquay byelaws).

(25) See e.g. **Repton School Governors** v **Repton** R.D.C. (1918) 2 K.B. 133; **Stiles** v **Galinski** (1904) 1 K.B. 615; **Arlidge** v **Islington Corporation** (1909) 2 K.B. 127; **Nokes** v **Corp. of Islington** (1904) 2 K.B. 610; **Attorney-General** v **Denby** (1925) Ch. 596.

(26) See e.g. **Errington** v **Minister of Health** (1935) 1 K.B. 249; **Robinson** v **Minister of Town and Country Planning** (1947) K.B. 702; **R** v **Secretary of State for the Environment, ex p. Brent LBC** (1982) 2 WLR 693.

(27) (1921) 1 Ch. 440.

(28) **The Times**, 28 December 1960, p. 6.

(29) (1925) A.C. 578.

(30) See B. Keith-Lucas, "Poplarism" (1962) Public Law 52; G.W. Jones, "Herbert Morrison and Poplarism" (1973) **Public Law** 11 ; Noreen Branson, **Poplarism, 1919-1925. George Lansbury and the Councillors' Revolt** (1979).

(31) (1940) Ch. 70.

(32) See R.F.V. Heuston, **Essays in Constitutional Law** (2nd Edn. 1964), at 186-88; Peter Collison, **The Cutteslowe Walls. A Study in Social Class (1963)**.

(33) (1948) A.C. 87.

(34) See Frank Schaffer, **The New Town Story** (1970), esp. ch. 4; Harold Orlans, **Stevenage: A Sociological Study of a New Town** (1962).

(35) (1964) A.C. 40.

(36) Report of the Royal Commission on the Police. Cmnd. 1728 of 1962, paras. 9-12.

(37) (1965) 2 All E.R. 193.

(38) See the Report of the Bognor Regis Inquiry (conducted by J. Ramsay Willis Q.C.), H.M.S.O. 1965.

(39) (1980) 3 W.L.R. 22.

(40) See Williams, "Public Local Inquiries - Formal Administrative Adjudication" (1980) I.C.L.Q. 701; John Tyme, **Motorways versus Democracy** (1978).

(41) See Williams, note 15 supra; Social Security Act 1980.

(42) (1915) A.C. 120. On the **Arlidge** litigation, see H.C. Vol xxxiv, c 1790 (written), 1 March 1912; Vol. xxviii, c 678, 17 July 1911; Vol. xxxii, c 2835, 16 December 1911; Vol xxix, c 568-69, 3 August 1911; vol. xliv, c 1296-97 (written), 27 November 1912. On latter activities of Alexander Macmorran KC, see **Noreen Branson**, note 30 supra, at 36-37, 39-40, 43, 98-9. See also the comment of Professor J.H. Morgan in introduction to **Gleeson E. Robinson, Public Authorities and Legal** Liability (1925) at v.

(43) Arlidge v **Islington Corporation** (1909) 2 K.B. 127 This was a variant on the contrast drawn in **Sturges** v **Bridgman** (1879) 11 Ch. D. 852 between Belgrave Square and Bermondsey.

(44) R v **Hampstead B.C.**, ex p. **Woodward** (1917) 116 L.T. 213. See also, **Arlidge** v **Tottenham** UDC (1922) 2 K.B. 719.

(45) See e.g. **A-G (ex rel. McWhirter)** v **Independent Broadcasting Authority** (1973) Q.B. 629; **McWhirter** v **Attorney-General** (1972) C.M.L.R. 882; R v **Home Secretary, ex** p. **McWhirter**, Times L.R. for 20 October 1969.

(46) See e.g., R v **Metropolitan Police Commissioner**, ex p. **Blackburn** (No. 1) (1968) 2 Q.B. 118; (No. 3) (1973) Q.B. 241; also **The Times** law report for 6 March 1980; **Blackburn** v **A-G** (1971) 1 WLR 1037. See Raymond Blackburn, **The Erosion of Freedom** (1964).

(47) **Willing** v **Hollobone (No. 2)** (1975) 11 S.A.S.R. 118.

(48) (1877) 2 P.D. 203, 211.

(49) (1898) 2 Q.B. 91, 99.

(50) (1911) A.C. 179, 182.

(51) (1919) 1 K.B. 176, 184.

(52) (1883) 8 App. Cas. 623, 634.

(53) (1880) 5 App. Cas. 473, 478.

(54) (1888) 21 Q.B.D. 313, 319.

(55) (1924) 1 K.B. 171, 204-05.

(56) (1949) 1 All E.R. 109, 118.

(57) (1948) 1 K.B. 223, 230.

(58) **CREEDNZ** v **Governor-General of New Zealand**, supra, note 14, at 182.

(59) **R** v **Post Office, ex p. ASTMS** (1981) 1 All E.R. 139, 142.

(60) **R** v **Secretary of State for the Environment, ex p. Powis** (1981) 1 All E.R. 788, 791.

(61) **R** v **Bristol City Council, ex p. Brown** (1979) 3 All E.R. 344, 352.

(62) **Henry Moss of London Ltd.** v **Customs and Excise Commissioners** (1981) 2 All E.R. 86, 90.

(63) **UKAPE** v **ACAS** (1980) 1 All E.R. 612, 620; **A-G** v **Ryan** (1980) 2 W.L.R. 143, 154, P.C. See also, for recent citations: **Newbury D.C.** v **Secretary of State for the Environment** (1980) 1 All E.R. 731, 746, 754-55, 761; **Rootkin** v **Kent County Council** (1981) 2 All E.R. 227, 234, **R** v **Crown Court at St. Albans, ex p. Cinnamond** (1981) 1 All E.R. 802, 805; **R** v **Slough B.C., ex p. London Borough of Ealing** (1981) 1 All E.R. 601, 610; **A-G (ex rel Tilley)** v **London Borough of Wandsworth** (1981) 1 All E.R. 1162, 1167-68, **R** v **Clerk of Lancs. Police Committee, ex p. Hook (1980)** 2 All E.R. 353, 366; **Cinnamond** v **British Airports Authority** (1980) 2 All E.R. 368, 372; **R** v **Commission for Racial Equality, ex p. London Borough of Hillingdon** (1981) 1 NLJ, 656; **Jim Harris Ltd** v **Minister of Energy** (1980) 2 N.Z.L.R. 294; **Bromley LBC** v **GLC** (1982) 2 All E.R. 129, 135, 170; **Norwich CC** v **Secretary of State for the Environment**(1982) 1 All E.R. 737, 749; and **R** v **Secretary of State for the Environment, ex p. Brent LBC** (1982) 2 W.L.R. 693. See generally, de Smith (4th edn) at 352-54.

(64) **Fawcett Properties Ltd** v **Buckingham County Council** (1959) 1 Ch. 534, C.A. (judgment of Romer L.J.) and (1961) A.C. 636.

(65) (1948) 1 KB at 231.

(66) **R** v **Northumberland Corporation Appeal Tribunal ex p. Shaw** (1952) 1 K.B. 338.

(67) **Judicial Review of Administrative Action** (4th edn. 1980) at 400.

(68) **Ibid.**, at 295-96. See especially the judgment of Diplock L.J. in **Mixnam's Properties Ltd. v. Chertsey U.D.C.** (1963) 2 All E.R. 787, 797 ff., a decision of the Court of Appeal later heard on appeal in (1965) A.C. 735.

(69) **Judicial Review of Administrative Action** (4th edn., 1980) at 142.

(70) (1877) 2 P.D. 203, 210-11.

(71) See de Smith, at 100-05.

(72) "The Task of Administrative Law", originally published in (1927) 75 Univ. of Pa. L.R. 614, reprinted in Law and Politics (Occasional Papers of Felix Frankfurter 1912-1938) (1939) at 231, 236.

(73) (1942) A.C. 206, referred to in **Inland Revenue Commissioners** v. **Rossminster Ltd** (1980) A.C. 952. On **Liversidge** v. **Anderson** see R.F.V. Heuston, "**Liversidge** v. **Anderson** in Retrospect" (1970) 86 L.Q.R. 33 (see also, (1971) 87 L.Q.R. at 161-66 for two "footnotes").

(74) (1942) A.C. at 244.

(75) Ibid.

(76) See R.F.V. Heuston, (1970) 86 LQR at 53-54.

(77) (1980) A.C. 952.

(78) (1980) A.C. at 1011.

LAW REFORM: THE CONSULTATION PROCESS by Dr P M North*

It is said that "law reform is only by consent or not at all". When Lord Campbell first made that statement and certainly when Lord Hailsham reiterated it,(1) I am sure that he was referring to political, or legislative consent. Law reform is difficult, to say the least, in matters which are the subject of party political controversy. A government can foresee that one of its most precious commodities, legislative time, may be in danger of erosion in committee by a law reform measure which divides Parliament on party lines. It may well prefer to use that time on what is, in its eyes, a more electorally attractive piece of legislation. That is not to say that politically controversial law reform proposals are doomed to legislative failure a number of the reforms proposed by the Law Commission over the last fifteen years in the field of family law, for example, might have been regarded as socially or politically controversial - but not in a party political sense.

Nevertheless, it is true that the greater the degree of consent, the greater the prospect of ultimate legislative success for law reform proposals. In order to achieve this general consent, the law reform process has to be a very open one. In that way, those who wish to influence the process may have, and been seen to have, an opportunity to do so. If their arguments are heard and either accepted or answered - whether they be technical lawyers' arguments or lobbyists' policy arguments - the greater the chance that the final proposals will prove acceptable. This means that the law reformer, whether he is to be found in the Law Commission, the Criminal Law Revision Committee, the Law Reform Committee, Governments or private bodies concerned with law reform such as Justice, or the All Souls/Justice committee currently considering reform of administrative law, finds it necessary and desirable to circulate some form of consultative document in order to seek views, either generally or from so-called "experts" before reaching a final view.

It is the purpose of this paper to examine some of the methods of consultation, both those which are currently in use, especially by the Law Commission, or which others have suggested should be adopted. It will be seen that, though widespread consultation does have immense

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benefits for law reform, it does have its dangers and difficulties, paradoxically because in some areas consultation might be thought to be too popular, thus slowing down the whole process unduly and, in others, because consultation is ineffective either for the reason that comment and reaction come too late in the process of formulating firm proposals, or for the reason that methods of consultation are not wholly effective in reaching beyond bureaucrats (in both the public and private sectors) to the actual users of the legal rules under debate.

The first weapon in the modern law reformer's consultation armoury is the working paper. The importance of the working paper to the law reform process, certainly to the work of the Law Commission, has been put thus by Lord Scarman:

> "The working paper is ... the foundation upon which the Law Commission constructs its proposals. It represents a major advance in legislative method. It is perhaps the greatest contribution to the public life of the nation made by the Commission. Successive governments have borrowed the method; and now publish 'green papers' foreshadowing legislation they have in mind. Social legislation is almost always now preceded by such discussion papers, which do not commit the government that issues them. The government has learnt the trick from the Law Commission - to the great advantage of the legislative process as a whole. The Law Commission's innovation has opened up over a wide field the hitherto secret business of preparing legislation for the consideration of Parliament."(2)

Imitation is the sincerest form of flattery and the working paper method of consultation has now become almost standard practice for law reform bodies in this country, whether they be public or private bodies.

There are undoubted, and proven, merits in the working paper method. A well prepared consultative paper of this kind will provide an accurate, and often detailed, statement of the present law, an analysis of its defects and an account of the criticisms that have been made of it, followed by an elaboration of the field of choice for reform, normally concluding, certainly in the case of the Law Commission, with a preferred provisional conclusion. Views are divided as to whether a consultative document of this kind, in which the opinions and assistance of others is sought, should contain a preferred solution. If no conclusion, albeit of a provisional kind, is included, then the reader's mind is not particularly closely concentrated on the merits and, especi-

ally, the demerits of specific solutions. Indeed, a cynical view is that it hardly matters in a working paper which solution is suggested from those in the field of choice, provided that one of them is. The cynic rests secure in the knowledge that critics will soon be forthcoming whichever is selected. On balance the practice of suggesting a specific solution does seem more effective in promoting helpful consultation than merely to invite the reader to take his pick of the solutions offered, or to produce his own. Experience has shown that where a Working Paper leaves a particular matter open, commentators may express a preference but without detailed reasons, whereas if they disagree with a preferred solution, reasons are given. Sometimes, of course, an issue has to be left open when the Law Commission is seeking information, rather than opinion or judgment, on a problem.

There are, however, other drawbacks to the practice of making provisional recommendations at the working paper stage. The most obvious one stems from a quite understandable aspect of human nature you are much more likely to write and comment if you disagree than if you are content with the provisional proposals. There is a danger that the consultation process becomes distorted in that much of what one receives is negative comment. This is less true, of course, of professional bodies such as The Law Society or the Senate of the Inns of Court and the Bar, which regularly react to consultative documents; but those who do not have a general interest in law reform, rather an interest in a particular topic, tend to comment only if they disagree with a provisional conclusion. This was brought home when both the Law Commission and the Scottish Law Commission published separate consultative documents, with somewhat different conclusions, on the somewhat esoteric question of the classification of limitation in private international law.(3) As is the usual practice when both Commission are working on similar topics, the consultation received by one Commission was made available to the other. Some comments were received in Scotland from English commentators who had not commented on the English proposals and those comments indicated a preference for the English rather than the Scottish approach. They were made, however, as comments disagreeing with the Scottish Law Commission, not as comments agreeing with the Law Commission.

Working papers have the further advantage, as compared with requests for "evidence", that everyone knows the lines on which the Commission is thinking. This openness in the development of solutions is, in a democracy, desirable in itself, but it also gives commentators a clear target at which to aim. Their fire may be very effective. Although

one of the first Law Commissioners, Professor Jim Gower, has been rather disparaging about the helpfulness of comments received on consultation,(4) his view has not been accepted by others and several instances may be given when comment received on consultation led to a major rethinking of the approach to a problem.(5)

Despite Lord Scarman's enthusiastic support for the working paper as a prime means of consultation, it is not, however, without its disadvantages. Lord Scarman suggested that consultation must be "wide enough to embrace all interests and deep enough to expose all the problems."(6) Working papers which do that tend to be formidable, and expensive, documents. Of the last ten working papers produced by the Law Commission, none was less than 70 pages long, and half were half over 150 pages, costing up to £7 a copy. It is unreasonable to expect the average informed and interested citizen to master such documents or to spend such sums of money in the interest of law reform. On the other hand, although shorter more succinct consultative documents would be cheaper to buy and easier to read, they run the risk of being criticised by the expert as incomplete and superficial.

There is a further, related problem with working papers. Their size and expense is such that they tend to be considered not by those who will actually be affected by proposed changes but by those who speak for them. This is, again, an obvious and understandable organisational reaction. It is just not practicable for all solicitors, all industrial companies or all consumers to buy and comment on working papers; instead comments come from The Law Society, the C.B.I. and the Consumers' Association and the National Consumer Council. Occasionally, however, it transpires that the views put forward by the committees of bodies like this, the inevitable bureaucracy of such organisations, do not necessarily reflect the views of the ultimate users of the legal services in question. This should not be taken as criticism of the bodies mentioned, all of which provide much useful practical assistance to the Law Commission; rather is it a comment that, in the nature of things, those who sit at the centre of the spider's web cannot know all the views of those at the circumference all of the time. There is the further problem that proposals for change may affect those who have no effective central body well able to formulate views on their behalf. For example, the Law Commission has recently published a working paper on the law relating to Minors' Contracts;(7) but there is no obvious central body (apart perhaps from consumer bodies) well able to communicate the views of sixteen and seventeen-year olds on the law of contract or the views of those with such experience in dealing with

children that their comments on the commercial maturity of older minors would be of assistance.

The problems of the size and cost of working papers and of the need to find a practical method of seeking the views of interested, informed individuals caused the Law Commission to rethink its working paper method of consultation a year or two ago. One possible improvement is so to structure working papers that the main issues, of interest to the general reader, are discussed first and separately from the more detailed complex matters of concern and interest to the expert reader. This is only a partial solution because the working paper remains a large and expensive document. So another solution had to be found and this took the form of the production of a short pamphlet to be published at the same time as, and not in substitution for, the working paper. This has not been done in every recent case when a working paper has been published. For example, working papers of limited interest, such as those on Foreign Money Liabilities(8) or Classification of Limitation in Private International Law,(9) have not been supplemented by pamphlets. Where, however, a problem of concern to a broad spectrum of the community is under review, pamphlets have been published. Recent examples have been those which examine the questions whether divorce should generally be permitted within the first three years of marriage,(10) whether an occupier of land should be allowed access to his neighbour's land so that he can maintain property on his own land(11) and whether the common law crime of blasphemy should be abolished.(12) In all these cases, in not more than about ten or twelve pages, it has been possible to state the basic legal position, the essential social problem under review, the possible options for reform and the Law Commission's provisional conclusions. The pamphlets have also included a questionnaire at the end of which views are sought on the specific issues raised in each topic. The effect of this new method of consultation will be discussed below, but first a recent variant of the pamphlet approach should be mentioned. In Working Paper No. 81, (1982) the Law Commission has made a number of provisional proposals for the reform of the law relating to Minors' Contracts. Essentially, these amount to a choice between maintaining the approach of the present law under which contracts made by those under eighteen are unenforceable against them (apart from employment contracts and contracts for the supply of necessaries) and a reduction of the age of contractual capacity to sixteen. It is obviously very important to find the views not only of traders, providers of credit and others who deal with minors on a commercial basis, but also those able to advise on the general maturity of sixteen- and seventeen-

year olds in managing their own affairs and, of course, the views of those currently within that age range. In this case, an even shorter pamphlet, only four pages long, has been produced in considerable quantities, with the object of making it available in schools, colleges of further education and the youth and community services. It is too soon to assess how effective a contribution this latest approach has made to the consultation process. It has, however, been warmly welcomed by those who are being consulted by it.

What effects have the use of short pamphlets had so far on the consultation process? The effects have been varied, some clearly beneficial to the efficiency of the consultation process, others perhaps less so. The use of pamphlets seems clearly to have affected the quantitative response to working papers, at least so far as private individuals are concerned. There has been a significant increase in the number of individual letters received on consultation. This has two consequences. It enables the Commission to get a better feel for the views of the man in the street; it also gives some indication of the extent of practical difficulties in the operation of the law. Indeed, in the response to Working Paper No. 78 on Rights of Access to Neighbouring Land, the individual comments produced far more evidence of concern and anxiety over the present state of the law than was expressed by "professional" commentators. Pamphlets have also proved useful to institutional commentators in that they have enabled them more effectively to canvass views throughout their organisations. For example, The Law Society has been able to seek the views of local law societies through the use of pamphlets; the National Association of Citizens Advice Bureaux has used them to canvass views in individual bureaux; and a large government department has used them to canvass opinion amongst administrators in different sections of that department. They have also stimulated comment through the media. It seems, naturally, to be easier for a journalist to write a feature article from a twelve-page pamphlet than from a working paper ten times as long. It is helpful for the radio commentator to base his four-minute discussion on a brief pamphlet - he might not bother with a long working paper - and he can always tell the listener that he also can have a pamphlet if he asks for one. In this way the debate on the matters in issue is broadened, as is the field of response.

There are, however, a number of apparently negative effects. Human nature being what it is, some institutional commentators who might have been expected to comment on the working paper have chosen to reply on the pamphlet alone, with the result that less detailed comments were received than might otherwise have been expected. The use of

questionnaires concentrates the commentator's mind on the particular issues there listed with the result that comments again may tend to be narrower and less fully reasoned. Sometimes they appear to be an almost instinctive response - but it may be no bad thing to discover people's instinctive responses because that may also be the response of many legislators.

One recent working paper and pamphlet, namely on the law of blasphemy, have posed for the Commission a novel problem in terms of obtaining and assessing consultation - the problem of a superfluity of comments, though not of views contained therein, as the result of a very effective lobby at work. For the first time, the Commission received a large number of letters (1000 or more) virtually in standard form, urging abandonment of the provisional conclusion to abolish the the crime of blasphemy. This was coupled with bundles of petitions with over 10,000 signatures, urging the same approach. Clearly this sort of reaction from a particular lobby group must be taken seriously. It indicates that a substantial body of people hold a particular view - though one particular problem with mass lobbying, and particularly with petitions, is that they are often prepared on the basis of what the lobbyists think you have proposed rather than on your actual proposals. Does one base law reform on a quantitative, head-counting basis of those who comment? Clearly not, but numbers are significant. How significant is the crucial question, and one that could probably only be answered, if then by the use of some form of opinion poll, a form of consultation which the Law Commission has not yet utilised? There are obvious organisational and financial diffiuclties with such a form of consultation process, but they ought not to be dismissed entirely. Indeed, they might prove useful as a form of attitudinal research when it is difficult to assess the extent to which a mass lobby genuinely represents the bulk of public opinion.

The Law Commission's consultation process is not, of course, restricted to the publication of working papers and pamphlets. There are a number of other, less formal, methods which may be utilised to achieve various different objectives. It is often the case that there is preliminary consultation even before a working paper is written. This may involve, for example, a search for assistance from lawyers, both academic and practising, for technical advice as to the present state of the law and and its defects, or from laymen experienced in the field under review for advice on practical difficulties created by the current legal rules.(13) For example, much assistance has been provided in the Law Commission's work in relation to Binding-over (on which a working

paper has not yet been published) from magistrates and justices' clerks who have been able to provide evidence of the incidence of binding-over orders in various parts of the country. This preliminary consultation may also include enquiries as to attitudes and not just facts. Fairly recently, in the Commission's work on offences against religion, it was decided to invite views on the place of blasphemy in the law today. This was done by letters to the press at the time that an announcement was made that this work was being undertaken and produced some 170 letters and submissions on this issue which provided assistance to the Commission in the formulation in Working Paper No. 79 of its provisional conclusions.

Again, this form of preliminary consultation may be useful in determining whether or not there is a real practical problem to which the Commission should devote its time and resources. An illustration of this function is provided in the field of polygamous marriages. It was suggested in 1979 that the Commission should examine the rule that no person domiciled in England has capacity to enter a marriage which is polygamous (albeit potentially so) in nature. It was not clear whether this rule was one which, though long the subject of academic criticism, actually caused problems in real life. The circulation of a preliminary consultative paper to a limited group of government departments, interested bodies such as the Commission for Racial Equality, legal bodies and individuals, revealed real evidence of difficulty. This led the Commission to take on this topic in due course and the evidence received has proved extremely useful in the preparation of the working paper due to be published very soon. A more formal type of preliminary consultation is through the use of working parties, comprising both members of the Commission and its staff and persons expert in the range of matters encompassed by the topic under review. Such working parties were much used in the early days of the Commission - less so now except in joint projects involving both the Law Commission and the Scottish Law Commission.

There is a variety of other methods by which the consultation process may be advanced. For example, lectures and talks by Commissioners or members of the Law Commission staff to specialist interest groups always provide, in the ensuing discussion, much useful comment. Such groups, particularly of professional or academic lawyers, have regularly provided the Commission with assistance and advice. The media, press, T.V. and Radio, provide significant tools in the consultation process. Discussion of the proposals in a working paper or a radio programme may both generate requests for any relevant pamphlet or indeed cause members of the public to write in directly with their

views. For example, a five-minute discussion on the Jimmy Young show generates thirty or fourty letters to the Commission, as has happened with a number of recent working papers. The same effect is created by some newspaper or magazine articles - but experience seems to suggest that radio is at least as effective a medium of communication to the general public as the written word. The Commission places very considerable importance on the role played by the mass media in advancing the cause of law reform and public debate on such matters It is standard practice for the publication of all working papers and reports to be accompanied by press notices, the drafting of which we have come to realise is an important skill in conveying ideas and proposals clearly, interestingly, and briefly to journalists and thus to the public at large. In addition, a press conference is held at the time of publication of all Law Commission papers on matters of general public interest. This enables journalists to identify the major issues and discuss them further.

There is one method of consultation which has not yet been mentioned because it has not in the past been utilised by the Law Commission, namely public meetings. Views are divided on the effectiveness of this form of consultation. It was an issue which arose in the very early days of the Law Commission and on which Lord Scarman has had this to say:

> "Lord Chancellor Gardiner frequently suggested to me, when I was chairman, that consultation could not be complete without public meetings held in various parts of the country to discuss the tentative proposals contained in a working paper. Kirby J., the imaginative and enterprising chairman of the Australian Law Reform Commission, tells me that they hold such meetings in Australia. Though we have not felt the need for them in the United Kingdom, I would not rule them out. Perhaps, for us, they are unnecessary because of the existence of so many societies, lobbies, and pressure groups upon every conceivable topic of social or economic importance. Our consultations embrace them: they all have their say; and there is little left to be said when they have finished."(14)

Similarly sceptical views have been voiced by other former Law Commissioners; it has been suggested that such hearings would produce "many irrelevant time-wasting suggestions"(15) and that it is only a "limited number of people out of the total population that public meetings would reach."(16)

On the other hand, as Lord Scarman pointed out, the Australian Law Reform Commission holds such meetings and they appear to be a very significant part of their consultative process. There are undoubted differences between the English and Australian positions. Australia is a huge, federal state. It is obviously desirable for the Australian Law Reform Commission, which is a federal body, to be seen to be involved with the concerns of the whole of Australia on issues of federal competence transcending state boundaries. The Law Commission has neither such problems of geographical size, nor of federal/state relationships. There are, however, other arguments propounded in favour of the Australian system of public hearings. It is said that they "flush out" the lobby groups and sectional interests, requiring them openly to state their position; they perform a useful fact-gathering function; they enable aspects of a problem which had never been considered by the Commission to be identified through personal experience. Finally, it is said that there is an important point of principle involved namely that "it is important in a democracy that citizens should be entitled to have a say in the design of the laws that will govern them."(18)

Whilst it cannot be denied that if public hearings were held in this country new facts might be revealed, or new aspects of a problem might be identified, it seems unlikely that any lobby groups would appear who were not already well prepared and able to state their views on paper and, where appropriate, in public. So far as the principle of openness is concerned, citizens are no less entitled to have their say in the law reform process by being required to do so in a considered manner in writing. Perhaps Australia is, in one respect, more like the U.S.A. with its greater reliance on the oral tradition. It does seem unlikely that the time and expense of holding public meetings in various parts of this country on even some only of the matters under review by the Law Commission would be justified in terms of the results achieved. The critic might, however, ask: How do you know until you have tried it?

This paper had concentrated so far primarily on response to consultation from the private sector. There is also to be considered the consultation process in relation to government departments. One view might be to suggest that they are no different from other potential consultees and should be treated in the same way. They are not, however, the same, for they can both express views at the consultative stage and play a very significant part in the formulation of final policy at the legislative stage. To the law reformer, departmental reactions can sometimes appear frustrating and mutually contradictory.

One reaction to the receipt of a working paper is that the Department as such has no views; it merely reacts to the views of those that it itself consults so few comments are forthcoming. Another reaction is that Departmental officials, who receive the working paper, have no views - only Ministers have views and it is too early to consult them. If either of these approaches is adopted and it must be emphasised that they are not always adopted the consultation process has failed. The frustration is compounded when, on publication of a final report, departmental criticisms are raised on matters which could have been dealt with more appropriately had departmental views been provided at the consultation stage. This is all the more galling if the department had been sent a copy of the working paper but did not comment on it!

It would be wrong to paint too gloomy a picture of the process of consultation with government. There are many occasions when departmental comment and advice, often of an informal kind, is freely given and of much value; but undoubtedly problems remain. There are reasons for them. A provisional conclusion in a working paper may cause no departmental difficulty, but criticism of it from other consultees may cause the final proposal to be cast in a different form and a form which for the first time does create departmental difficulty. Even if both working paper and report advance the same solutions, the timetable of law reform is such that a new government may be far less receptive to the report than its predecessor was to the working paper. One consequence is that departmental consultation may be more effective at the stage when a report is being prepared, for then the work of the law reform agency can be seen to be close to completion, even if legislative implementation is still some way off. It could be said that it ought not to matter when the consultation takes place so long as it is useful and effective when it does. This is, of course, true but an input of departmental views at a later stage does have its dangers for an independent body such as the Law Commission. Provisional conclusions as to the approach to be taken in the final report will have been formed in the light of the general consultation and any further discussions with consultees which may flow from that. It is not easy to accommodate a different departmental view at a later stage.

The problems created by the timescale of the law reform process in relation to the efficacy of consultation methods are not confined to the public sector. There is a danger, for example, that industrial or commercial concerns, and their trade organisations, when confronted by a working paper may take the view that its proposals, though in their eyes possibly unsatisfactory, may be changed in the final report,

or that legislation to implement them may never be introduced - so it is thought to be too early to spend time and money on detailed examination and comment. When, in fact, legislation is introduced, the "now or never" stage is reached and their lobbyists go to work. However, by then, views have hardened. It is more difficult to change provisions in a Bill, especially one with Government support, than to influence their form before they are published. A consequence is that the whole consultation process has been broadened in the following way. Instead of accepting the law reform body's consultation as evidence of broadly based acceptance, government finds it necessary and appropriate to consult again both within the public sector and elsewhere, using the law reform body's final report as its, the government's consultation paper. Not only does this lead to delay, it also leads to considerable expense. Those who may have commented already have to reassemble their committees and experts to provide something of a repeat performance, this time for government rather than for the law reform agency. There must be a limit to consultation and the present fashion for consultation at times oversteps the limit and unduly postpones the time for decision.

Some people might think it unusual for a paper on an aspect of the work of the Law Commission to be dovoted not to some burning substantive issue of law reform, but rather to an aspect of the method ology, even the logistics, of law reform. No apology is offered for so doing. The consultation process is an important, integral part of the open debate which should guide law reform. It is particularly important that Law Commissioners who are appointed, not elected, should not attempt to make policy proposals from on high. If they did their advice is unlikely to be accepted. Widespread consultation provides appropriate means of balancing the needs of a democracy with the independence of the Commissioners. Indeed, "it may be that the techniques of consultation which the Law Commissions have developed are at least as important as the actual reforms which they have proposed because much of the difficulty of achieving law reform has been a problem of means rather than ends."(19)

(1) "Obstacles to Law Reform", (1981) Current Legal Problems 279, 281.

(2) Jawaharlal Nehru Memorial Lectures (1978). The working paper method of consultation has also been described as a "major contribution towards the methodology of law reform": Diamond, "Law Reform and the Legal Profession" (1977) 51 A.L.J. 396, 405.

(3) Working Paper No. 75 (1980); see now Law Com. No.114.

(4) "Reflections on Law Reform" (1973) 23 U. Tor. L.J. 257, 263.

(5) Diamond, "The Work of the Law Commission" (1976) 10 The Law Teacher 11, 14-15.

(6) Jawaharlal Nehru Memorial Lectures (1978).

(7) Working Paper No. 81 (1982).

(8) Working Paper No. 80 (1981).

(9) Working Paper No. 75 (1981).

(10) Working Paper No. 76 (1980).

(11) Working Paper No. 78 (1980).

(12) Working Paper No. 79 (1981).

(13) Another important means of acquiring information at an early stage is by social surveys and similar research projects.

(14) Jawaharlal Nehru Memorial Lectures (1978).

(15) Marsh, "Law Reform in the United Kingdom: A New Institutional Approach", (1971) 13 William and Mary L. Rev. 263, 279.

(16) Diamond, **op. cit.** n.2 above, p.406.

(17) Kirby, "Reforming Law Reform: New Methods of Law Reform in Australia". paper delivered to Colloquium on Law Reform, held by the United Kingdom National Committee on Comparative Law, (1979), pp.14-20.

(18) **Ibid.**, p.19.

(19) Marsh, **op. cit.** n. 14 above, p.278.

THE ORIGINS OF TRESPASS TO AIRSPACE AND THE MAXIM 'CUJUS EST SOLUM EJUS EST USQUE AD COELUM' by D E Smith*

Introduction

Trespass to land has been described by Winfield and Jolowicz as 'the unjustifiable interference with the incidents of ownership of land'. The word 'land' may include not only the visible surface of the earth but the air space above and the ground beneath the particular site. This has been expressed over many years by the maxim 'Cujus Est Solum Ejus Est Usque Ad Coelum' - indeed this has been a hallmark of traditional property rights.

The intention of this article is to give a detailed account of the origins of the maxim with particular attention being paid to the theories which claim the phrase to be Roman or Jewish. Since the maxim is 'couched in Latin' as Lord McNair points out, the assumption that it is Roman is a reasonable one and for many this is a satisfactory explanation. However, Roman law rarely refered to airspace rights qua ownership and so this initial assumption is rebutted. It will also be shown that many of the alleged links with Jewish law are extremely fanciful.

Translations and Variations

The maxim has been subject to many translations, the best known being 'he who possesses the land possesses also that which is above it' (Broom's Legal Maxims); 'he who has a right to the soil has a right even to the sky' (Halkerton- 'A Collection of Latin Tags and Rules'); and 'whose is the soil his it is upto the sky' (Black's Law Dictionary). There are several forms of the maxim itself but since it is now recognised as cujus est solum ejus est usque ad coelum this particular form will be used.

The Roman Theory

Notwithstanding statements of such conviction as 'the maxim is not Roman'(1) many have accepted and openly refer to Roman law as providing the origins of the phrase and as such the merits of this theory can be examined. That Roman law made numerous and scattered reference to the airspace rights of the private surface owner cannot be doubted

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but general principles, it is submitted, must not be too readily drawn from a hotch-potch of statements which are nothing more than particular rules applicable in specific circumstances. McNair refers to the standard extract although the preferable work is 'Roman law and the Maxim Cujus Est Solum' by John Cobb Cooper. A combination of the two reveals a wealth of material.

The Jurist Ulpian, by reference to the Twelve Tables stated that tree branches belonging to one land owner must not be allowed to shade (and thus injure), a neighbour's land (Ulpian Digest XL III 27.1.8); and Pomponius, another jurist, stated that the owner of a fence which has blown over a neighbour's land can be compelled to remove it (Pomponius Digest XL III 22.2). According to Justinian's Institutes II.1.1 taken from Marcian Digest 1.8.2, by natural law, the air ('Aer') was to be free to all men. It is in the Digest, however, that the majority of the rules are to be found: sky over public grounds ought to be free (Digest VIII 2.1.); whoever has a building that is superimposed on another may lawfully build on top of his own structure as high as he pleases (VIII 2.24); a tomb consists not only of the ground where the remains are laid but also extends to the air space above (XLIII 24.22.4).

These give an impression of the various types of rights but in regard to trespass to airspace two further extracts are worth noting. Firstly, as stated in Ulpian Digest VIII 5.8.5., a lessee of a cheese factory was prohibited from letting smoke rise and enter an adjoining house. This was considered to be a trespass situation. Secondly, in a little discussed passage, Ulpian Digest IX 2.29.1, where a roof projected over a neighbour's house, the plaintiff's remedy was not one similar to abatement of nuisance but was an action claiming the defendant has no right to have the roof projecting in such a manner and therefore must move it. Both of these extracts point to the existence of an action in trespass.

One further trait of private airspace rights in Roman law must be noted. It can be seen that where passages refer to the land owner's interests in the superincumbent airspace they do so very often, with a qualification as to any servitudes which may exist against the owner. Thus, subject to any servitude, one could raise one's own house to any extent, as stated in Justinian Codex III 34.8, and according to Justin's Digest VIII 2.14, the owner of vacant ground is free to build on it. Clearly, despite restrictive qualifications, airspace rights over private lands did exist in Roman times.

The more important question is what conclusions may reasonably be drawn from these extracts. Opinions vary and as a prelude to these opinions certain broad observations can be made. Firstly, Roman airspace rights were not restricted, as many academics tacitly suggest, to the airspace above private lands. The above mentioned extracts refer to public grounds and land above tombs and are only particular rules governing particular types of land. The number of passages explicitly involving private rights are fewer than is commonly reckoned and, as already, stated servitudinal qualifications were in abundance. Secondly, it is necessary to distinguish between 'aer' (air), the mixture of gases that humans breathe and 'coelum' the geographical area of sky (airspace). If the meaning of Institutes II.1.1 is taken to have referred to both forms of 'air', then there would have been a startling conflict between this provision and many of the others. However, what was common to all men was the 'aer', the 'omnipresent medium, necessary for the life and health of all'.(2) On the other hand, the geographical airspace, the 'coelum' was res soli and thus capable of private ownership. As Goudy states, there was no conflict.

For Cooper the conclusion in regard to airspace over private land is that it was either (a) the exclusive property of the landowner upto an an indefinite height, subject to building restrictions, or (b) remained under state control subject to a vested exclusive right of occupancy or or user by the landowner to be determined by the State. He states that no conflict exists in the extracts but this is unacceptable: from a general view, there must be conflict in order for Cooper to reach two very differing conclusions. On a more detailed level Digest XLIII 27.1.8 is not reconciled with Codex III 34.8..In the former every house is taken to be unrestricted from the foundations to the sky, subject to any servitude. That is, building up without infringing a servitude is no offence. Yet according to Codex III 34.8 it is an offence to shade a neighbour's land. One could build up, shade the neighbour's land, but so long as no servitude exists, plead the authority of Digest XLIII 27.1.8. Yet the agrieved neighbour would plead Codex III 34.8. There is, therefore, a direct conflict.

Buckland appears(3) to have been unable to keep his conclusions free from complication. He said that under early twentieth century conditions, the Romans would accept no upper limit to ownership, yet rules for building restrictions would clearly exist 'as mere limitations of ownership in the general interest'. Lardone(4) claims the property owner had control of the airspace above his property at low altitudes, but also, that the spirit of the extracts enable such control

to extent to any altitude. Montmorency concludes(5) that the state controlled all airspace which was not necessary for the enjoyment of private lands. Cooper reports that Von Ihering stated that the owner of the soil also owned the airspace above, but only to the extent needed to satisfy his practical needs. He notes that Roman jurists would not have accepted such an 'abuse of logic' as property in space without limit. Finally, Bonfante, in a much admired work, has concluded(6) that Roman law gave limited rights of airspace ownership.

The above show that airspace rights may have been as inextensive as mere control of low altitudes, but may have amounted to unlimited ownership at any altitude. It is suggested that all that can be safely concluded is that the authorities as well as some of the original texts are in conflict, although individual situations have limited legal certainty. But where did the maxim come from?

The work of the Glossators probably led to an early form of the maxim crystallising out. The Bolognese Glossator, Accursius(7) is thought to have produced around 100,000 glosses, one of which appeared attached to the word 'coelum' in Paulus, Digest VIII 2.1 and reads: 'Nota-cujus est solum ejus debet esse usque ad coelum'. Translated this is: 'note-the owner of land OUGHT to be taken to own right upto the sky'. It is submitted that this gloss sounds very much like a casual opinion or perhaps that Accursius thought the owner had a moral right to own upto the sky. Goudy was unable to trace the maxim to any source earlier than the Glossators although he has suggested that Irnerius may have been the author. This gloss later appeared in a number of fifteenth century editions from the Digest and, as H.D. Klein has indicated, Accursius had 'woven from a few passages in the Digest (which protected) the airspace above public lands, highways, tombs, fields and buildings from shading, darkening, rainwater and smoke, a clever general maxim'. This form of the maxim, it is said, came to England via Franciscus, son of Accursius, who appears to have come across in 1274 upon the invitation of King Edward I. He left in 1287 after teaching law at Oxford and having secured a pension.

For about 300 years the maxim was little used. Its rennaissance stemmed from the footnote to **Bury** v **Pope**(8) in 1558 which reads 'Nota-cujus est solum ejus est summitas usque ad coelum. Temp. Ed. 1.' Much has been said of the 'Temp. Ed.1' but it is submitted that this simply means that the maxim was known in the said king's reign. In any event 'debet esse' (ought to be) was dropped in favour of 'est' (is). Also the word 'summitas' did not exist in classical Latin.(8a)

As such although 'summitas' added Roman flavour it was not part of the original gloss. However, a further change was completed by Coke in 1610 in **Baten's Case**(9) and from then on the maxim was popularised as 'cujus est colum ejus est usque ad coelum'. In the words of Richardson 'Coke had a well recognised inventive faculty and the enunciation of the formula may have been yet another of his ipse dixits and not an accurate expression of law'.(10)

Subject to what will be said below as to Jewish law it would appear that the maxim, although having a quasi-pseudo Roman origin, has been the product of the imagination of Lord Coke, with notable help from Accursius; his son; and the reporter of **Bury** v. **Pope**.

The Jewish Theory

Several academics including Lincoln, Loewe, Klein and McNair have claimed the maxim has its origin in Jewish law and entered English law through Jewish usage and influence. So convinced are the proponents of this theory that they often refer to the maxim as being 'constantly employed' by the Jews and further state, quite categorically, that it was used for defining ownership of airspace.(11)

H.D. Klein(12) explains how the Jews came to England in 1066 and adds that a special branch of the Exchequer, known as the Jewish Exchequer was in existence. It is said that Jewish customs and phraseology was used when fines were administered. When the Jews were expelled in 1290 it appears they may have left their mark on our legal system. To support this theory, both Lincoln and Klein refer to a starr, (Jewish contract) in this case a conveyance, of the year 1280, although Lincoln incorrectly puts the year at 1285. Lincoln with Loewe, claimed he had traced the phrase 'height and depth' as defining ownership far back in Jewish jurisprudence. However the phrase 'height and depth' does not actually appear in the conveyance and must not be confused with phrases which, prima facie, appear similar in meaning. Klein picks up on the fact that contemporary and pre-1280 starrs used a similar formula and translates line 14 of the above mentioned conveyance as giving the owner rights 'from the depth of the earth to the height of the sky'. Lincoln's translation of the same line reads 'to the heights of the heavens and to the depths of the earth' although these two translations have notable similarities the two must be distinguished from each other and be seen in their true context.

Other references are made to various sources as an attempt to support the Jewish theory. Mishnah (Jewish law case) is quoted and it is said, in the Baba Bathra section IV 2, that reference is made to the phrase 'height and depth' and this, in conjunction with a Rabbi Akiba's dicta (which is said to refer to the phrase) provides further authority indicative of a jewish origin. Klein puts Rabbi Akiba's death at AD 132 He did in fact die in AD 70. Finally, Lincoln refers to two Biblical references, Isaiah and Deuteronomy as adding support. These three sources, the 1280 starr, the Mishnah and the Biblical references lead Lincoln to conclude that without making 'any dogmatic assertions' Jewish law may be responsible for the maxim having entered English usage.

It is submitted, however, that on close examination, the three authorities cited do not lend themselves to any theory supportive of airspace ownership. Links with Jewish law are not incredulous but are possibly over zealous, over romantic and often appear to be made out of context. Treating the starr first, it is known it was a conveyance of a property in Mancroft Street, Norwich, on December 2nd 1280. This document can be found in the British Library, Department of Oriental Printed Books and Manuscripts, Lansdowne Charter 667, No. 1199. It is written in Aramaic and Norman-French in Hebrew characters and conveys property from Miriam, the wife of Rabbi Oshayah ben Isaac to William, the son of Roger from South Walsham. As stated above, the conveyance in line 14, is said to use the formula 'from the depth of the earth to the height of the sky' (Klein) OR 'to the heights of the heavens and to the depths of the earth' (Lincoln). On close examination, line 14 is correctly translated as meaning something much narrower than the two learned authors suggest: it reads '... and transfers all the appurtenances attached thereto, to build, to tear down and to dig in it, wells and cysterns from the depths of the earth to the height of heaven for an inheritance and a possession and to sell ...'. Therefore, Klein's translation is quite accurate but is taken, grossly, out of context. What is even more important is the fact that these words are not from the Mishnah but are definitely classical and typical Jewish state law (called the Talmud.)

The authority for the last contention can be found in the Babylonian Talmud Baba Bathra 63b Soncino, English Edition p 256. (This text has not been officially translated into English). Under Talmudic law even when such a formula as 'from the depths of the earth to the heights of heaven' is used, as has been seen, only the well and cystern will be transferred. The 1280 conveyance was written, therefore, under Talmudic law and could not have transferred ownership of airspace.

Under Mishnahic law (the second strand of Lincolns and Kleins authority) if an apartment were conveyed and used the words 'I sell you the depth and the height', the space above and below the apartment will not, despite the formula, automatically be transferred. This is perhaps because in the Middle East a roof could be used for drying corn or storing produce and as such was a very important structure and was not one to be parted with except upon careful consideration. Under Mishnahic law, in order to transfer the airspace a further formula must be used. This is: 'acquire for thy self possession from the depths of the earth to the height of heaven'. It would appear, therefore, that IF the correct Mishnahic approach were used airspace rights would be transferred. It is not clear in whom the property would have vested if the Mishnahic formula were not used. Despite this uncertainty it is clearly an over-reaction to say that Jewish law often used the maxim 'cujus est solum ejus est usque ad coelum'. The above phrase does not appear anywhere and it is submitted that there is nothing unusual about Jewish or any other law having a system of conveyancing where, depending on the formula used, airspace rights are transferrable. As stated, the footnote to **Bury** v. **Pope**(8) indicated that the maxim was used in the time of Edward I and this is the same period as the conveyance above, but it is contended that this is no more than a coincidence of history.

The Biblical references are vague. Isaiah VII, ii reads: 'when the house of David heard that the Aramaens had come to terms with the Ephraimites, King and people were shaken like forest trees in the wind'. Deuteronomy XXX 11-14 reads 'The command that I lay on you this day is not too difficult for you, it is not too remote. It is not in heaven that you should say 'Who will go up to heaven for us to fetch it and tell it to us, so that we can keep it?'. Nor is it beyond the sea, that you should say 'Who will cross the sea for us to fetch it and tell it to us so that we can keep it?'. It is a thing very near to you, upon your lips and in your heart, ready to be kept'. It is suggested that these two passages are not authority for airspace ownership nor for the 'cujus est solum' maxim. Instead, the second passage especially, they are references to a method of preaching called theological homiletics, a form of teaching and reasoning whereby, it is advocated, every source of argument and discussion should come from the region between the earth and the heavens as this is the domain that God gave to man. It would appear that this concept is totally devoid of any connection with property rights.

The above suggests that there is very little concrete evidence of airspace ownership or of the origins of the maxim to be found in Jewish law. In any event there are several indications that even if rights in airspace were transferable (as by the use of the Mishnahic formula of 'height and depth' plus the 'possession qualification') there is no indication of actual ownership. This is borne out by several other references, which it is suggested, put the matter beyond all reasonable doubt. According to Rabbi Herzog,(13) airspace cannot be transferred, and therefore cannot be owned as air is intangible. Secondly the Mishnah itself, in Baba Bathra 4.1. decrees that a conveyance does not necessarily transfer the roof unless the special 'possession qualification' is added so long as the particular roof involved has a parapet ten hands breadth high. Further evidence that no ownership occurs comes again from the Mishnah where the dispute is argued between Rabbi Meir and Rabbi Judah. This dispute concerned two gardens separated by a vertical terrace, see Baba Metzia 10.6. If vegetables were to grow out of this bank who would own them? Rabbi Meir said they belonged to the owner of the upper garden as he could remove his soil and thus remove the vegetables. Rabbi Judah said the lower garden owner owned the vegetables because if he filled up his garden with soil he would remove the vegetables. Each could thwart the other so the question was asked 'from whence do the vegetables derive their life the soil or the air?' This dispute was finally settled by referring to the dicta of Rabbi Simeon who said the owner of the upper garden owned whatever he could take by stretching out his hand and grabbing. The rest belonged to the lower gardener.

The relevance of the above argument should not be underestimated. There is no contradictory ruling in the Mishnah or the Talmud and accordingly, Rabbi Simeon's dicta becomes substantive Jewish law. It must be noted that nowhere in this dispute was the question of trespass by the upper gardener ever raised and clearly this was a 'low level' intrusion and not one at an unreasonably high altitude which would be too contemptible to be taken notice of. Therefore the lower owner appears to have no rights in the airspace above his land. It would be interesting to know whether the legal position of the lower owner would have been the same if the lower garden had been conveyed under the Mishnahic formula with the added 'possession qualification'. There appears to be no definite answer to this legal nicety.

There is a problem of precedent. Even if the maxim were Jewish it would be very difficult to decide whether Jewish law was then, or is now, binding on English courts. It is unlikely that this question will be satisfactorily answered.

Finally, there is a very important point to be made in relation to the Jewish concept of altitude. The importance of this cannot be overlooked as it further indicates the inadequacies of the Jewish theory. In Jewish usage the words 'to the heights of the heavens' would be given a limited interpretation as it was believed that the sun, moon and stars were all equi-distant from the earth and Midrush Rabba Genesis has put this distance as fifteen cubits above the height of Mount Ararat. The Jewish measurement of "infinity" was therefore a definite and settled distance and can be starkly contrasted with the indefinite limitation as enunciated in the 'cujus est solum' maxim.

Conclusions

The maxim 'cujus est solum ejus est vsque ad coelum' would appear to have come from Lord Coke. Undoubtedly the modern form of the maxim did, and in practice the phrase has been accepted in this form. Roman law provided a number of airspace rights while not actually confirming the maxim. A foetal version probably made its way to England via Franciscus the son of Accursius who was responsible for an early form of the phrase. Links with Jewish law are not numerous and even where they do exist show little indication of airspace ownership and even less of a concept of trespass; the Jewish culture with law, religion and philosophy often being rightly fused, not lending itself to uncomplicated explorations. It is due to the imagination and influence of Lord Coke that the maxim and trespass to airspace exist today.

(1) McNair - 'Law of the Air'

(2) Goudy - 'Two Ancient Brocards' - Essay in Legal History.

(3) 'The Main Institutions of Roman Private Law' 1931 pp. 103-4,

(4) 'Airspace Rights in Roman Law, Air Law Review, Vol. 2 1931 p.455.

(5) 'The Control of Airspaces; Grotius Society 'Problems of the War' 1917 Vol. 3 p.67.

(6) Corso di dinitto romans; Rome, Attilio Sampaolasi, 1926-1928, Vol. 2, Parts 1 & 2 Chpt. 12, pp. 218-229.

(7) There is an interesting biographical note in 46 Law Quarterly Review (1930) pp. 148-150.

(8) (1588) Cro. Eliz. 118; 78 E.R. 375.

(8a) Baxter & Johnson 'A Medieval Word List' 1934 at p. 411.

(9) (1610) 9 Co. Rep. 536; 77 E.R. 870.

(10) 'Private Property Rights in the Air Space at Common Law' Canadian Bar Review Vol. XXXI February 1953 at p. 122.

(11) Lincoln LQR (1931) at pp. 15-16.

(12) 'Cujus est solum ejus est ... Quousque Tendem?', 26 Journal of Air Law and Commerce, 1959, p. 243.

(13) 'The Main Institutions of Jewish Law' 1936 Vol. 1 p. 84.

DRINKING AND DRIVING IN FRANCE

by R J Marshall*

In October 1981 the writer was privileged to carry out, with financial assistance from the Council of Europe and the Prosecuting Solicitors' Society of England and Wales, a short comparative study of certain aspects of French Criminal Law and procedure. One of the areas considered was drinking and driving legislation, in which the French claim to have put themselves at the forefront of current European legislation.(1) This article seeks to look at the recent history and practice of French Law in the light of that claim.

If one goes back twenty years or so, the extent of the French problem becomes clear. France not only had one of the world's highest per capita alcohol consumption figures, but this was combined with an ethos which placed a high value on social drinking and an even higher one on the motor car.(2) In the 1950s and early 1960s, France had an unenviable position towards the top of the league table among countries of the western world for death and serious injury on her roads; many of these were alcohol related. It is not possible to be more specific in placing France in the rankings since available statistics are not sufficiently detailed and the bases of calculation varied significantly from country to country so that any attempt at strict comparison would be misleading;(3) the general nature of the problem is not in doubt, however.(4)

In 1970, three years after our Road Safety Act, France made her first serious attempt at legislation to control drinking and driving.(5) Prior to that there had of course been a law against drunken driving, but that had suffered from the defects of all such legislation, notably the definition and proof of drunkenness. Slogans had been used,(6) but they were of little effect against the background of a law without teeth. The 1970 legislation included for the first time the per se offence of driving a motor vehicle with a blood/alcohol concentration exceeding a specific level. This level was set at 80 mg per 100 ml, essentially the same as that in the United Kingdom with the minor difference that the French offence commences when the blood/alcohol level equals or exceeds that concentration whereas ours commences only when the blood/alcohol level exceeds it.(7)

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The 1970 legislation, however, was not renowned for its success and there was very soon pressure in the French National Assembly for strengthening the law, particularly in the area of enforcement.(8) The Comité Interministeriel de la Securité Routiere (the Interministerial Committee for Road Safety), a Government body set up in 1972 under the industrious Christian Gerondeau, was an early and influential voice calling for reform; it was soon to receive further support from research into drinking and driving, particularly that of Professor Got who was able to confirm the high and continuing risks which it entailed.(9) Further legislation was promulgated in 1978,(10) and the position in France is now regulated by the provisions of 1970 and 1978.

Before passing on to consider that legislation, however, a brief reference to the work and methods of the Interministerial Committee may prove useful. This body has made a very substantial contribution to the public relations aspect of selling a number of road safety measures to the French Public, including the introduction of speed limits,(11) the introduction of limited seat-belt legislation and the strengthening of drink driving laws. Much of this has been effected by widespread publicity, both by traditional methods such as advertising, but also through the publication of informative fact sheets. Publicity still remains high on the Interministerial Committee's list of priorities, and one still sees in France many advertisements aimed at discouraging drinking and driving.(12) The amount of literature generally available in the form of hand-outs is quite large; these pamphlets give detailed explanations of the law and its operation but, perhaps more surprisingly, also provide detailed examples of likely blood/alcohol concentrations reached in varying circumstances having regard to a subject's body weight and various different combinations of alcohol intake with and without meals. This literature is well produced and highly informative, but does not claim to be completely authoritative. The arguments for and against the distribution of literature of this type are fairly self-evident and do not need rehearsing here; the French motorist does, however, have access to a considerable volume of guidance of this sort, if he chooses to avail himself of it, whereas his English counterpart is forced to rely largely on rumour and hearsay.

It should not be assumed, however, that the Interministerial Committee's task went completely unopposed; the activities of one Francois Rongier and his Auto-Defence, a kind of AA/NCCL hybrid, were aimed at creating as much public opposition to these measures which were seen as unwarranted intrusions into personal freedom as possible. Rongier himself, in a celebrated incident drove through a pre-arranged roadblock breathalyzer and refused to supply specimens. Ironically, however, the

publicity which Auto-Defence generated through this kind of activity seems to have served largely to increase public awareness of the new legislation and so, from Rongier's point of view, proved counter-productive.

Current French legislation creates a two-tier system to deal with the drinking driver, similar to that operating in Denmark; Northern Ireland interestingly, also operates a two-tier type of system.(13) From readings of 80 mg per 100 ml to 119 mg per 100 ml inclusive, the offence is classed as a 'contravention' and dealt with in the lowest court, the Tribunal de Police;(14) at levels of 120 mg per 100 ml and over, the offence becomes a 'delit' and is dealt with in the higher court, the Tribunal Correctionnel. There is, therefore, an immediate distinction drawn between the driver who is modestly over the limit and he who grossly exceeds it, and the penalties vary accordingly.(15)

The power to breathalyze in France arises in one of three ways; following an accident; following some (but by no means all) 'infractions' (road traffic offences); and during a 'contrôle preventif', a roadblock breathalyzer blitz authorised by the Procureur de la Republique. The first two grounds will sound familiar to those acquainted with English law in this area, but the third is rather novel.

Dealing first with the post-accident breathalyzer, we do indeed find that the position is similar to our own. It should first be noted that, as in England, the police(16) do not necessarily become aware of every accident because of provisions, in non-injury cases, for the mutual exchange of insurance and other details.(17) Difficulties concerning the extent of police powers of entry to private premises to breathalyze, which recently confronted the House of Lords in Morris -v- Beardmore,(18) do not present a major problem because French law, in such cases, clearly prohibits the pursuit into, and arrest of suspects at, their home between the hours of 9 p.m. and 6 a.m. In practice it seems that if a motorist reaches home the breathalyzer aspect is rarely pursued; in in the event of a serious accident, however, the matter might well be pursued at 6 a.m! There is, though, a clear disincentive to making off after an accident because this particular offence (known as 'délit de fuite') is a serious one in French law, resulting almost inevitably in disqualification and an overall penalty at least as severe as that imposed for an average excess alcohol offence. In the present context two changes brought about by the Transport Act 1981(19) are interesting; first, the dramatic increase provided by Section 26 in the maximum penalty (from £100 to £1000) for failing to stop after an accident; and

secondly the demarcation in Section 25(2) and Schedule 8 Section 7(6) of specific circumstances in which police officers will have the power of entry by force to private premises to arrest or breathalyze.

This leads on to consideration of a related defence (not confined to accident cases but usually arising there) known colloquially here as the 'hip-flask' defence.(20) This defence is recognised in France but is rarely seen; one might think that even without a hip-flask the Frenchman is so well provided with bars and cafes taking advantage of generous licensing laws that he would be unlucky in the extreme not to be able to find such an establishment in his hour of need. In practice, however, the inquisitorial system in which much wider considerations of culpability are legitimately placed under the judicial microscope tends to militate against the use of this ruse; far from suggesting a technical defence which might result in an acquittal, as in England, the courts in France would invariably consider such actions to be exacerbating and would increase the penalties. If faced with a post-accident drinking driver the police would usually elect to proceed in any event with the breath test; in such a case the result of any subsequent analysis will be accompanied by expert evidence as to the likely effect of the post-accident drinking. In some cases, however, they may be able to fall back on the long-stop provision for the arrest of a driver 'en etat d'ivresse manifeste'(21) (which is similar to our residual provision in Section 5 of the Road Traffic Act 1972) available where, as the phrase itself graphically puts it, drunkenness is self-evident.

The second ground for requiring a breath test is the commission of certain 'infractions'. The relevant ones are specifically set out in the Code(22) and are all 'quality of driving' type offences; thus there is no risk of being breathalyzed for a single defective light nor is there such a risk of a police officer, after stopping a driver for an unconnected reason such as to check documents, subsequently suspects the consumption of alcohol. The officer has a power of arrest in such cases only if the driver is 'en etat d'ivresse manifeste'; and he has no power to require a breath test. The infractions' giving rise to the power to require a breathalyzer are as follows:- (1) driving on the wrong side of the road (a trap into which the unsuspecting British holidaymaker might easily fall!) (2) crossing a continuous white line (3) making a sudden change of direction without signalling and thereby causing possible danger (4) most speeding offences (5) overtaking in dangerous circumstances (6) accelerating dangerously whilst being overtaken (7) failure to observe the 'priorite a droit' rule (8) failing to conform

to traffic lights or stop signs (9) stopping or parking dangerously (10) failing to dip headlights or maintaining fog lights in circumstances where annoyance is caused to other drivers (11) driving at night or in fog without lights (12) certain prohibited manoeuvres on autoroutes. Such a list has perhaps twin merits; in the first place it is simple and easily understood by police and public alike; and in the second, in aiming at the more serious type of offence which is logically more likely to be committed by someone under the influence of alcohol, it serves to avoid any serious detraction from police-public relations. It is perhaps also worth noting, in passing, that there seems to be no problem in French law about whether a person is or is not still 'driving';(23) anyone who has driven and falls within any of the specified provisions is liable to be required to submit to a breath test and may be convicted if the subsequent analysis confirms that he was over the limit. It goes without saying that a defence based on identification of the driver is not thereby precluded. Again we should note that the Transport Act 1981 considerably modifies the previous case-law position here;(23) the new Section 7 of the Road Traffic Act 1972 (introduced by Schedule 8 of the Act) extends the circumstances in which a constable many lawfully require a breath test from those who are or have been drinking.

The final ground for requiring a breath test - and perhaps the most interesting one for the Anglo-Saxon is during a 'controle preventif' authorised by the Procureur de la Republicque. It is outside the scope of this article to describe the functions of the Procureur in detail; there is usually one Procureur and two or more deputies (known as substituts') for each departement, although some of the larger departements have two Procureurs, each with responsibility for a different area. The Procureur has overall responsibility for the investigation of offences and prosecution of offenders within his area, and is completely independent of the police and of local government - in many respects not unlike the Scottish Procurator-Fiscal.(24) He is held in great esteem by the French public, and this was a major factor enabling the French Government - aided by the Interministerial Committee - to enact this controversial element of the drink-driving legislation. It was, on the face of it,(25) a significant inroad on personal freedom, and enormous emphasis was placed in the explanatory literature on the role of the Procureur in controlling the use of this weapon. The Procureur is required by law to authorise a minimum of one 'controle preventif' in his area per month;(26) he, and he alone, determines its exact time, duration and location. Such roadblock testing is widespread in the Scandinavian countries, but is relatively rare in countries with a common-law tradition (though it has been used in some parts of Australia).

My visit enabled me to observe one of these 'controles preventifs' in action. It has been authorised from 8 p.m. to 10 p.m. on a major road out of Perigueux, a city about the same size as Lincoln. I had expected, partly from hearsay and partly from the impression (perhaps purposefully!) given by the hand-out literature that every vehicle would be stopped. In fact this was not the case, and it soon became apparent that on this particular occasion it would have been impracticable; it seems that whether every vehicle is stopped depends on the volume of traffic and a matter of logistics. On this particular evening, something in the region of 50% or 60% of all vehicles were stopped, and in the region of 150 breath tests administered. Surprisingly, not one was treated as positive, although a very high proportion, perhaps a third or more, were borderline and at least two or three appeared to be over the line and would almost certainly have been treated as such in this country.(27) In borderline cases, drivers were given a forceful but friendly warning, and their knife-edge predicament was sometimes reinforced by a firm direction to wait several minutes before resuming their journeys or by an emphatic suggestion that a capable friend or spouse in the vehicle should continue the driving from there on. The English palliative of 'I've only had two pints officer' was heard with monotonous regularity, 'aperitifs' of course being substituted for 'pints'. There did not seem to be any difficulty over the administration of the tests generally; most drivers accepted it with quiet resignation - several commented that although they had heard of roadblock checks they had never seen or experienced one in operation - but even the exceptional driver who chose to express his opposition to the principle of this type of check limited his protest to an enthusiastic vocal one. It would naturally be quite wrong to draw any firm conclusions from the operation of a single roadblock, but my general impression echoed that of Professor H.L. Ross of the University of New York at Buffalo who in an (as yet) unpublished study(28) said that his view was that the police involved in this type of roadblock control were very generous in their interpretation of the results. I was told that for Perigueux and the northern half of the Dordogne area, positive breath tests and arrests during this type of control resulted from only about 1% to 2% of tests administered. Again, although the numbers are too small to justify drawing positive conclusions, during observations of court proceedings in the area I saw thirteen cases of excess alcohol dealt with; in eleven of those cases the breath test had followed an accident, in two it had followed one of the specified 'infractions', and none arose from an authorised roadblock. One can perhaps assert with some confidence that while the 'controle preventif' may be a useful exercise in publicity it is not a substantial means of controlling the mischief

aimed at; whether it has any deterrent value is hard to guage. Professor Ross thinks not; as he succinctly puts it(29) "The French experience (i.e. of the strengthening of the law in 1978) teaches again that the fear of a legal threat does not long survive experience of its unlikelihood".

The post-breathalyzer procedure is not dissimilar to that operating in England, though - not for the first time - one is struck by the general lack of technical requirements. The hospital, rather than the police station, is the usual destination for the arrested motorist; in rural areas, where hospitals may be few and far between, the driver may be taken to a police station and a local doctor called, but this is the exception rather than the rule. There are no statutory warnings,(30) and there is no option to provide urine,(31) but the doctor in charge has an absolute discretion over the taking of the blood sample; a police officer must be present whilst the sample is taken. If the doctor in charge decides for medical reasons that the taking of a blood sample would be inappropriate, that is an end of the matter. As in England, the sample is divided into two parts, but in France the authorities retain both.(32) After the driver has been notified of the result of analysis (usually about a fortnight later), he has five days in which he has the right to require that the remaining sample be analysed by a different laboratory. If such a request is received, the authorities arrange the second analysis, and if there is a discrepancy the lower of the two readings is used in determining whether process should be issued against the accused and in which court. One particularly interesting aspect is that if a suspect refuses to submit to the 'prise de sang' (the taking of the blood sample) he is automatically guilty of a delit (the more serious offence triable in the Tribunal Correctionnel), with the result that such refusals are apparently extremely rare. This offence falls into the same category as the 'delit de fuite' mentioned above; disliked by the courts and severely punished.

The penalties on conviction for drink-driving offences do not appear particularly severe; another area where perhaps the claim outlined earlier in this article seems less than wholly convincing. There is in fact no mandatory minimum period for 'suspension' (i.e. disqualification) of the driving licence although in practice some period is automatic.(33) The writer's own observations suggested that in the Tribunaux de Police one month's 'suspension' and fines of between £60 and £80 were typical; in the Tribunaux Correctionnels between two and six months' 'suspension' seem typical with slightly higher levels of fine. The court also has power to 'annul' a driving licence in serious cases;

the effect of 'annulment' is that after a period of disqualification a driver has to repass a driving test before his licence can be restored. This power is not frequently used, but would be appropriate where an excess alcohol offence is combined with dangerous or reckless driving resulting in serious injury or death. In some cases, particularly with short 'suspensions', it is possible to have an 'amenagement', an arrangement whereby the disqualification is served at weekends and/or holidays, the consent of the court and the police being necessary,(34) Imprisonment is not mandatory for any drink-driving offence, but, rather strangely, if it is imposed it is subject not only to a statutory maximum but to a statutory minimum as well; the statutory limits are ten days to one month for the lesser offence in the Tribunal de Police and one month to one year for the greater offence in the Tribunal Correctionnel.(35) Immediate imprisonment for drink-driving offences seems to be quite exceptional, although it is not infrequently imposed 'avec sursis', (i.e. suspended) in the higher court.

It would be misleading to conclude consideration of the penalties without referring to a further significant feature of the French system, which is that the licensing authorities (in practice, the office of the Prefet in each department) have power to suspend driving licences for up to one year. The office of the Prefet receives a copy of every accident report submitted by the police to the Procureur's office, and an immediate 'suspension' of the driving licence can be ordered against any party involved. This power is frequently exercised against drivers suspected of a drink-driving offence. Although a driver has to be given notice of the authority's intention to take such a step and can appear and be legally represented before the committee which makes the decision, it is apparently unusual to so appear. The cost of representation can be high particularly if the incident was not in one's own area - the prospects of success seem limited and there is no right of appeal. Perhaps the only consolation is that subsequent judicial proceedings arising out of the same incident and which result in a 'suspension' or 'annulement' supersede any ban imposed by the administrative authorities; thus, for example, a driver who is banned by the Prefet on 1st August and who appears before a court to be dealt with in respect of the same incident on 1st October where he receives two months' 'suspension' will receive his licence back immediately; if the court imposes one month's 'suspension', although he will receive his licence back immediately he will already have served two months' 'suspension'. This last example is by no means purely an academic one; the writer saw several examples of this in practice, the most

glaring being that of a young man who had served just over four months' ban at the hands of the administrative authorities, only to receive a one month ban from the court. This system of loss of licence by administrative act is patently arbitrary, not least because it involves non-judicial authorities deciding in advance - without seeing or hearing from witnesses - who was responsible for an accident or other misdemeanor, and it met with almost universal hostility and criticism even among police officers and others responsible for law enforcement. There was also a widely voiced suspicion, almost impossible to substantiate, that 'knowing the right people' was the best insurance against subjection to a measure of this sort.

France has undoubtedly made great strides in the control of drinking and driving in the last twenty years or so; it seems questionable, however, whether the French legislation in this field is substantially tougher or more advanced than elsewhere in western Europe. Certain aspects of its provisions merit admiration, in particular the informative publicity and relatively non-technical legislation; on the other hand, closer examination of police powers to deal with drinking drivers shows that they are somewhat limited, the penalties imposed by the courts relatively lenient, and the deterrent value of the law as a whole unconvincing. Statistics, however, might seem to provide a more favourable verdict; in 1969 the figures for deaths and serious injuries on French roads were 14,640 and 93,882 respectively; the comparable figures for 1980 were 12,543 and 88,300.(36)

(1) L'Acool au Volant, No. 9, p. 1.

(2) The motor car was more than once described to me as 'sacre' in French society, meaning literally, and intended in context to mean, sacred: ironically, its other meaning is of course damned or cursed.

(3) To give just one minor example, some countries attributed deaths to road accidents if death followed within twenty-four hours of the accident; others counted deaths following within thirty days or even three months.

(4) See e.g. L'Homme et la Route, Michel Roche (1961); the work of Professor Got referred to in footnote 9, below; the pamphlet 'La Securite Routiere a travers les chiffres' (1981), published by the Comite Interministeriel de la Securite Routiere.

(5) Loi no. 70-597 of 9 July 1970.

(6) Of which the four best known were perhaps; 'Boire un petit coup, casse-cou'; 'L'alcool tue lentement, il tue aussi a 100 a l'heure'; 'votre voiture est sobre, faites comme elle'; and 'Securite, sobriete'. All seem rather old-fashioned today.

(7) Section 12(1) of the original Road Traffic Act 1972; Section 12(2) of the substituted provisions introduced by the Transport Act 1981. 80 mg per 100 ml seems to be the most common limit in force in Europe, being the limit applicable also in the U.K., Austria, Belgium, West Germany and Switzerland. Poland has a limit of 20 mg per 100 ml; East Germany, Norway, Sweden and Yugoslavia have 50 mg per 100 ml; Finland 75 mg per 100 ml; and Denmark 1 gramme per 100 ml.

(8) Minor amendments were made to the legislation in October 1971, and further proposals to strengthen the law were put forward in the National Assembly in December 1973 but were not then implemented.

(9) See e.g. L'Alcool et la Route, Ch. 2. (1980), and the article on his work in the Revue du Comité de la Securité Routière No. 17 of April 1978, pp. 9 10.

(10) Loi no. 78-732 of 12 July 1978.

(11) Non-existent in France prior to 1973.

(12) Of which the most familiar is undoubtedly 'Votre permis ne support plus l'alcool'.

(13) For the position in Northern Ireland, see the Road Traffic Act (Northern Ireland) 1970.

(14) There are three levels of criminal court in France; the lowest being the Tribunal de Police, dealing mainly but not exclusively with minor motoring matters; the middle court being the Tribunal Correctionnel,

dealing with most of the middle-range offences such as the more serious motoring matters, theft, burglary and assaults; and then there is the Cour d'Assise which has a wide jurisdiction overlapping to some extent that of the Tribunal Correctionnel, but in practice dealing only with the most serious matters. All the courts are staffed by professional 'career' magistrates. For a fuller discussion of the courts and their respective powers, see A.V. Sheehan, Criminal Procedure in Scotland and France (HMSO). It should be noted that the classification of jurisdictions and offences in France is not over-rigid; thus, if the injuries to the innocent party (the 'Partie civile') in a road accident result in more than thirty days' incapacity, the matter is heard before the Tribunal Correctionnel, even if, for example, the defendant's blood/alcohol level is between 80 and 119 mg per 100 ml. Such a reclassification is entirely unconnected with the blood/alcohol reading and does not affect the general principle.

(15) See below, p. 49-50.

(16) I use the term 'police' to include both the Gendarmerie and the various Commisariats de Police. The organisation of the French police forces is complicated, largely for historical reasons. The Gendarmerie is a quasi-military force and universal: the Commissariats de Police are non-military and exist principally in the large towns and cities. Both forces deal with excess alcohol matters.

(17) For the position here, see Road Traffic Act 1972 s.25, as amended by Transport Act 1981, s.26.

(18) (1980) 2A11ER 753.

(19) At the time of writing (January 1982) most of the relevant provisions of this Act had not been brought into force.

(20) See e.g. Rowlands -v- Hamilton (1971)1AllER 1089 (HL); on the other hand, several cases highlight the unreliability of this defence see, inter alia, the remarks of Lord Diplock in D.P.P. -v- Carey (1969)3AllER 1662; Ingleton -v- Dibble (1972)1AllER 275; R -v- Lawrence (1973)RTR 64.

(21) Loi no. 78-732 of 12 July 1978, Art.II.

(22) Code de la Route, Art.266.

(23) cf. Pinner -v- Everett (1969)3AllER 257; Sakhuja -v- Allen (1972)2AllER 311; Edkins -v- Knowles (1973)RTR 257.

(24) For a fuller discussion of the comparative aspects, see Sheehan, op.cit.

(25) Although the principle appears (and undoubtedly is) somewhat illiberal, the practical effect of the legislation seems limited. Professor Ross, quoting from the Journal Officiel of 21 April 1979, indicates that between August 1978 and January 1979, 335,449 breath tests were administered in the whole of France during authorised roadblocks, from

which only 733 prosecutions resulted. Even the apparently large figure for tests administered suggests in reality little more than a remote chance of being stopped for such a test.

(26) Though it seems that, particularly in the early days, even this was not always complied with.

(27) Two types of breath test kit are currently authorised for use in France, both of which are comparable to the alcotest (R) 80 in use here. I understand that a device similar to the Alcolmeter (now approved for use in this country under the Breath Test Device (Approval) (No.2) Order 1979) is to be introduced to France in the near future.

(28) Deterrence of the Drinking Driver: An International Survey (1981). I understand that this work forms the basis of a book to be published in the United States in the near future.

(29) Op.cit. p. 77.

(30) cf. Road Traffic Act 1972 s.9(5) and s.9(7); under the replacement provisions created by Schedule 8 of the Transport Act 1981, s.8(8) is the relevant one.

(31) cf. Road Traffic Act 1972 s.9(1); now embodied in s.8 of the provisions substituted by Schedule 8 of the Transport Act 1981.

(32) cf. Road Traffic Act 1972 s.10(5); now s.10(6) of the provisions substituted by Schedule 8 of the Transport Act 1981.

(33) In the thirteen cases observed by the writer in French courts during October 1981, all resulted in a disqualification, the shortest being for one month and the longest being for six months.

(34) Because the police, not the court, take physical possession of the driving licence for onward transmission to the authorities.

(35) In certain cases (e.g. those resulting in death or serious injury) the Code provides for the doubling of penalties.

(36) La Securite Routiere a travers les chiffres (1981); as with all statistics, however, a caveat is required. The period from 1969 to 1980 saw the introduction in France of a number of other road safety measures notably the introduction of speed limits and seat belt legislation.

*The author would like to record his appreciation of the assistance given by the Comite Interministeriel de la Securite Routiere; by Professor Ross; by Monsieur Guemas, Procureur de la Republique for Perigueux and by Messieurs Pelbois and Crespy of the Commissariat de Police for Perigueux, and by many others. Naturally, any views and errors appearing in the article are the author's alone.

COHABITATION

Introductory Note

The practice of cohabitation has become an almost accepted feature of our society. As this acceptance continues, there will, unevitably, be further developments in the legal system designed to accommodate the legal problems arising from cohabitation in respect of both personal and property rights. At the same time, cohabitees will be required to discharge their responsibilities towards children of their union.

The aim of the following three articles is to evaluate the present state of the law in three different areas. In some parts of family law, there is now clear evidence, both at Common law and in the statutes, that the similarities between marriage and cohabitation can no longer be ignored. This can be seen, for example, in the Domestic Violence Act 1976 as interpreted by the courts.

In the area of property law, many of the problems encountered some years ago on the break-up of marriage, and now largely solved in that context by the provisions of the Matrimonial Causes Act 1973, are being solved similarly with regard to cohabitees. The same attempts are being made to reconcile formal rules with emotional relationships, but, in the absence of legislation, the task is by no means easy.

No similar movements can, however, be discerned in the area of tax law which is entirely the creature of statutes. Given the traditional restrictive interpretation of taxing statutes it is unlikely that there will be any common law attempt to assimilate the position of spouses and cohabitees and that any such change will be effected by statute.

The English judiciary adopts a piece-meal approach to law, dealing only with the case before the Court and refusing to take what the late Karl Llewellyn termed a "grand style" of judgment. Given that Parliament has little interest and even less expertise in most areas of law reform, it seems unlikely that anything approaching a rational code of law governing cohabitees will emerge in the foreseeable future. No such code exists for those who are married and many important reforms, such as automatic co-ownership of the matrimonial home, are still waiting to be enacted. It seems that lawyers will be called on for some time to grapple with, and occasionally to exploit, the problems which arise in relation to cohabitation.

COHABITEES AND THE FAMILY HOME: PROPERTY RIGHTS by J M Hooper*

When two people decide to live together, whether or not they marry, they do so on the basis of an apparently successful and satisfying personal relationship founded on mutual love and respect. The parties anticipate that the relationship will be an enduring one. Property, including the family home, is likely to be regarded as being for their mutual use and enjoyment. The beneficial ownership of the property will be of little importance to the parties unless the owner dies or becomes bankrupt, or unless the relationship breaks down and each party wishes to take his or her portion of the "shared" asset.

It is a truism, nonetheless valid, to state that cohabitees, who have a personal relationship, do not deal with mutually enjoyed property in a business-like manner; "They do not as a rule enter into contracts with one another so long as they are living together on good terms. It would be very odd if they did".(1) In any dispute over the home the Courts are faced with particular problems arising from the break-down of a personal relationship but which can only be dealt with in accordance with general property law. The courts must deal with these problems as they arise irrespective of the marital status of the parties. Where the couple have gone through the ceremony of marriage the mechanics of a "share out" are, in a sense, easier to deal with as the Courts have a wide discretion on divorce to adjust the property rights of the spouses(2) taking into account factors such as the needs and resources of the spouses, the length of the marriage and contributions made by the parties.(3) Legislation has provided a solution to difficult questions of ownership of property for spouses on the break up of their marriage. No such legislation exists for cohabitees and thus the Courts are faced with the same problems that they used to have in dealing with matrimonial property in respect of the property rights of cohabitees.

The fact of cohabitation does not, strictly, have any relevance for the Court as it does not give rise to any special principles of law. It is, however, relevant in the sense that the Court is aware of the

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personal nature of the parties' relationship and may be prepared to make inferences which would not be appropriate in other circumstances.(4) It is the purpose of this article to consider how the general law of property has been used and adapted by the Courts to deal with the family homes of cohabitees.

Where the property has been conveyed to the parties jointly few problems arise as it is presumed, in the absence of evidence to the contrary, that they are beneficially entitled in equal shares. Similarly if the property is conveyed to one party he or she may create an express trust for the parties by making a declaration of trust and signing a document which evidences the declaration in accordance with S.53(1)(b) Law of Property Act 1925. Unless property is jointly conveyed or the subject-matter of a validly created express trust then a non-owning cohabitee can only rely on the principles of resulting and constructive trusts in making a claim against the property.

Where the family home is conveyed into the sole name of one cohabitee, prima facie, the other party has no interest in the property unless a declaration of trust is made and S.53(1)(b) complied with. Resulting, implied and constructive trusts however, are not created by any formal act(5) and a plea of lack of writing as required by S.53(1)(b) will not prevent such a trust arising.

A resulting trust may be "automatic" for example, where a settlor fails to dispose of his entire beneficial interest, or "presumed" where property is conveyed voluntarily or where a party provides all or part of the purchase monies for property conveyed into the name of another.(6) The resulting trust may be said to be based on the intention of the parties, express or implied. The constructive trust, conversely, is imposed by the Court in fairly limited circumstances and is usually the last thing the legal owner of the property intended or desired.

Financial Contribution: resulting trust

A resulting trust is presumed where one party provides the purchase monies for property which is conveyed to another. The presumption can, of course, be rebutted. Again where cohabitees both contribute to the purchase price of property the presumption is raised. The problems in this area arise in deciding on what basis the contribution was made by the non-owner. The House of Lords in Pettitt v Pettitt(7) and Gissing v Gissing(8) considered the effect of payment of money by a non-owning spouse which could be related to the acquisition

of the home. These, and many other, cases involve disputes between spouses on the break-up of their marriages, but the principles applied are derived from principles of property law. Since the Courts have not restricted their decisions to married couples, property disputes between cohabitees will, as expressly stated by Lord Denning, M.R. in Cooke v Head(9), be dealt with in the same way as such disputes between spouses. If payments by a non-owner are to give rise to a resulting trust in favour of the payer, the money must be expended on the basis of an agreement between the parties to the effect that through the payments the non-owner is acquiring a share in the property. Payment of money does not, of itself, give rise to a beneficial interest in the property unless the necessary prior agreement can be shown.(10) The Court must look at the facts surrounding the payments and decide, on the evidence, whether they were made pursuant to an agreement between the parties; if so, then the payer will have a beneficial entitlement proportionate to contributions toward the purchase price.

In Pettitt v Pettitt, Lord Diplock recognised that the parties' respective proprietary interests will assume a relevance for them only when their relationship deteriorates and that in a majority of cases no thought is given to these when property is acquired and payments made. He was willing to impute an agreement between parties on the basis of what agreement would have been reached by the parties had they put their minds to it when the property was acquired.(11) This approach was rejected by the majority in Gissing v Gissing, "The court does not decide how the parties might have ordered their affairs: it only finds how they did. The Court cannot devise arrangements which the parties never made. The Court cannot ascribe intentions which the parties never had".(12) Thus it appears that although the break-up of a relationship will concentrate the minds of the parties wonderfully towards proprietary rights, such concentration is necessary from the outset.

Where a cohabitee provides a part of the monies used to purchase the family home the Courts experience little difficulty in finding, prima facie, a presumed resulting trust based on common intention.(13) The law is more complex where responsibility for various payments is divided between the parties. It may be that one party pays the mortgage instalments whilst the non-owner is responsible for the payment of household expenses. In such a situation the non-owning party has clearly made no direct contribution towards the purchase of the property. Here the Courts adopt a practical approach to the realities of family economics(14) and if such an arrangement is found to be referable to the purchase of the property, then such indirect contributions, if substantial, may be evidence of a common intention that the non-

owner should have some share of the beneficial interest by virtue of these payments.

It appears that the relationship of the parties, being of a personal rather than a business nature, has no bearing on the principles of law involved. Where the nature of the relationship does have relevance is in deducing whether or not any agreement, express or implied, does in fact exist between the parties relating to the indirect contributions of a non-owning cohabitee. Here the nature of the parties' relationship is of vital importance as the Court must then consider the "economic realities"(15) of one cohabitee making substantial contributions to family finances and thus leaving the other cohabitee free to use his own resources to purchase the home. The House of Lords felt that such contributions would undoubtedly give rise to a resulting trust if referable to the purchase of the property. What is not clear is whether these indirect contributions must, in order to give rise to a resulting trust, be paid to enable the owner to acquire the property or whether they need simply relieve the financial burden placed on the owner. It is submitted that, whilst the financial standing of the parties vis-a-vis each other is not irrelevant, what does matter is that the contribution should be made on the understanding that the payments give rise to, or increase, the payer's beneficial interest.

The question of indirect contributions has been developed considerably by Lord Denning, M.R., who has adopted the view that a substantial indirect contribution will give rise to a trust irrespective of necessity or, indeed, of referability to the purchase of the property. In Hazell v Hazell(16) his Lordship considered it "quite wrong"(17) that a prior agreement relating to the contribution was necessary in order to give rise to a share in the property and, on the authority of his own judgement in Hargrave v Newton(18) went on to state:(19)

> "It is sufficient if the contributions made by the wife are such as to relieve the husband from expenditure which he would otherwise have had to bear. By so doing the wife helps him indirectly with the mortgage instalments because he has more money in his pocket with which to pay them. It may be that he does not strictly need her help - he may have enough money without it - but, if he accepts it (and thus is enabled to save more of his own money), she becomes entitled to a share."

Lord Denning's view has not gone uncriticised. A.A.S. Zuckerman(20) suggests that it is erroneous to suppose that the House of Lords intended to lay down fixed rules relating to indirect contributions in Gissing v Gissing but equally that Lord Denning is wrong in his belief that any

contribution of substance will automatically give rise to a beneficial interest. Professor J.M. Eekelaar questions whether, as a matter of law, the Court of Appeal could dispense with the requirement of referability while admitting that this approach "has the initial attraction of satisfying the demands of simplicity and justice".(21) Professor Eekelaar goes on to express extreme disquiet, "But referability may yet turn out to have been a life-line which, once cut, cast the Courts adrift in uncharted, indeed forbidden, waters".(22) There is, in English law, no concept of family assets and, as Professor Eekelaar points out, without the requirement of referability a claim to a beneficial interest would be open to any individual who contributed to the household expenses. Also would any other property acquired by the cohabitee who "is enabled to save more of his own money"(23) by virtue of the contributions be held on similar trusts?

In Cowcher v Cowcher,(24) Bagnall, J., adopted a more orthodox stance in deciding on the ownership of the home. The decision is based on Pettitt v Pettitt and Gissing v Gissing and departs somewhat from interpretations placed on the judgments in these cases by the Court of Appeal. Bagnall, J., reiterated that property principles alone were applicable and that, contrary to the view of Lord Denning, property rights may not be determined according to what is reasonable and fair or just in all the circumstances. According to Bagnall, J., there are two areas of agreement open to the parties. They may achieve an "interest consensus" where they agree on the beneficial interest each is to have. If this is the case then what is contemplated is an express trust and if the agreement is to have any effect for land then S.53(1)(b) must be complied with. The second type of agreement is "money consensus" where contributions to the purchase price will give rise to a resulting trust in favour of the non-owner in the proportion which the parties contributed to the purchase monies. However "money consensus" also covers an agreement between the parties that the purchase price shall be regarded as having been paid in particular proportions and will thus take indirect contributions into account.

It is submitted that referability to the purchase of the home is essential in deciding whether indirect contributions give rise to a beneficial interest. Where property could not be purchased without such contributions it is submitted that there is little real difficulty in infering an agreement; where, however, such contributions are not vital to the acquisition, stronger evidence of the parties' intentions will be required.

Contributions which are not financial: Constructive Trusts

Thus far, any interest acquired by the cohabitee has been based on money contributions, direct or indirect, and on an express or implied agreement. Further difficulties arise where a cohabitee has clearly contributed to the home in terms of work involved in running the home but has not contributed in cash, or where the Court can find no evidence of any agreement relating to the basis of ownership of the home.

The factor common to resulting and constructive trusts is that there are no formal requirements for their creation. Lord Diplock stated in Gissing v Gissing:(25)

> "A resulting, implied or constructive trust and it is unnecessary for present purposes to distinguish between these three classes of trust is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired."

These remarks have been seen by Lord Denning as giving rise to a "new model" of constructive trust whereby the trust is "an equitable remedy by which the Court can enable an aggrieved party to obtain restitution"(26) and is a means of doing justice inter partes, apparently ignoring Lord Diplock's qualification that the conduct must be such as to "induce the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land".(27)

In Cooke v Head(28) the Court of first instance held that by virtue of monetary contribution Ms Cooke was entitled to a one-twelfth share on resulting trust. Ms Cooke had done considerable work in helping to build the bungalow in which the parties were to live and Lord Denning felt that

> "In the light of recent developments, I do not think it is right to approach this case by looking at the money contributions of each and dividing up the beneficial interest according to those contributions. The matter should be looked at more broadly".(29)

It was on this broader basis that Ms Cooke was held to be entitled to a one-third share although whether the trust was constructive or resulting is far from clear.

In Eves v Eves(30) the parties purchased a home which was conveyed to Mr Eves alone. The parties intended to marry when free to do so, a factor subsequently held to be vital(31) by an identically constituted Court of Appeal in deciding whether the acquisition of the home was a joint enterprise which could give rise to a trust. The financial contribution of Ms Eves was too small to infer an agreement for a "purchase-money resulting trust". She had, however, been tricked by Mr Eves who informed her that the property could not be conveyed into their joint names as she was a minor, an obstacle which no longer existed at the time of the conveyance. In view of the hard physical work she had done to improve the property and in the light of Mr Eves's unconscionable conduct, the Court of Appeal fixed her interest at a quarter share in the property.

It would appear from Lord Denning's judgment in the case that he found a constructive trust in the form of a remedy against unjust enrichment, a creative use of the constructive trust of which Lord Denning is much enamoured. The majority agreed that Ms Eves was entitled to her share on constructive trust but did not base their decision on the prevention of what would otherwise have amounted to unjust enrichment. The majority found, on the facts, that Ms Eves clearly and reasonably believed that she was to have an interest in the property, that belief being fostered by Mr Eves, and it was on this basis that she did so much physical work improving the property. It would thus be fraudulent to permit Mr Eves to rely on the absolute conveyance to him and plead lack of writing as required by S.53(1)(b) to deny the existence of a trust. So, in the more orthodox view of the majority although no express trust was created the "agreement" between the parties and Ms Eves's subsequent actions were sufficient to prevent the unconscionable reliance by Mr Eves on the conveyance and for equity to impose a constructive trust.(32) In fact, the surprising feature of the case is that Ms Eves was not entitled to a half share.

In Eves v Eves, Ms Eves had acted to her detriment thus making Mr Eves's subsequent reliance on the conveyance and S.53(1)(b) fraudulent. It has been argued by Frank Webb(33) that it is unnecessary to show anything other than an express agreement that the property should be jointly owned; this is sufficient to make it unconscionable for the legal owner to rely on the lack of writing and thus gives rise to a constructive trust. If this view is correct, a cohabitee need only reach an express agreement with the other party, make no contribution

of any kind to the acquisition of the property, and claim that it is unconscionable for the owning cohabitee to renege on the agreement on the basis of S.53(1)(b). There does not seem to be any valid reason why S.53(1)(b) should not apply to such agreements and it is submitted that unless, in the words of Lord Diplock(34), the agreement has caused the non-owner to "act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land it is difficult to see how the legal owner has acted, or would be acting, fraudulently or unconscionably.

It would appear that the detriment suffered by the non-owner need not be particularly extensive to invoke the aid of Equity. In Pascoe v. Turner(35) a transfer of the legal estate to the cohabitee was ordered on the basis of proprietary estoppel. The owner had stated that he intended to give the property to Ms Turner and permitted her to spend various small amounts in refurbishing the property. She claimed to be entitled either by way of constructive trust or proprietary estoppel to the property for her lifetime at least. The case is interesting in that the detriment suffered by Ms Turner was amply and very profitably recompensed by the transfer of the house to her.

The type of trust and the size of the share

As stated above, it seems that a resulting trust arises on payment of money plus intention whereas in the absence of money and intention any trust imposed by the Court will be constructive. The limits of each type of trust have become blurred and, it is respectfully submitted, judicial confusion over two distinct areas of the law of trusts is most unhelpful.(36) It is submitted that the distinction is vital as it would appear that where a resulting trust arises the non-owner's share is fixed by the proportionate expenditure. Where a constructive trust is imposed on the basis of detriment and fraudulent conduct the Court appears free to determine in a completely random manner the extent of the beneficial interests. In Cooke v Head the amount of work done by Ms Cooke meant, for Lord Denning at least, that simply to quantify by reference to money payments alone was unfair. The same could be said of Ms Eves whose work considerably improved the property. Perhaps this is permissible if an agreement on Bagnall, J's "money consensus" could be inferred. The alternative is to suggest that the constructive trust, used as an equitable remedy against unjust enrichment, may entitle the Court to award a larger share than would otherwise be justified on the ground of monetary contribution made by the non-owner. There seems to be no logical reason for the decision on quantum

in these cases. Even if regarded as cases where "improvements" led to an enhancement in the value of the property it seems inconceivable that the work done by Ms Eves could account for such a dramatic increase. In any event it would appear that improvements leading to a proprietary interest must be undertaken by the non-owner on the grounds of an agreement to that effect(37) which appears to be lacking in Eves v Eves. Further, if improvements alone can lead to such an inflated share of the property the cohabitee would appear to be in a better position than a spouse(38), who basically takes an interest equivalent to the enhanced value.

It is submitted that whether the cases were decided on the basis of the supposed value of the physical work done, the orthodox constructive trust as advocated by Lord Denning, the decision reached on quantum seems unrelated to any detriment suffered by the respective cohabitees in so willingly providing their labour. It may be that in coming to a decision on the cohabitees' respective interests that the court was aware that the capital shares awarded represented the only financial benefit which the cohabitees would derive from the relationship as neither woman, unlike a spouse, could look to their cohabitee for maintenance payments.

Although the limits of resulting trusts and constructive trusts may be blurred they are trusts of a differing nature. This was neatly illustrated in Re Densham(39), a case concerning spouses. The wife had contributed to the purchase price and the parties had agreed that the property should be conveyed to them jointly although by some error the wife's name had not been included on the conveyance. When the husband bankrupt it was essential to determine the wife's interest. It was held that she was entitled to a one-ninth share on resulting trust by virtue of her contribution that being increased to a one half share on constructive trust based on the mistake in the conveyance. On the husband's bankruptcy the wife could claim her share on resulting trust but under S.42 Bankruptcy Act 1914 the constructive trust was voidable against the husband's trustee in bankruptcy for lack of consideration.

In conclusion, it must be admitted that the property rights of cohabitees are uncertain. A non-owning cohabitee maywell be regarded as the holder of a lottery ticket when it comes to assessing his or her interest in the shared home. The Court may take the attitude that a resulting trust based on contribution provides a solution or that in the interest of justice an enlarged share on constructive trust is appropriate. Unromantic though it may be, intending cohabitees would be well advised to decide upon their respective interests in the home and ensure that

the agreement is expressed in writing. It seems that legislation specifically relating to cohabitees' property is unlikely to be enacted in the foreseeable future and reliance on vague understandings and implied agreements in the light of conflicting views of the law in this area is little short of foolhardy.

(1) Pettitt v Pettitt (1970) AC 777 per Lord Hodson at p 806.

(2) Matrimonial Causes Act 1973 S.24.

(3) Ibid S.25.

(4) cf Paul v Constance (1977) 1 WLR 527 where an express trust of personal property was held to exist based on phrases such as; the property was as much hers as his. The position regarding the matrimonial home is more complex as, being real property, formalities are required to create an express trust.

(5) Law of Property Act 1925 S.53(2).

(6) See Re Vandervell's Trust (1974) Ch 269 per Megarry J.

(7) supra.

(8) (1971) AC 886.

(9) (1972) 2 All ER 38 at p 41.

(10) eg Richards v Dove (1974) 1 All ER 888 where money was lent by a mistress and used for the acquisition of property she also made payments for food and other household expenses; here the mistress had no beneficial entitlement.

(11) supra at pp 822-823.

(12) supra per Lord Morris of Borth-y-Gest at p 898.

(13) ibid per Lord Pearson at p 902.

(14) See for example Gissing v Gissing supra per Lord Diplock at pp 906-908.

(15) see note 14.

(16) (1972) 1 All ER 924.

(17) ibid at p 925.

(18) (1971) 3 All ER 866.

(19) Hazell v Hazell supra at p 926.

(20) The Matrimonial Home 94 LQR 26.

(21) The Matrimonial Home in the Court of Appeal 88 LQR 333 at p 335.

(22) ibid.

(23) Hazell v Hazell supra at p 926.

(24) (1972) 1 WLR 425.

(25) supra at p 905.

(26) Hussey v Palmer (1972) 1 WLR 1286 at p 1290.

(27) supra at p 905.

(28) (1972) 2 All ER 38.

(29) ibid at p 42.

(30) (1975) 1 WLR 1338.

(31) Tanner v Tanner (1975) 1 WLR 1346.

(32) see Rochefaucauld v Boustead (1897) 1 Ch 196.

(33) Trusts of Matrimonial Property 92 LQR 489.

(34) Gissing v Gissing supra at p 905.

(35) (1979) 2 All ER 945.

(36) cf Hussey v Palmer (1972) 1 WLR 1286. Lord Cairns felt the plaintiff was entitled to repayment of monies expended on the basis of a loan, Lord Denning MR and Lord Phillimore felt she was entitled under a constructive trust and a resulting trust respectively.

(37) Pettitt v Pettitt supra.

(38) Matrimonial Proceedings and Property Act S.37. See also: Richards, The Mistress and the Family Home 40 The Conveyancer 351.

(39) (1975) 1 WLR 1519.

COHABITEES AND THE FAMILY HOME: LEGAL RESPONSES by P M Knott*

> "Some years ago we had cases about deserted wives. Now we have cases about deserted mistresses."(1)

Since 1970(2) the courts have had wide powers to adjust property rights between spouses so rendering the question of property ownership between married couples largely redundant. Thus it is not surprising that the judiciary should have turned their attention towards the resolution of problems concerning cohabiting couples (cohabitees).

Disputes about such rights frequently arise when the title to the property concerned (usually the joint home) is in the name of one of the partners and the other, the "non-owning partner", under threat of eviction, wishes to establish some right to remain in occupation of the property. The aim of this article is not to provide an exhaustive review of the law in this area, but rather to investigate judicial attitudes towards the problem through an examination of selected case law which demonstrates the range and flexibility of potential remedies available to the non-owning partner.

Trusts

Potentially the most effective method of securing occupation of property is to establish that one has a proprietary interest in the property itself. For a partner whose name does not appear on the title deeds this will usually involve resorting to the law of implied trusts, based on proof of contributions towards the purchase and/or improvement of the property. It is submitted that the type of trust employed is not of importance to the family lawyer.(3)

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The use of the law of trusts in cohabitation cases is now well established(4), primarily by extending principles previously applied to married couples. Thus it is pertinent to consider the extent to which the law now offers protection to the non-owning partner irrespective of marital status.

A number of cases in the early seventies placed significant emphasis on the parties' intentions with regard to marriage. Thus in Cooke v Head (1972) Karminski LJ referred to the fact that the partners

> "intend to marry when they are free"(5),

words which were echoed by Lord Denning three years later in Eves v Eves.(6)

Trusts were recognised and shares awarded(7) in both of the above cases, but meanwhile in Richards v Dove (1974) where there was

> "no thought of marriage on the part of either of them"(8)

it was recognised that the "mistress" might find it more difficult to establish a trust because unlike a wife she has no right to be maintained by her partner. In this case the payment of a deposit on the home from a joint bank account was interpreted as a loan from the mistress rather than as a contribution towards the purchase and consequently her claim failed.

It appears therefore that the courts were treading cautiously in the early seventies, and that those cohabiting as a direct alternative to marriage might find little sympathy in the courts, in contrast to those whose cohabitation could be described as 'pre-marital'.

Two more recent decisions concerning cohabitees suggest, however, that the law is still evolving, and demonstrate a tendency towards ignoring the parties' marital intentions when adjudicating on property disputes. In each case the property was held upon express trust for sale and, the relationship having broken down, the issue before the court was to consider the principles upon which an application for sale under Section 30 of the Law of Property Act 1925(9) should be determined.

In Re Ever's Trust (1980)(10), Ormrod LJ reviewed a number of cases, relating to married couples and proceeded to enunciate common principles for "these 'family' cases". Thus a sale was refused because

the purpose of the trust was to provide a family home for the three children, and that purpose was still continuing. Indeed, Ormrod LJ went so far as to say that the case

> ". . . brings the exercise of the discretion under this Section, so far as possible, into line with the exercise of the discretion given by S.24 of the Matrimonial Causes Act 1973."(11)

Similarly in Dennis v McDonald (1981)(12), where the father wished to remain in the jointly-owned property with three of the five children, Purchas J referred to their "matrimonial association" and "family home" in refusing an application for sale by the mother.

It is significant that in neither Re Ever's Trust nor Dennis v McDonald did the parties have any intention to marry, and it is submitted that any initial distinction in the court's attitude between married and and unmarried couples in relation to the discretion as to sale is becoming blurred almost to the point of extinction.

Confirmation of this trend is illustrated by the recent case of Bernard v Josephs (1982)(13) in which Lord Denning MR stated that when ascertaining shares in family property the courts should not normally distinguish between co-habitees and the "truly married". He also confirmed that applications by cohabitees should normally be dealt with in the Family Division. Griffiths LJ however sounded a note of caution when stating that the same principles should only be applicable if:-

> "the relationship was intended to involve the same degree of commitment as marriage."

This suggests perhaps that a substantial period of cohabitation may be necessary in this context.(14)

A potentially more significant distinction concerns the date at which the non-owning partner's equitable share should be valued. In Hall v Hall (1981)(15) it was confirmed that valuation of a cohabitee's share should normally occur when the relationship is extinguished, that is at the date of separation. Conversely, in a case involving a married couple where "their relationship was intended to be permanent"(16) valuation would normally take place at the date of the court hearing (or actual sale if later). In inflationary times this distinction is important - for example in the instant case there was a three-year delay

between the separation, and trial of the issue.

However, it should be noted that the court's powers in this regard are always discretionary and in the subsequent case of Cousins v Dzosens (1981)(17) both sale and valuation of the "quasi-matrimonial home" were postponed for upwards of six months beyond the hearing date to enable the non-owning cohabitee to find alternative accommodation. The flexibility of the court's approach in such cases is thus confirmed.

Proprietary Estoppel

Despite developments in recent years the trust concept still has its limitation for cohabitees in that it can only be used to give effect to existing property rights. In contrast, the divorce court has wide statutory powers to adjust such rights when a marriage breaks down by transferring or settling property, a distinction which Ormrod LJ specifically recognised in Re Ever's Trust.(18) In response to these limitations the courts have shown considerable imagination in adapting the doctrine of proprietary estoppel to afford yet further protection to cohabitees.

This doctrine operates where one party encourages another to act to his or her detriment in the expectation that the latter will obtain an interest in the property concerned. In Pascoe v Turner(19), Mrs Turner remained in Mr Pascoe's house after their relationship had broken down. Mr Pascoe promised that 'the house is yours', in reliance upon which she redecorated and improved the property in a modest but substantial manner, mainly from her own limited savings. The Court of Appeal held that she had established a claim and it followed that she was therefore entitled in Equity to the appropriate remedy because (unlike promissory estoppel) proprietary estoppel gives rise to a cause of action: it may be used as a sword, not merely as a shield.

In deciding between the alternative remedies of granting Mrs Turner a licence to occupy for her life, or ordering Mr Pascoe to convey the property to her outright, the court preferred the latter, partly because of the ruthlessness with which Mr Pascoe had pursued his claim. Clearly, by ordering a transfer of the property, the court was exercising a power very similar to the discretion to adjust the property rights of married couples on divorce. As S D Migdel has commented:-

> "It may well be that had Mrs Turner been married to Mr Pascoe she may not have achieved a better settlement."(20)

Whether proprietary estoppel offers much potential to cohabitees generally, will depend upon the attitude of the courts towards the dual requirements of encouragement and detriment, each of which was established with unusual clarity in Pascoe v Turner. In Greasley v Cooke (1980)(21) Miss Cooke, a housekeeper who lived in the home and cared for the family following vague assurances that the owner would "do the right thing" by her, was granted a licence to stay on in the house for so long as she wished.

Lord Denning's judgment in this case reveals a broad approach to the doctrine in two respects.

First, he held that,

> "the expenditure of money . . . is not a necessary element",(22)

so that the provision of household services, as in the instant case, is capable of raising an estoppel.

Second, assurances having been given,

> "there was no need for her to prove that she acted on the faith of those assurances. It is to be presumed that she did so."(23)

Therefore it is not even necessary to prove a connection between the encouragement given and the detriment incurred.

Couple this liberal interpretation with the court's discretion to provide the "appropriate" remedy and the scope for the use of proprietary estoppel by cohabitees may be wide indeed.

Thus it can be seen that the law has evolved quite rapidly over the past decade. The development in judicial attitudes is perhaps best illustrated by returning to the case of Eves v Eves(24) in which Janet(25) decorated, broke concrete, demolished and rebuilt a shed, all in reliance upon (false) assurances from Mr Eves that the property would have been placed in joint names but for the fact that she was a

minor. Janet was awarded a one-third share in the home on the basis of a constructive trust: it is interesting to speculate on what she might have obtained had the doctrine of proprietary estoppel been utilised by the court.

Occupation rights

It remains to complete the picture by mentioning that the primary concern of the non-owning partner will often be to secure occupation, rather than ownership, of the family home; and that (s)he cannot rely upon the statutory right of occupation afforded to spouses by the Matrimonial Homes Act 1967.

A cohabitee may be granted temporary occupation rights under the Domestic Violence and Matrimonial Proceedings Act 1976, but usually limited to three months in the first instance.(26) Alternatively, (s)he may be able to establish an implied licence to occupy the property: the terms of such licences have varied from twenty-eight days, through twelve months, to ten years(27), depending on individual circumstances.

Clearly these more personal rights are less attractive than a proprietary interest, particularly in that only the latter can yield a share in the proceeds if and when the property is eventually sold. Therefore any such occupation right would only normally be relied upon when an ownership claim cannot be established.

Conclusions

What are the wider implications of this trend towards dealing with property disputes between couples with little regard to their marital status? The Office of Population Censuses and Surveys(28) estimates that in 1979 there were one-third of a million cohabiting couples in Great Britain, undoubtedly

> "a social development of some importance".(29)
> (Ormrod LJ)

The cases cited above demonstrate a flexible, rapid and imaginative judicial response to an essentially social phenomenon.

Meanwhile, there have been parallel developments in other areas of the law, both judicial and legislative; for example in the law of succession(30), in interpretation of the Rent Acts(31) and in proposals to abolish illegitimacy.(32) Together these suggest a move towards

acceptance of (social) family rather than (legal) marriage as the basic household unit deserving of the protection of the law.

Whether the legal recognition of extra-marital relationships constitutes merely a reflection of a society in which 150,000 couples divorce each year(33), or contributes towards an undermining of the very status of marriage is another question altogether.

(1) Lord Denning MR in Tanner v Tanner (1975) 3 All ER 776, at 779.

(2) Now Section 24 of the Matrimonial Causes Act 1973.

(3) ''^ resulting, implied or constructive trust it is unnecessary to distinguish between these three classes of trust'', per Lord Diplock in Gissing v Gissing (1970) 2 All ER 780.

(4) eg Diwell v Farnes (1959) 2 All ER 379.

(5) (1972) 2 All ER 38, at 43.

(6) (1975) 3 All ER 768, at 771.

(7) ¼ in Cooke v Head, 1/3 in Eves v Eves.

(8) per Walton J (1974) 1 All ER 888, at 894.

(9) Section 30 provides: ''If the trustees for sale refuse to sell ... any person interested may apply to the court ... for an order directing the trustees for sale to give effect thereto and the court may make such order as it thinks fit''.

(10) (1980) 3 All ER 399.

(11) at page 403.

(12) (1981) 2 All ER 632.

(13) (1982) 2 WLR 1052.

(14) cf three months cohabitation has been held sufficient under DVMPA 1976. McLean v Nugent (1979) 123 Sol Jo 521.

(15) No 79, 01231 Unreported Association LEXIS.

(16) per Lord Denning.

(17) The Times, 12th December 1981.

(18) supra, at page 401.

(19) (1979) 2 All ER 945.

(20) Family Law, Volume 9, page 197.

(21) (1980) 3 All ER 710.

(22) at page 713.

(23) ibid Waller and Dunn LJJ gave concurring judgments.

(24) supra, note 6.

(25) Lord Denning felt that to refer to any one of her four surnames would only add to the confusion.

(26) Practice Direction (1978) 2 All ER 1056.

(27) Horrocks v Foray (1976) 1 All ER 737, Chandler v Kerley (1978) 2 All ER 942 and Tanner v Tanner (1975) 3 All ER 776 respectively.

(28) Population Trends, 25.

(29) In Re Ever's Trust, supra note 10, at 401.

(30) Inheritance (Provision for Family and Dependants) Act 1975.

(31) eg Dyson Holdings v Fox (1975) 3 All ER 1030; and Watson v Lucas (1980) 3 All ER 647.

(32) Law Commission Working Paper Number 74.

(33) 150,385 decrees nisi in 1980.

MARRIAGE OR COHABITATION - TAXATION IMPLICATION by Mrs F E Spearing*

Much has been said recently on the relative merits of marriage and cohabitation from the income tax aspect; much less attention has been been paid to the capital position and it is therefore the writer's intention to focus particularly on the latter. From the point of view of tax law an individual may have the status of being single, married, separated or divorced.(1) Each category attracts the application of particular rules of tax law. To complicate the position further the results of a particular status may vary according to which tax is under discussion. A couple is regarded as married for the purposes of capital transfer tax until the marriage is ended by decree absolute of divorce, decree of nullity or by death. In contrast, for the purposes of income tax and capital gains tax the rules applicable to single persons apply once the parties are separated in such circumstances that the separation is "likely to be permanent".(2)

It is proposed to include in this article a brief summary of the general principles applicable to the three major taxes previously mentioned, together with a more detailed analysis of their application to persons of differing legal status. Before attempting to draw any general conclusions there will be a short note on the position with regard to settlements.

A INCOME TAX

Income tax charges receipts of an income rather than of a capital character; income is classified according to its source, for example income from employment, income from carrying on a trade or income derived from lettings.(3) Certain receipts are excluded either expressly for example scholarships(4), or because they do not have the character of income, for example gifts. Certain expenses are deductible in computing the net income derived from each source, for example expenses of heating and wages for a trader.(5) The taxpayer's net income from all sources is aggregated to give a figure known as statutory income.(6) Certain payments are then deductible from this figure, for example, covenanted payments,(7) perhaps to a charity or dependent relative, which, subject to limitations, will be regarded as the income

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of the payee for income tax purposes. Further deductions are then permitted for allowable interest and personal reliefs.(8) The latter depend on the status and characteristics of the individual involved. A married man receives a larger personal relief than a single person and the elderly, subject to income limits, receive higher rates of personal relief than the rest of the population. No relief is given in respect of the income of a married woman unless that income is earned rather than investment income.(9) Other more restricted reliefs are those, for example, for the maintenance of dependent relatives and for the registered blind.

The figure which ultimately emerges after all these deductions is the taxable income. Tax is then charged in bands or slices at progressively higher rates on such income.(10) Initially there is a broad band taxed at the basic rate. The bands then become narrower and rise relatively quickly to a top rate of 60%. Where there is substantial investment income this is subject to an additional rate, currently 15%.(11)

The income of husband and wife is aggregated for tax purposes.(12) Thus they have only one band of income taxed at basic rate and move rapidly through the higher rates of tax. For a number of years it has been possible for the spouses to make a joint election for separate taxation of wife's earnings but any investment income of either party will always be regarded as that of the husband.(13) Therefore, a married couple quickly reach the point at which such income is subject to the additional rate, often referred to as the investment income surcharge. If spouses do elect for separate taxation of wife's earnings the penalty for doing so is that the husband receives only the single person's allowance. Thus it is necessary to calculate the point at which extra tax payable by reason of aggregation exceeds the value of the married man's relief.

Cohabitees will always each enjoy the personal relief applicable to a single person even if the woman is not earning, assuming, of course, that she has some income. They will also benefit from two slices of income taxed at basic rate and at each successive higher rate because there is no provision for aggregation. This is also true of investment income so that each cohabitee may enjoy the slice of investment income which is free from the additional rate or investment income surcharge. Furthermore, cohabitees may each convenant payments of income in favour of the other thus utilising the personal relief of one of them who may otherwise have little or no income to absorb the available single person's relief. If they both have children they may each claim the additional personal relief available to single parents

caring for children, thus giving each the equivalent of the married man's allowance.(14) It is probable, however, that they could not each covenant income to the children of the other in order to absorb the personal relief theoretically available even against the income of a child because the statutory provision which prevents this in the case of parents providing for their own children also contains provisions to prevent reciprocal arrangements.(15)

The position of divorced or legally separated spouses is very much alleviated by the income tax rules. Maintenance payable under a legal obligation is treated for tax purposes as the income of the recipient instead of the payer so that the payer is not taxed on that part of his income which is the subject of the obligation. The payee will be liable at his or her own rate of tax which may be very much lower.(16) In addition maintenance is no longer treated as investment income and and will never, therefore, be subjected to the additional charge on such income.(17) The divorced or permanently separated "wife" becomes entitled to a single personal relief even if she is not working and will also often be entitled to claim the additional personal relief given to a single person caring for children. It is also possible to provide for the children of the marriage by giving each his or her own income so that the available personal reliefs may be fully utilised.(18) Such arrangements for children are only effective where paid under a court order and may cover payments for school fees if made by the paying parent as agent for the child.(19) One can distribute the same gross income much more effectively among a separated family than among a family united by marriage because the share of the tax man is so much reduced.

With regard to the purchase of property eg by mortgage, cohabitees are each technically entitled to one loan of £25,000 giving rise to tax deductible interest on an only or main residence.(20) Likewise each is theoretically entitled to one residence exempt from charge to capital gains tax.(21) However, practically speaking it may be hard to persuade the Revenue that two parties living together have two such qualifying residences. Such an argument may succeed, however, if residence is spread reasonably equally between the two properties and one party owns most of the contents and meets most of the expenses with regard to one; and vice-versa.

As a result of these basic rules the balance at the lower levels of income is generally in favour of marriage because of the larger personal relief given to the married man but at the higher levels it is in favour

of cohabitation because the income of husband and wife is aggregated so that they move very rapidly through the higher rates of tax.

B CAPITAL GAINS TAX

Capital gains tax is charged on the disposal of a chargeable asset(22), the tax being charged on the profit element after deducting allowable expenditure.(23) The 1982 Finance Bill proposes for the first time index-linking of expenditure to eliminate charges on paper gains created by inflation. In the case of a gift, or any disposal taking place other than at arm's length the property is deemed to be disposed of at market value at the time of the disposal.(24) Thus tax is charged on a notional gain. There are many exemptions from capital gains tax, often intended to simplify administration or to prevent avoidance of tax as much as to permit certain relatively small gains to escape taxation.(25) The scheme is that if an asset is not chargeable to capital gains tax no loss incurred in respect of that asset is allowable to off-set gains on assets which are so chargeable.(26) United Kingdom currency is exempt from charge; thus, if cash is settled or given away there can be no charge to capital gains tax(27), whereas if the property involved were land or shares a charge would be incurred on the creation of the settlement or the giving of the asset, assuming, of course, that the donor makes a notional profit, ie if market value at that time exceeds the donor's allowable expenditure in respect of the asset. It is, of course, rare for an individual to have large sums of cash available without at some previous time having disposed of some asset, in respect of which a charge may have been incurred at that time.

At one time death was regarded as a disposal, but this is no longer the case. Chargeable assets are valued on death and the base value for capital gains tax is raised, to that valuation but no capital gains tax charge is incurred.(28) This is sometimes referred to as a "free uplift" or "capital gains tax holiday". If the property passes to a legatee his base value for capital gains tax is the death value; the value of the asset at the time of the transfer to him is irrelevant.(29) If personal representatives dispose of an asset in the course of administration they become liable for capital gains tax but only in respect of any increase in value between the date of death and the date of the disposal. The reasoning behind this is that as capital transfer tax is chargeable on the whole estate there should be no capital gains tax charge in addition.

One of the most significant exemptions from capital gains tax is the annual exemption available for an individual.(30) A married couple must share this exempt amount.(31) In the case of cohabitees each will enjoy the full amount. In the case of cohabitees any disposal between the parties will give rise to a charge to capital gains tax on general principles. In the case of a married couple the transferee takes over the base value (allowable expenditure) of the transferor(32) so that the charge to tax is postponed until the recipient spouse disposes of the property to a third party. Thus the net effect is to treat spouses as one person.

The tax is charged on the profit element in a transaction whether actual or notional. Thus if the price is kept down the charge is reduced or extinguished provided the transaction is regarded as taking place at arm's length. Of course as a result the recipient has a low base value and therefore a larger amount of tax may be payable on a later disposal by him at market value. There are special rules governing transactions between "connected" persons and, indeed, any disposition other than one at arm's length, whereby market value is substituted for the actual consideration.(33) As cohabitees are not "connected persons"(34) the price can be kept down if this seems likely to be beneficial in the long term. Assuming, of course, that the Revenue will accept that the disposal is at arm's length. Thus cohabitees will enjoy double exemptions and may also engineer transfers at unrealistic values.

C CAPITAL TRANSFER TAX

Capital transfer tax is normally referred to as a tax on gifts. It was introduced as a tax on such dispositions both inter vivos and on death, providing thereby a replacement for estate duty which charged only dispositions on death. However, in practice the charge may be levied wherever there is a gratuitous element in a transaction.(35) This may occur, for example, if consideration is given but that consideration is inadequate. The charge is computed by taxing any reduction in the transferor's estate, which consists of all the property to which he is beneficially entitled, and which occurs other than by way of an exempt transfer.(36) The loss to the estate will normally be the value of the property but may be greater, where, for example, the taxpayer gives away 2% of his 51% share-holding in a private company, thus disposing of the shares which give him control or where he disposes of one of a set of four Chippendale chairs. Such gifts are tax inefficient because the value to the recipient may well be less than the reduction in the estate of the transferor which is the basis on which tax is charged.

Conversely certain gifts are tax efficient, as where 2% of the shares in a private company are given to a transferee who already owns 49% of those shares. The value received by the transferee will then normally be greater than the loss to the transferor.

The original scheme of the tax was that all the taxpayer's chargeable transfers inter vivos would be aggregated and charged at progressively higher rates. Property passing on death would form a final transfer to be aggregated with transfers effected inter vivos.(37) The total tax due on all transfers could then be calculated and a deduction made for payments made in respect of earlier transfers. Further, the rate of tax on death would be at a higher rate than that charged in respect of transfers inter vivos. However, as there is no charge to capital gains tax on death, while there may well be such a charge in respect of a gift inter vivos, a transfer on death is not necessarily more costly in tax terms. The whole impact of the tax has been radically affected by the Finance Act 1981. This Act replaced the concept of "cradle to the grave" aggregation of transfers with ten year bands.(38) Thus ten years after any transfer is made it ceases to be relevant with regard to any future transfer. This is particularly significant in that every individual is entitled to transfer a considerable sum, said to be taxable at nil rate, before tax is chargeable.(39) Such a slice is now available every ten years and was fixed by Finance Act 1981 at £55,000. This nil rate band is quite separate from other exemptions, for example the annual exemption of £3,000 which is given in addition.(40)

For the purposes of capital transfer tax each spouse is in exactly the same position as a single person in that only the transfers made by the spouse in question are relevant in fixing the rate of tax. There is no question of the aggregation of the estates of husband and wife or the sharing of exemptions. This is particularly significant as the the rates of capital transfer tax increase sharply with the amount transferred, it is a progressive tax. In finding the appropriate rate all previous transfers within the ten years before the transfer under consideration must be taken into account, thus the charge is based on the cumulation of transfers to ascertain the appropriate rate of tax.

In spite of the basic philosophy of separate treatment the relationship of marriage is recognised both by way of privileges and also by way of anti-avoidance devices. Thus, transfers between spouses whether inter-vivos or on death are exempt from charge, this exemption extending not only to the value of the property transferred but also to the extent of the loss to the transferor's estate if this is greater.(41) Similarly, the exemption which exists in respect of settled property

on an occasion when it reverts to the settlor is extended to cover reverter to the settlor's spouse, including a widow or widower who takes within two years of the settlor's death.(42) In addition, an important capital transfer tax exemption is the family maintenance exemption.(43) This provides that transfers in favour of spouses, former spouses in connection with divorce, children and dependent relatives are exempt in so far as they provide for maintenance. This may be particularly relevant with regard to heavy expenditure, such as school fees, which it may not be possible to meet out of income. Clearly, in the light of the spouse exemption the provision is of particular significance with regard to arrangements in connection with divorce, delayed until after decree absolute, where the transfer might be regarded as having a gratuitous element, and for transfers for the benefit of children and dependent relatives.

The exemption just mentioned deals with payments for maintenance made out of capital.(44) The capital transfer tax rules also contain what may be referred to as a "quasi-exemption" for normal expenditure out of income. Capital transfer tax is, of course, intended to be a charge on capital transactions but the imposition of the charge is based on a reduction in the value of the transferor's estate and the transferor's estate consists of all the property to which he is beneficially entitled(45), thus making no distinction between capital and income. This "exemption", is, therefore, necessary in order to preserve it. The tests are basically of normality, recurrence and preservation of the transferor's previous standard of living. Particular purposes for which it is useful include payments of premuims on life assurance policies and everyday family expenditure out of income including gifts of moderate size.

While the law recognises the special position of spouses, limitations have to be set. It is regarded as perfectly proper for the spouses to seek to equalise their estates by transfers where one is much wealtheir than the other. This will reduce the impact of tax on transfers in favour of the children because of the highly progressive character of the tax. The tax on one large estate will be much greater than the total tax payable on two moderately sized ones. Therefore, the Revenue regard it as perfectly acceptable that property should be transferred from one spouse to the other, advantage being taken of the spouse exemption, and that the recipient spouse should transfer that property to the children provided that the original transfer is not conditional on such a subsequent transfer.(46) An example of an anti-avoidance provision aimed specifically at transfers by spouses to third parties

is the related property rule.(47) The effect is that where spouses each own similar property which is worth relatively more as a whole than in two separate portions, for example two 26% share-holdings in a private company, the valuation on the occasion of a chargeable transfer by either of them to a third party will be based on the appropriate proportion which the property transferred bears to the value of the whole combined property. Thus if the husband transfers his share-holding the loss to his estate is one half the value of a 52% controlling interest rather than the value of his 26% minority interest. This effectively prevents a transfer between the spouses from radically reducing the value of retained property which could thereafter be transferred to a third party at a reduced value.

Naturally the position of cohabitees is that they are simply single persons; thus as married persons are for many capital transfer tax purposes treated in exactly the same way as those who are single many of the rules coincide. Rules applicable specifically to married persons, for example the inter-spouse exemption and the related property rule will obviously not apply. It is also possible that in considering normal expenditure out of income the Revenue may well not be prepared to regard as normal, as between cohabitees, expenditure which they would accept as such between persons who are married.

However, even the lack of exemption for transfers between cohabitees may not make the gulf between the married and the unmarried as broad as might be supposed. It has been seen that the charge to capital transfer tax is imposed on transactions which contain a gratuitous element.(48) It follows that the legislation contains rules intended to distinguish commercial transactions and those which can be classified as containing an element of gift. If some payment is made a vital element in classifying the transaction is whether the payment is adequate. As it is more likely that property will be disposed of at an under-value if the transferee is related to the transferor the provision first of all applies a common test to all transfers, that there must be no gratuitous intent, but then goes on to differentiate between transfers between "connected" persons and between unconnected persons. In the former case the test of commercial character is objective leaving little scope for argument with the Revenue over the proper level of payment; in the case of unconnected persons the test is subjective so that it is only for the parties to establish that they were in fact operating at arm's length and not further that they were acting in the same way that strangers would act with regard to the transaction.(48) Thus, as cohabitees are not within the definition of "connected persons"

any payment made for property may perhaps be pitched at a low level with little danger of revision. This may mean that a transfer for a minimal payment from the recipient will result in no charge to tax on either party.

D SETTLEMENTS

Settlements clearly provide a useful means of tax planning. The Revenue are fully aware of this and the tax statutes therefore contain an elaborate "code" of provisions intended to limit the more obvious devices. As a result it is usually vital when drafting a settlement to ensure that it is never possible for the settlor to receive benefits under the settlement, particularly in the case of a discretionary trust, because otherwise he may be deemed for income tax purposes to be entitled to the entire income of the settled property.(50) By virtue of the requirement for aggregation of the income of husband and wife, it is also normally necessary to exclude the settlor's spouse from any benefit during the settlor's lifetime. In the case of cohabitees this further limitation does not apply and it will, therefore, be possible for one party to use a settlement to create an income for the other, thus possibly utilising personal reliefs in the same way as can be achieved by an annual covenant of income.

E CONCLUSIONS

Obviously individual circumstances make generalities of limited use but it is possible, nonetheless, to draw a number of conclusions. Income tax considerations would clearly favour cohabitation or the divorced state save in the case of extremely low incomes or where both spouses work and earn average earnings. In the case of capital gains tax there is a clear advantage to cohabitees in the availability of double exemptions. However, from the point of view of capital transfer tax the balance would appear to be in favour of marriage. As already mentioned it is possible to be single for the purposes of income tax and capital gains tax and married for the purposes of capital transfer tax. Thus it may be possible to have one's cake and eat it. In connection with the spouse exemption for capital transfer tax it should be noted that as a matter of tax planning it may be advantageous for both spouses to pass their property directly to their children, thus eliminating the heavy charge to tax on the death of the second spouse which could arise if advantage were taken of the spouse exemption. However, perhaps a death-bed marriage, ideally to a very young spouse could be advocated, giving the recipient plenty of time to utilise the exemptions and spread his gifts over a number of ten year bands!

(1) In the area of tax law there is a tradition of precise and restrictive interpretation of the statutes, whether this be favourable to the taxpayer or to the Revenue. This attitude is firmly entrenched in constitutional history. It thus seems most unlikely that cohabitees will be treated in the same way as those who are married, for the purposes of tax law, unless this is done by express statutory provision. Thus the legal form of the relationship is the vital issue. The substance is irrelevant. The reader should not be misled by indications of liberality of interpretation in favour of the Revenue in the very recent past, with regard to complex or artificial avoidance schemes. Such interpretations are often perfectly justifiable as a matter of law but may also be encouraged by a fear of very broadly drafted general anti-avoidance provisions which will catch the innocent as well as the guilty.

(2) Income and Corporation Taxes Act 1970 (ICTA) S.42(1). The Revenue practice is to regard separation as "likely to be permanent" in circumstances where it has exceeded one year, in addition to the situations of separation by court order or under an enforceable separation agreement.

(3) ICTA S.1.

(4) ICTA S.375.

(5) ICTA S.1.

(6) ICTA S.130

(7) Taxes Management Act 1970 (TMA) S.8(8): ICTA S.457.

(8) Finance Act 1972 S.75: ICTA Ss. 5-21.

(9) ICTA S.8(2).

(10) Finance Act 1971 S.32: Finance Act 1981 S.19.

(11) Finance Act 1981 S.19(1).

(12) ICTA S.37(1).

(13) Finance Act 1971 S.23: ICTA S.38.
These two elections must be carefully distinguished. The election for separate assessment is available on the application of either spouse and results in the wife being liable for her own tax whereas the normal position is that the husband is liable for tax on the joint income of both parties and only he may communicate with the tax authorities in respect of the spouses tax affairs.

(14) ICTA S.14.

(15) ICTA S.437 and S.444(2).

(16) See (7) above.

(17) Finance Act 1974 S.15 as amended by Finance Act 1978 S.21.

(18) This is Revenue practice, there is no specific statutory provision.

(19) Inland Revenue Statement of Practice 15/80.

(20) Finance Act 1972 S.75: Finance Act 1974 Sched 1, para 5(1): Finance Act 1981 S.24.

(21) Capital Gains Tax Act, (CGTA) 1979 S.101.

(22) CGTA 1979 S.1(1).

(23) CGTA 1979 S.32.

(24) CGTA S.29A.

(25) Eg CGTA Ss. 127 and 128.

(26) CGTA S.29.

(27) CGTA S.19.

(28) CGTA S.49.

(29) For example; a testator (T) devised a house, Greenacre, purchased for £20,000 inclusive of incidental expenses in 1974, to a devisee (D). On T's death in 1981 the property was valued at £50,000. At the date of transfer to D in 1982 it was valued at £52,000. D sells it later in 1982 for £58,000. He is chargeable to capital gains tax on £8,000 (£58,000-£50,000) less any allowable expenditure incurred by him, eg on improvements to the property or for incidental costs of sale.

(This ignores the index-linking of expenditure proposed by Finance Bill 1982).

(30) CGTA S.3.

(31) CGTA Sched 1, Para 2.

(32) CGTA S.44.

(33) CGTA S.29A.

(34) CGTA S.63.

(35) Finance Act 1975 S.20(4).

(36) Finance Act 1975 S.20(2) and (5) and S.23(1).

(37) Finance Act 1975 S.22(1) and S.37.

(38) Finance Act 1981 S.93.

(39) Finance Act 1975 S.37 as amended by Finance Acts 1980 S.85(1) and Schedule 4 and 1981 S.92 and Schedule 13.

(40) Finance Act 1975 Sched 6, Para 2.

(41) Finance Act 1975 Sched 6, Para 1.

(42) Finance Act 1975 Sched 5, Para 4(6).

(43) Finance Act 1975 S.46.

(44) Finance Act 1975 Sched 6, Para 5.

(45) See (36) above.

(46) Inland Revenue Press Release 8/4/75, discussing the application of of the association operations rule.

(47) Finance Act 1975 Sched 10, Para 5.

(48) Finance Act 1975 S.20(4)

(49) Finance Act 1925 S.51(4).

(50) ICTA Ss. 446 and 447.

SOCIAL INSIGHTS AND BLACK-LETTER LAW: SOME THOUGHTS ON A NEW LAND LAW TEXTBOOK

by Professor D G Barnsley*

The need for a new book

Compared with thirty years ago the present day land law student is faced with a rather bewildering array of text books in his field of study. When the writer of this review article was at University during the 1950's the choice was much more restricted. The prescribed book was Cheshire's well known **Modern Law of Real Property**, supplemented by Hargreaves, **Introduction to Land Law**, a text that is virtually unknown to today's generation of students. Megarry & Wade did not enter the arena until 1957, though Megarry's Manual was first published in 1946. How fortunate is the land law student of the 1980's! Those who feel that the two major works are too daunting can find enlightenment in the pages of an introductory text such as Dalton, Land Law (2nd ed.), or Harwood, **English Land Law**, or Riddall, **Introduction to Land Law** (2nd ed.). For the devotee of the case book there is, of course, Maudsley & Burn's, **Land Law, Cases and Materials.**

As land law teachers have increasingly come to recognise, the two major texts, despite the eminence of the authors and the excellence of their exposition, are not without their limitations. Their perspective is dated. Prominence is still accorded to areas of law that have ceased to be relevant, socially and practically; modern developments tend not to receive the attention which their importance warrants.

There was room for a new land law text book, it was said one with an up-to-date outlook, one that endeavoured to expound land law principles in their modern social context. Such a book has now appeared, Gray & Symes' **Real Property and Real People**, published in 1981 by Butterworths. It is new. It is different. The authors do not adopt the stance of the traditional real property lawyer; indeed there is much in the book which an orthodox property lawyer may be reluctant to accept. According to the Preface the authors see it as essential for the land lawyer to "reach beyond the technical mastery of his subject towards some vision of the social and economic dimension of the law of property." Our land law must be explained and understood in the

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social context of the day. In their view land law has all too frequently in the past been taught as if it had no reference to real everyday life. "Land law is in fact very much concerned with the way in which 'real people' live their lives." Hence the catchy title of this new work, **Real Property and Real People**, though the uninformed may not appreciate the play on the word 'real', even after reading the book. The reason why in English law land (or rather a freehold estate in land) is characterised as real property is nowhere made clear. It is stated simply to connote 'immoveable' property (p.4, but compare p.389 in relation to the leasehold estate).

Aims and contents

The author of a new basic land law text book must find himself in an invidious position. This vital branch of our law encompasses such a wide variety of topics that it is difficult to know what to include, what to exclude. Moreover many of these individual topics have entire books devoted to them - leases, mortgages, easements, restrictive covenants and so on. How can the land law student be given an adequate understanding of all these within the confines of a single book? The writer bold enough to embark on the task has no prospect of being able to satisfy every reviewer. Messrs. Gray and Symes have chosen to define the boundaries of their work by reference to the syllabus of the Land Law I course taught at Cambridge University. This accounts, as the Preface records, for the virtual exclusion of the law relating to conveyancing, planning, compulsory purchase and the priority of mortgages. It also explains the inclusion of strict settlements (which they concede to be 'largely archaic) and perpetuities. Some fifty pages are devoted to these two subjects. It is hard to envisage a land law book which does not deal in some measure with these topics, beloved of real property teachers of a previous age, despite the fact that 'real people' in everyday life just do not make settlements. On the other hand real people die. They make wills. Yet, apart from incidental references to wills throughout the book, no attempt is made to consider the testate or intestate succession to land. This is conceived to be a major omission, presumably prompted by the absence of this branch of law from the Land Law I syllabus. It is not easy to see how the authors can justify a section on the acquisition of title by adverse possession (see chp. 3) and yet say nothing as to the acquisition of title on death- a far more common occurrence. Again, the chapter on the matrimonial home (chap. 16) quite properly considers the spouses' rights on divorce. But what happens to the matrimonial home when the owner-spouse dies? What rights has the surviving spouse (or a mistress) to remain

in occupation, particularly when the property is devised to a third party? The thoughtful reader may well ask such questions. Oddly, a passing reference is made to the problem in the chapter on Mortgages (p. 513), but no more.

The book is divided into six parts. Part I is headed General (The idea of property; an overall view; the acquisition of title to land). Part II comprises six chapters relating to Unregistered Conveyancing (Land charges, Strict Settlements, the rule against perpetuities: trusts for sale; co-ownership; a review of equitable interests in unregistered land). Part III is confined to Registration of Title and discusses the mechanics of registered conveyancing (chap. 10) and Registered land and the single trustee for sale. Part IV is devoted to Residential Security (Leases; housing Law; licences, equities and constructive trusts (a most instructive chapter) and Mortgages). Part V comprises a single chapter on the Matrimonial home (chap. 16). The remaining Part entitled Control of Land Use considers Easements and profits (giving a somewhat strained meaning to the word 'control') and finally in chapter 18 Covenants and the planning of land use.

Within their self imposed boundaries the authors have produced an eminently readable and thought-provoking book. Their style is lucid, at times chatty. The text is frequently punctuated by telling diagrams (there are over 70 in all) to aid the student in his understanding. Some of these looked very familiar! This is a good feature. Most land law teachers find the blackboard or overhead projector an indispensable teaching aid for the purpose of illustrating different points. In the main the authors have succeeded in expounding complex property concepts in a way understandable to the reader new to the subject. However, the opening chapter could well prove difficult for some to follow, and the authors display a disconcerting tendency to stray on occasions from the paths of accuracy. Whilst acknowledging that our real property cannot properly be understood save in the light of its history (p. 42), they do not dwell unnecessarily on the historical foundations of the subject.

Their avowed aim, as already indicated, is to relate our land law to the social and economic conditions prevailing within our society today. This approach permeates the entire book. It is evident not only in the choice of topics for inclusion in the book, but also in the way each topic is developed in the text. For example, the chapter on Mortgages discusses, in rather emotive terms perhaps, the important role played by mortgages in determining the quality of life of millions of our countryfolk. There is also a brief excursus on the ethics of

usury, with Biblical, Papal and Calvinist views on the question. It would not have been inappropriate to have made some mention in this chapter of various schemes designed to promote low cost home ownership, such as shared ownership schemes or low start mortgages.

The writers have chosen to focus their attention primarily on residential property. They foresee that it is in this area that the land law of the 1980's is likely to diverge most significantly from the conventional rules of our real property. Already they can discern the emergence of a new species of property right, the right to enjoy secure accommodation in a house free from the intervention of third parties (see eg. p. 265). The theory is interesting. A substantial part of the book is devoted to the way in which the courts, as the writers interpret recent decisions, appear to be moving towards recognition of this new right. In consequence certain topics receive in-depth treatment. Trusts for sale (chap. 7) and co-ownership (chap. 8) occupy almost one-sixth of the book, and a further 30 pages are concerned with the position of the single trustee for sale in registered land (chap. 11), something of a luxury. Inevitably the book lacks balance. The treatment of other areas of land law is sketchy and at times inadequate for the student, who will be obliged to consult the standard texts to gain a fuller understanding of some subjects. One example will suffice. A mere seven lines are allocated to the doctrine of part performance, and the significant House of Lords' decision in **Steadman** v. **Steadman**(1) manages a single footnote citation. Compare the treatment in Megarry & Wade (4th ed.), or in Riddall's introductory text, where this topic occupies a whole chapter. This imbalance is also reflected in some of the more general chapters. Take the chapter on Settlements (chap. 5), for instance. Seven pages are spent discussing the effects of imperfect and perfect vesting of the legal estate, including an analysis of the problematical decision in **Weston** v. **Henshaw**(2) (see pp.169-76). Yet consideration of the life tenant's statutory powers in relation to the settled land is confined to the single sentence, "These powers include certain powers to sell, lease and mortgage the legal estate" (p. 170). The same concentration on a few topics is also apparent in chapter 12 (Leases).

The citation and consideration of cases provides another unusual feature. At times the book assumes the character of a case book. Copious extracts from the judgments of relevant cases appear in the text and footnotes. This represents a conscious decision on the part of the authors. They highlight certain significant cases and work through them in detail. This approach has both merits and demerits.

It explains in part the uneven treatment of the subject matter, already commented upon. On the other hand students reading the major texts are sometimes unable, because of the wealth of material contained in them, to see the wood for the trees. As a result the table of cases in Gray & Symes lists a mere 780 cases, compared with the 5000 or so cited in Megarry & Wade. Pride of place goes, of course, to Williams & Glyn's Bank Ltd v. **Boland.**(3) This case is to the land lawyer and conveyancer what **Donoghue** v. **Stevenson** was to the tort lawyer half a century ago. It is exhaustively and critically examined in chapters 7, 8, 10 and 11. It is seen as having wide legal and social implications far beyond the immediate issues resolved by it. These it will be recalled centred around s. 70 (1)(g) of the Land Registration Act 1925 and the overriding status of an occupying wife's equitable interest in the matrimonial home. For example, Gray & Symes see the decision as introducing a new degree of 'democracy' into the trust for sale. By this they mean that a beneficiary in possession of residential property under an implied trust for sale is effectively given a power of veto over dealings by the trustee for sale in the single legal owner situation (p. 272). Whilst welcoming the decision they nevertheless doubt whether it in fact achieved social justice. They allege that it raises as many moral problems as it purports to solve; see pp. 374-76. Ought the matrimonial home, they ask, to be mortgaged for commercial reasons, eg to obtain a business loan, as distinct from using it as security for an advance to enable the house to be purchased or extended? Their Lordships were not competent to adjudicate on such moral issues, and those who criticise the decision as 'disturbingly superficial'(4) misunderstand the function of the judiciary.

A 'new property'?

Whereas the standard texts in their opening chapters introduce the reader to the historical foundations of our property law, Gray & Symes launch into a philosophical disquisition on the idea of property. Drawing heavily on certain American writers, they argue that property is really a relationship between people in respect of things (p. 9). Moreover, it is dynamic; it is a changing relationship. Both the 'subjects' and the 'objects' of property are liable to fluctuate in different social eras. The 'objects' of property are said to be "those resources to which social or economic value is generally attached." By showing that the 'objects' of property are in a state of development in today's society, the authors, relying on Professor C. Reich's article, 'The New Property',(5) maintain that it is time to recognise the existence of a 'new property'. So far the jurisprudence of this

new property has arisen largely in connection with the individual's rights in the fields of employment and social security, but an emerging component of this new property is the provision of security in the enjoyment of residential accommodation. The chapter also plunges into sociological theory. The reader is introduced to the terms, **Gesellschaft** and **Gemeinschaft.** The social ethic of the former is stated to be 'the maximisation of private profit' (p. 17), illustrated by the laissez-faire system. The property legislation of 1925 is seen as founded on the **Gesellschaft** principle. But a new social ethic pervades the twentieth century, that of social welfare, the **Gemeinschaft.** In the interests of social justice everyone has a right to enjoy access to the 'goods of life', broadly equivalent to those interests that go to make up the new property (p. 18). The authors return to these notions of **Gesellschaft** and **Gemeinschaft** later when discussing co-ownership. Stamp J's decision in **Caunce** v. **Caunce**(6) displays the **Gesellschaft** principle. The learned judge declined to hold that a wife's equitable interest in the matrimonial home was enforceable against her husband's mortgagee. He was thus facilitating conveyancing procedures, favouring the purchaser or the mortgagee at the expense of the occupier. The exchange value of land was preferred to its use value (see pp. 293ff). **Boland's** case saw a reversal of this pattern. The occupier's rights prevailed, and the decision clearly demonstrates the **Gemeinschaft** (pp. 365ff).

This remarkable opening chapter concludes with an exposition of the nature and development of the trust in English law, even before anything is said about the basic structure of English land law. Tenures and (more importantly) estates do not make their appearance until the next chapter. This is, of course, highly unorthodox. For the authors, however, this unusual sequence is essential, since they are at pains to show how the trust concept can be accommodated within the new property. "It may be true to say", they maintain," that with the advent of the new property we begin to see also the emergence of a 'new equity'" (p. 40). The new property fastens a public trust upon the 'social property' comprised in 'the goods of life'. Various forms of social and economic advantage are effectively held in trust by nominees (eg landlords, employers, fiscal authorities) and in consequence a 'social trust' should be imposed upon such nominees by the conferment of 'status rights' of enjoyment on the individual beneficiaries, i.e., on members of society (p. 40).

All very interesting, but for this reviewer, too speculative. However, what will the first or second year student, at the commencement of his

land law studies, make of this chapter? Will he struggle through it? If he manages this, how much will he understand? He may be tempted to wonder how it relates to real people in everyday life. Yet, without some understanding of the authors' thesis, the reader may experience difficulty in following the line of argument developed in subsequent chapters.

Residential security

The element or component of the new property of closest relevance to land law is claimed to be that of residential security. One further quote from the opening chapter will suffice. "In the context of land law, the social rights which are given proprietary status under the broadly based 'trust' of the new property are rights connected with the protection of that highly valuable resource of modern times residential security" (p. 41). Put in a different way, the law is beginning to recognise that in our modern society the exchange or investment value of land is to be subordinated to the use value of land. The vital issue today is not the right of an owner to sell his land free from occupational rights, but the occupier's "right to live in a house or flat free from the threat of arbitrary eviction, free from the exploitative and oppressive impact of normal market forces" (p. 419). The obvious starting point is the protection conferred on private residential tenants by the Rent Acts (see chap. 13, which contains a clear and helpful exposition of the subject). Other examples are not lacking:- the courts' readiness to find a contractual or equitable licence as a means of protecting a residential occupier (chap. 14); the decision in Boland's case; the courts' statutory power to stay a mortgagee's proceedings for possession (pp. 540-44); and the courts' attitude to the adjustment of property rights on divorce (chap. 16). These developments encourage the writers to talk about, albeit with diffidence, a new species of property right. (pp. 265, 419). Some more specific comments are called for.

The vast amount of residential property that is jointly owned justifies prominence being given to trusts for sale and co-ownership, although this reviewer found the discussion at times repetitive and occasionally tedious. Vital questions, of legal and social significance, are explored: the doctrine of conversion, the nature of a beneficiary's right to occupy the land prior to a sale by the trustees, the refusal by one trustee for sale to sell, the position of a purchaser from a single trustee for sale. The Law Commission's proposals in their Third Report on Family Property (Law Com. no. 86) are considered, and the legislative solution produced by the Joint Family

Homes Act 1964 (NZ) is examined. A reading of the relevant chapters clearly demonstrates the urgent need for reform. The concept of the trust for sale, whilst providing a convenient conveyancing device, bears little relationship to the practical realities of the situation - as any articled clerk will speedily discover when he attempts to explain the mysteries of an express trust for sale to a newly married couple buying their first home.

The decision in **Caunce** v. **Caunce**(6) is analysed critically. Here it may be recalled that H and W contributed to the purchase of an unregistered freehold house, which was conveyed into the name of H alone. Without W's knowledge he mortgaged the house to his bank. The question arose whether the bank took free of W's equitable interest (arising by virtue of her contribution to the purchase: see **Bull** v. **Bull.**(7)) In the absence of actual notice Stamp J held that W's occupation of the house, jointly with H, did not fix the bank with constructive notice of her rights under s. 199 (1) (ii) of the Law of Property Act 1925. The bank therefore took free from W's interest. On the other hand, where the title is registered the wife's occupation at the material time operates to confer on her equitable interest (assuming she has made a contribution) the status of an overriding interest under s. 70 (1)(g) of the Land Registration Act 1925. Her interest is enforceable against a mortgagee (and equally a purchaser) who makes no enquiry of her: **Boland's** case. The reasonableness or otherwise of the enquiry is not a relevant issue as regards para. (g). Can this difference of approach and of result between the registered and the unregistered systems of land transfer be justified. Ideally, no. But the assimilation of the rules can, it is felt, be effected only by legislation. Despite the attacks made on it in subsequent cases, it would not appear open for the courts to reverse the ruling in **Caunce'** case (compare Gray & Symes at pp. 301, 361). Section 199 (3) of the Law of Property Act 1925 enacts that a purchaser shall not by reason of anything in s. 199 be affected by notice in any case where he would not have been so affected if the section had not been enacted. This provision, which tends to be overlooked in the debate on this issue re-enacts the Conveyancing Act 1882, s. 3. It suggests that Parliament did not intend the doctrine of constructive notice to be extended beyond limits already set by the courts prior to 1882. Even as early as the 1850's eminent Chancery judges were advocating the expediency of confining the doctrine within its then boundaries; see eg **Ware** v. **Lord Egmont.**(8) The crucial point in this. Apart from a rather guarded dictum in **Nelthorpe** v. **Holgate,**(9) no case prior to 1882, let alone 1926, has decided or even suggested that where a **vendor**

is himself in occupation any enquiry ought reasonably to be made of any other occupier as to his or her rights, if any. One may have to accept, as Lord Wilberforce has admitted, that there is a difference between unregistered and registered land as regards what kind of notice binds a purchaser, or what kind of enquiries a purchaser has to make: **National Provincial Bank Ltd** v. **Ainsworth.**(10)

From the conveyancer's standpoint the decision in **Caunce** is eminently sensible. A purchaser's (or mortgagee's) obligation is to make such enquiries and inspections as ought reasonably to have been made by him: s. 199 (1)(ii)(a). What is reasonable or not depends on the particular circumstances in question. The thrust of Stamp J's judgment is this. Where a sole vendor who is himself in occupation contracts to give vacant possession of the property on completion - this is a vital factor - it is not reasonable to require the purchaser to make enquiries of any other person whose presence is consistent with the title contracted to be sold. In the absence of actual notice the mere occupation on the property of members of the vendor's family, his wife, mistress, 'Uncle Harry or Aunt Matilda' (per Stamp J), is not of itself suggestive of an interest inconsistent with the title offered. The law does not require the purchaser to regard the vendor's contractual obligation to give vacant possession as meaningless, or to be disbelieved. In any event, is the enquiry likely to produce any informative reply? See Lord Upjohn in **Ainsworth's** case.(11)

The stance taken by Gray and Symes is quite the opposite. The discernible shift in emphasis away from the economic or money interest in land (the **Gesellschaft**) in favour of the use value of land (the **Gemeinschaft**) suffices to raise a presumption that every non-owning spouse has or may have enforceable rights of occupation. A purchaser who neglects to make enquiries does so at his peril. They admit that certainty exists as to which kinds of beneficiary behind a trust for sale are capable of fixing a third party with constructive notice by reason merely of their joint occupation of unregistered land. It is not, however, the law that should provide the answer. "It is ultimately a social calculus which decides the issue." And they conclude that "Black-letter law but thinly conceals an instructive world of social insights" (pp. 299-303). It seems that in their view property rules must conform to what society from time to time dictates, rather than society ordering its affairs within the framework of the rules laid down by Parliament. But is this not a dangerous philosophy, leading ultimately to anarchy?

Conveyancing practice under attack

In their chapter on the acquisition of title the authors feel constrained to jump on the conveyancer-bashing bandwagon. With evident agreement they quote from Michael Joseph's **The Conveyancing Fraud**, which caused quite a stir among solicitors on its publication two years ago. Conveyancing is branded 'a lucrative form of white collar crime' (p. 400, note 10); the work solicitors do is worse than useless (quoting from M. Joseph). They do not seek to justify the criticisms or to place them in their context. The views of the Royal Commission on Legal Services are mentioned briefly (pp. 92-93), with the observation that the Commission did not really address itself to the fundamental criticisms directed at conveyancing practice over the years. This may be true. Nevertheless the solicitors' profession cannot afford to be complacent about the standard of professional advice and expertise that is sometimes foisted on the public. Only the worst examples of conveyancing malpractice and incompetence hit the headlines. For two recent examples see **Scarfe** v. **Adams**,(12) (an extreme case of slapdash conveyancing) and **Joyce** v. **Barker Bros**(13) (involving a conveyance of land to spouses "in fee simple as beneficial joint tenants in common in equal shares"). One wonders how many instances of bad conveyancing go undetected; do these form a significant proportion of all conveyancing transactions undertaken by solicitors?

The author's willingness to voice criticism of conveyancing procedures is in marked contrast to their apparent reluctance to expound the principles of land law against the practical setting in which they operate. In focusing their attention upon a socio-economic approach, they have ignored the practical realities of the subject. This is a pity. No examples are given of the form and contents of a typical conveyance, transfer, building society mortgage, or land certificate. The chapter on Leases could have benefited from some discussion of the type of express covenants to be found in a standard form lease of residential property. The authors explanation of land law principles does not always reveal a full appreciation of what happens in practice. The execution of two documents in the case of land held on an express trust for sale tends to be the exception, not the rule (as p. 288 suggests). The statement that the equitable ownership of land is often left unspecified by the conveying parties (p. 242) is true only of cases where land is purchased by two people but the conveyance is taken in the sole name of one of them. It is highly unlikely that land would ever be conveyed to "A, B and C, each as to a one-third share", or to "A, B, C, D and E, each as to a one-fifth share",

(pp. 254-55). It is quite proper to use these examples to explain the operation of s. 34 (2) of the Law of Property Act 1925. Not to add a rider that such express formulae rarely occur in practice, if at all, is misleading. The references to "an old set of title deeds" and "redundant title deeds" (pp. 172, 174) when considering **Weston v. Henshaw**(14) is mystifying. Is the reader to infer that title deeds relating to past transactions serve no useful purpose and ought, perhaps, to be destroyed? If within a period of fifteen years land is conveyed by A to B, then by B to C, and by C to D, who contracts to sell the land to E, the A-B and B-C conveyances do not become redundant. They form links in the chain of title which E must investigate, and eventually on completion of the transaction they must be handed over to E with the other deeds. It was not fortuitous that the life tenant in **Weston v. Henshaw** possessed "an old set of deeds". The deeds relating to earlier transactions were rightly in his possession qua owner of the legal estate in the settled land. However, it was fortuitous for him that prior to the creation of the settlement there had been a conveyance whereby the land had been vested to him as sole beneficial owner. By failing to disclose the transaction subsequent to that conveyance he was able to conceal the existence of the settlement, thereby perpetrating the fraud. Other indications of a lack of understanding on practical issues were noted on pp. 127, 286 and 409, note 3.

Disturbing features?

Every writer of a legal text book aims to present the law clearly, consistently and accurately. However, like the majority of authors Gray & Symes do not always manage to achieve these objectives. The following are some instances that occurred to this reviewer. The failure to mention the leasehold estate in the passage on pp. 45-49 (the doctrine of estates) allied to the considerations of s. 1 of the Law of Property Act 1925 on pp. 53 and 57 gives the impression that the leasehold estate acquired its status as an estate by virtue of s. 1. It is not until the chapter on Leases is reached that the reader discovers otherwise (p. 389). The diagram on p. 77 which indicates that in the case of registered titles legal rights are binding on the world but require registration is bound to perplex a student who has read on p. 55 that legal rights bind the world irrespective of notice. On p. 73 it is said that there are two systems of land law operating side by side, the registered and the unregistered systems. Presumably what is meant is that there are two systems of land transfer, which is quite different. How and where to deal in a land law book with

registration of title is a major headache for the writer and a potential source of confusion for the student. Gray & Syme's early treatment of the protection of equitable interests (pp. 72ff) necessitates introducing the reader to aspects of the registered system (notices, cautions and restrictions (pp. 76-77), also limitation (p. 101)) before the basic structure of the system is explored in chapter 10. This approach does not help the student's understanding, at least not in the early chapters. An unpaid vendor's lien arises immediately on the execution of an enforceable contract for sale (see **Re Birmingham,**)(15) not merely if he parts with possession before completion (see p. 86, though, significantly, the same misconception appears in Emmet, **Title,** (17th ed.) 226).

The discussion of the overreaching effect of a trust for sale is not entirely consistent. According to p. 218, for a trust for sale to be 'binding' the trustees must be able, on sale, to give a conveyance which operates to vest in the purchaser a 'title free of all previous interests' affecting the land. Ten pages later it is asserted that a sale of land held on an immediate binding trust for sale cannot overreach 'commercial equitable interests' which will continue to affect the land if duly protected in the proper manner. On p. 255 the effect of s. 34 (3) of the Law of Property Act 1925 is misstated. A devise of land (eg) to A, B and C as tenants in common will ordinarily operate to vest the legal estate in the testator's personal representatives on the statutory trusts, not in A, B and C.

In the chapter on Leases a tenancy at will is described as "merely a type of licence determinable by either party" (p. 395). As such it would not constitute a letting within s. 1 of the Rent Act 1977, as the reader would discover on pp. 421-22. The precise legal status of a tenancy at will is somewhat uncertain (as to which see Megarry & Wade, 639-40), but there is clear Court of Appeal authority that a tenancy at will is a letting within s. 1: **Francis Jackson Developments Ltd v. Stemp.**(16)

In a few places recent statutory amendments have been overlooked. Tithe redemption annuities (p. 65) have now been extinguished by the Finance Act 1977, s. 56. The qualifying period of five years for exercise of the statutory right to purchase the freehold under the Leasehold Reform Act 1967 has been reduced to three by the Housing Act 1980, Sch. 21, para. 1.

A further consequence of the authors' preference for a case law orientated exposition of principle is the superficial attention at

times paid in the text to statutory material. Their treatment of such varies. There is an adequate citation of statutes, some of which, as is to be expected, is subjected to detailed analysis, eg the Rent Act 1977. In other places the discussion was found to be very generalised, without any elaboration. Two instances are the Prescription Act 1832 (p. 601) and s. 84 of the Law of Property Act 1925 (as amended) relating to the discharge of restrictive covenants (pp. 634-35). A few specific examples should, perhaps, be mentioned.

The passage dealing with the imposition of a trust for sale in all cases of co-ownership (pp. 250ff) would have benefited from a fuller citation of the provisions of ss. 34 (2) and 36 (1) of the Law of Property Act 1925. The reader could then have appreciated why it is that no trust for sale appears to arise by statutory implication in a **Bull v. Bull** type of situation. The passage on rectification and indemnity (pp. 348ff) was rather disappointing. Section 82 of the Land Registration Act 1925 hardly receives adequate treatment. No mention is made of the fact that ultimately rectification is discretionary ("The register **may** be rectified pursuant..."), nor does para. (g) covering the 'double conveyance' situations typified by **Epps v. Esso Petroleum Co Ltd**(17) feature in the commentary. In the Mortgages chapter the reader may justly ponder how a sale by the mortgagee, who on p. 518 is stated to have merely a security interest in the mortgaged property, can have the effect of transferring a good title to the purchaser (p. 546). What is meant by this is not explained. A footnote reference draws attention to s. 88 (1) of the Law of Property Act 1925, but not to s. 104 (1). Further, s. 104 (2) provides specific support for the view tentatively doubted by the authors, that the purchaser is not affected by constructive notice that the power of sale has not become exercisable under s. 103. Finally, will the omission of any reference to subs. (5) of s. 62 of the same Act cause students to interpret too literally the requirement (p. 596) that there must be some diversity of ownership or occupation before s. 62 can apply? Unless the point is actually brought to their notice, students are apt to apply s. 62 to the very situation expressly excluded by subs. (5).

One last point. Some enlightenment on the meaning or significance of various technical expressions would have been of assistance to the reader, such as 'novel disseisin' (p. 49), 'unpaid vendor's lien' (p. 82), 'good title', 'abstract of title' (p. 87), 'periodic tenancy' (p. 95), 'memorandum of severance' (p. 305), 'Waste', 'tenant-like manner' (p. 403), 'tenancies by estoppel' (p. 423 without referring to p. 532 where they are explained).

Conclusions

This new book is extremely well produced. Hardly any printing errors were noticed, the most serious occurring on p. 304 where part of the text is missing. How successful will it prove to be? Opinions will probably vary. The book is bold and innovative. A colleague summed it up in three words fascinating but irritating. The authors are to be congratulated for having the courage and foresight to break away from traditional modes of property exegesis. They have demonstrated that the principles of our land law can be expounded within the social and economic framework of the day. This modern perspective is bound to give the book an instant appeal for some. But it has to be viewed as a whole. It has strengths; weaknesses it also has. And to this reviewer these features seemed to stand out in marked contrast.

The book does not set out to be a rival to the well established major student text books; see, for example, the statement on p. 4 that it contains an outline of the law of real property. It is rather a book to read along side the standard texts, to supplement the student's understanding of the law and its operation in those areas where the authors excel. Price-wise, however, it will prove a more attractive buy for impecunious students than, say, Megarry & Wade the latest publisher's price for which is £25, compared with £16 for Gray & Symes. The book is certain to go into subsequent editions. But before it comes to be more readily acceptable as a basic text, the authors will, it is thought, have to do something about the lack of balance that is so apparent. In a way they have become victims of their own pioneering spirit; they have too readily allowed their pens to run away with them. The book would have lost none of its impact had the exposition in chapters 8 and 11 particularly been curtailed and the resulting saving in space been utilised to expand those parts where the discussion is so compressed as to make comprehension rather difficult.

This reviewer will certainly be very interested to read the next edition when it appears.

(1) (1976) A.C. 536.

(2) (1950) Ch. 510.

(3) (1979) Ch. 312; (1981) A.C. 487.

(4) (1980) 43 M.L.R. 692, 696.

(5) (1964) 73 Yale L.J. 733.

(6) (1969) 1 All E.R. 722.

(7) (1955) 1 Q.B. 234.

(8) (1854) 4 De GM & G 460, 473, per Lord Cranworth, LC.

(9) (1844) 1 Coll. 203, 215.

(10) (1965) A.C. 1175, 1261.

(11) At p. 1234.

(12) (1981) 1 All E.R. 843.

(13) (1980) The Times, February 26.

(14) (1950) Ch. 510.

(15) (1959) Ch. 523.

(16) (1943) 2 All E.R. 601.

(17) (1973) 1 W.L.R. 1071.

THEORIES OR THEORISTS; SOME OF THE FAILURES OF ANALYTICAL POSITIVISM

by R N S Saunders* and P H J Huxley*

Introduction

The continued revival of interest in legal theory has again been demonstrated by the start of a new series of students' books entitled 'Jurists: Profiles in Legal Theory'. It says much about the strengths and weaknesses of English, as opposed to American and contintental legal education, that the subject of the first volume(1) is H L A Hart; and that it is written by a distinguished former student who, he claims, wishes sympathetically to expound and extend Harts' ideas in the light of recent criticism. Pending the promised reply, a revised version of 'Concept of Law' which Hart, apparently, has in hand(2), this review will attempt not only to give an insight into MacCormicks book, but also to consider more generally the significance of Hart's views some twenty years after the publication of 'Concept of Law'.

First, however, some general comments on the need for such a book as MacCormick has written and its general success or failure are called for.

Justification for this type of book

Since the study of legal theory and jurisprudence is the study of ideas the decision to write through the medium of the person holding these ideas, rather than through the ideas themselves, needs justification. No quarrel is taken with the description of Hart's standing as a jurist as contained in the Preface, but the drawback of the approach adopted in this series - as indeed of traditional jurisprudence teaching - is that it may lead to a failure to perceive that it is ideas which are developed, modified and sometimes rejected, rather than the personalities.

The contribution to legal theory made by the Sovereign-inspired early positivists was to shake loose the grip of natural law doctrine and to enable jurists to see that law and legal systems are man-made, owing

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their validity to some fact or identifiable standard or test. If major responsibility for identifying the flaws in the Imperative theory can be shouldered by Kelsen and Hart, it is, nevertheless, the demonstration of those flaws, rather than the demonstrators, which is crucial.

Teachers of the discipline are surely well aware of the way in which the topic of rules becomes identified with Hart, or that of norms with Kelsen, or that of imperatives with Olivecrona. What is really important, however, is to trace the flow of ideas and to attempt to assess their overall significance; this must transcend the particular jurists in question. The major quarrel with most books(3) and courses on the subject is that they adopt precisely the approach now criticised. Consequently, a student may end up thinking of legal theory as consisting of jurists rather than of ideas.

What, then, could MacCormick argue by way of defence? He might well assert that he never set out to write a textbook and he certainly has has not produced one. However, even if the object were to produce a picture of Hart "in the round", the book must count as a failure both, we suspect, to the reader with a good background in legal theory and, particularly, to the non-expert. It seems, with respect, to fall between two stools. For the lay reader far too much knowledge of Hart's work is assumed. Indeed it seems to be written from the point of view of the expert for the expert(4), but that is where the other deficiency shows itself. For it adds little to the understanding of Hart's original work or to the detailed and often sympathetic criticism which the major work, Concept of Law, has attracted.

In general and although the book covers in individual chapters most of the specific issues of legal theory raised by Hart, there is, within the chapters, a lack of clear explanation by MacCormick both as to how these issues are related to each other and as to what propositions he is making, attacking or defending. For example, in Chapter Four, MacCormick is concerned with the uncontroversial distinction between positive and critical morality, and especially with the crucial role played by the latter. The Chapter would surely be vastly improved if MacCormick had set out the following propositions:-

(a) there are different types of standards (ie, other than rules) and that any or all of them can be described as moral;

(b) it is crucial to show how some of these standards could be described as rules while others at present cannot but may become

rules;

(c) such standards are rational.

After all, legal writing in general and legal theory in particular have everything to gain and nothing to lose from clarity of exposition. It is by no means the least of Hart's achievements that the reader is never in any doubt as to the propositions which he is seeking to expound or criticise be they his own or those of another.

A summary of MacCormick's argument

The final section of this article will be concerned with the perceived failures both of Concept of Law and MacCormick's sympathetic exposition. As a prelude to this, a brief summary of MacCormick's views is necessary.

The first chapter is a biographical sketch emphasising Hart's period in practice at the Chancery Bar which led to his interest in the use of language and linguistic philosophy, and his appointment to the Oxford Chair of Jurisprudence; also his social democratic political views which influenced his critical work on law and morality.

Chapter Two summarises Hart's theory of law as social rules; and legal systems as a union of primary and secondary rules; the admission of the minimum content of natural law and of Hart's belief in the need for a positivistic view of law though not of the mechanical or formalistic type of earlier writers who claimed that law consisted of a body of rules which could provide answers to every legal problem.

In Chapter Three, MacCormick stresses the value of looking at the use of language from the internal point of view of those subject to stipulation(5) concerned but claims that there is a need for extension to standards other than rules. Such principles are rationally justifiable, not, like rules, merely conventional and are more general and hence less certain than rules. They are, it is argued, allowed for both in Hart's legal and moral theory.

This last point is pursued in Chapter Four. Moral standards are said to be rational in that they are geared to a coherent scheme of values which do not change, though (pace Hart) the moral conventions and understandings which are based on them do change and become more clearly formulated in terms of moral rules.

The importance which MacCormick places on the hermeneutic approach is seen again in Chapter Five where he argues that it should be used to extend Hart's account of obligation beyond rules to cover different types of wrongdoing such as breach of duties and offences. This approach also allows the different degrees of importance of these forms of wrongdoings to be appreciated. Nevertheless (pace Dworkin) judgments of wrongdoing typically do refer to rules because of the need for certainty, which rules provide.

Chapter Six deals with powers which, MacCormick claims, Hart now accepts create obligations conditionally on proper procedures being used. In the light of this, Hart's emphasis on the facultative nature of law eg wills, contracts etc, must be refined. MacCormick offers a very similar definition of capacities which, he states, like powers, invoke rules and are not things one can naturally do.

Chapter Seven the shortest in the book at less than three sides of text - gives a very brief sketch of legal rights (moral rights getting a similar, if more extensive, treatment in Chapter Twelve) as a family of concepts connected by the central idea of individual choice and thus control of the actions of oneself or others.

Chapters Eight and Nine cover some of the issues for which Concept of Law is best known. There is some amendment of the minimum content of natural law to which MacCormick connects Hart's ideas of a 'pre-legal' society with only primary rules which, MacCormick insists, would also contain powers and non-rule standards such as informal understandings. There is also an important revision of the definition of primary rules as those categorical requirements governing natural and other non-rule invoking acts, secondary rules being other rules relating to and dealing with the former; they are not necessarily power-conferring. In particular, judges have a duty to adjudicate; this comes from their judicial role originating in delegation from the sovereign and they must exercise it in accordance with standards the criteria for which may ultimately be laid down clearly in the rule of recognition but whose binding force derives from acceptance. Similarly, the power to legislate is said to evolve from delegation of the sovereign's duty to state what the law is.

In Chapter Ten, MacMormick applies the arguments employed in Chapter Four concerning moral standards to decision-making. He claims that Hart's views fit his own model of judicial reasoning which entails a judge testing a potential ruling against its consequences, its coherence and consistency with the established law. He insists,

however, that not only can such standards be accommodated within the rule of recognition but also that they will leave discretion in difficult cases, though not to the extent that the American Realists imagined.

Chapter Eleven revises Hart's views on punishment to include a denunciatory element which, MacCormick claims, is inherent in there being any system of rules. Finally Chapter Twelve applies to moral rights the views expressed in Chapter Seven showing that Hart recognises a general right of liberty, intrusion into which in the name of duty requires justification. Contrary to Lord Devlin's views, mere endangering of the morality of even the majority of society is not enough, though MacCormick argues that infringement of the values inherent in the minimum content of natural law would be. He further claims that while legal rules are open to moral criticism, there is a prima facie obligation to obey law on those who benefit from legal arrangements. Hart must, therefore, accept that 'law is a moral order'. His positivism nevertheless remains, not in asserting the unjust laws can be law (with which modern natural lawyers might agree) but in his insistence that legal rules are the result of social practices and are not derived from pre-existing natural standards.

Detailed Comments

The overall impression which is conveyed by Concept of Law is of a revision of Imperative and Pure theory into the more acceptable pattern of varieties of rules. It is sometimes argued that the results of an inquiry are conditioned as much by what the inquirer expects to find as by what he does in fact find. In addition his method of inquiry will often determine what he finds and condition his evaluation of these findings.

In this respect, positivism, under the influence of Hart has proceeded on the assumptions that there is a tenable distinction between law and morality, at least in relation to legal validity; and that law itself is best and/or exclusively explained in terms of rules.

There is no doubt that these ideas, now assumptions, have had an enormous impact upon legal theory since Hume drew attention to the Is/Ought "fallacy" of classical natural law and since later positivists perceived the inadequacies of Austin's command theory, substituting therefore the idea of a normative proposition. If, prior to 1961, there was a feeling that legal theory, if not dead, was in a terminal condition,

it is remarkable that only two decades later it is alive and well. Yet doubts about positivism have increased substantially of late. The natural law apologists never really surrendered of course(6), but the feeling persists that positivism is, in some sense, not very relevant; that its intellectual landscape is arid; and that whatever lessons it may have had for us have been learned. No longer can we afford to be tied to what is essentially a static (or sterile) theory which persists in asking unimportant questions (what is a rule? what do bindingness or validity mean?) and which, according to one of its greatest exponents can do nothing to guarantee minimal justice or even-handedness between citizens.(7) How can we be satisfied with a legal theory which, Pilate-like, tells us that if we want justice for the "nigger" in Huckleberry Finn(8) we must look elsewhere for it?

There have been challenges to positivism ever since it took its dominant hold upon English jurisprudence. About a hundred years ago, the Americans, led by Homes asked as to consider the major role which the courts play in our legal system and to understand the crucial function of the judge in decision-making. Even though the Realist message became wrapped in slogans which were unrepresentative of their case, their insistence that we concentrate our ideas on what the courts do and how they do it opened a new chapter in legal theory, the writing of which is far from concluded.

For all the virtues of Concept of Law, Hart's method, consisting as it does in the analysis of terms, is basically similar to that employed by Bentham and Austin. While the criticism of ignoring the adjudicative process is not one which could fairly be levelled at Concept of Law, per se, it has become apparent both that positivism in general and Hart's version of it in particular cannot cope with the demands which both the new wider jurisprudence(9) and truly empirically based sociology of law(10) is making on it.

MacCormick acknowledges some of this in Chapter Ten which commences with the admission that Hart ought to have taken the underlying message of the Realists far more seriously. As MacCormick properly points out(11), any major reconstruction of positivism involved Hart in both maintaining the view that law is essentially a matter of rules and in steering clear of formalism. Hence Hart's response was basically three-fold. In the first place it is a rebuttal and criticism of some of the Realists wilder assertions, especially those of Gray(12). This need detain us no longer. Secondly, Hart attempted to show(13) that the "open-texture" of language is a sufficient response to those who allege that if law were really a system of rules, judicial decisions would be easier to predict.

Finally, Hart claimed(14) that, in spite of the criticisms of positivism, law is essentially rule-based and consists of a union of two types of rule which he termed primary and secondary. It is most important that Hart's claim about this third element in his theory is not understated for he claims(15) that it represents the "key to the science of jurisprudence". Today the claim seems extravagant and one wonders, with respect, what Hart now makes of it. Perhaps, most seriously of all, this claim, which is the centre-piece of the theory, represents that very formalist approach which Hart was seeking to avoid.

The claim has been subject to attack from a number of quarters. It seems sufficient, for present purposes, to mention two of them. In the first place, it is by no means clear that Hart's description of the rules of recognition, adjudication and change not only as "secondary" but also as "power-conferring" is appropriate. Second, Professor Dworkin has attacked the idea that we can give an adequate account of law and of legal systems exclusively or even essentially in terms of rules.(16)

To consider first, power-conferring rules, we can here take on Hart on his own terms. It is important to consider words in their context and in the way in which they are used. So, "What do we mean when we say power-conferring rules"(17) or "in what conditions can we truly say in ordinary English" that this is a power-conferring rule? We surely mean that a rule (X), enables some legal person, (Y), to bring about some consequence, (Z), as a result of some voluntary act by Y. Without X, Y could not occur; nor, in a legal context, would Z be done lawfully and hence be recognized and enforceable. Thus the Criminal Law Act 1967 section 2 confers on a policeman certain powers of arrest. As Hohfeld observed(18), the policeman, by his voluntary actions, changes his relationship with the wrongdoer, as well as the wrongdoer's relationship with other officials of the system.

The most serious flaw in Hart's approach is in not distinguishing between powers and capacities. Cohen has said(19)

> "When I married, no Statute, no rule of
> Common Law, no private person empowered
> me to do so. I did not need any such power
> I merely had the requisite capacity."

The criticism developed by Cohen is applicable squarely, inter alia, to the rules of adjudication and change. What rule empowers the Queens Bench Division to entertain an application for a prerogative order?

What rule confers upon Parliament the power to legislate?

MacCormick appears initially to appreciate this when he compares courts to the elders of a village making decisions in accordance with pre-existing standards.(20) However, his explanation of the development of courts and legislatures involves not capacities but duties to decide and to change law in accordance with stipulated criteria(21), duties which stem ultimately from delegation of the King's judicial role. If this is correct, then the term 'power' is left with little meaning as MacCormick himself virtually admits.

This crucial distinction between powers and capacities represents a strong challenge to the centre-piece of Hart's theory. Yet the challenge is not met by MacCormick in Chapter Six which purports to cover the area. Late in the chapter(22) he does move to some discussion of capacity and makes the major concession that many of an individuals civil law transactions are possible because of status or capacity, but he insists, questionably, that such status etc involves invoking rules in relation to legal enforceability. Hart has asserted(23) the "kinship" between his secondary rule of change and what he terms "private power-conferring rules". If, however, MacCormick is correct that such civil law transactions as the making of contracts or wills, or the transfer of property depend on status or capacity, this casts doubt on Hart's analogy and, far more crucially, on the description of such rules as "power-conferring".

The secondary rules as power-conferring appear, therefore, to stand in need of a major reconstruction. That suggested by MacCormick, however, leads to a greatly increased stress on the importance of duties quite inconsistent with Hart's view that law is essentially facultative.

Secondly we can turn to Dworkin's case. In exaggerating(24) Hart's views on open-texture as a "theory of discretion", MacCormick argues that it stands in need of amendment. How much amendment can be seen in the light of the following passage from one of the earliest essays in Taking Rights Seriously:(25)

> "Day in and day out we send people to jail or take money away from them or make them do things they do not want to do, under coercion of force and we justify all of this by speaking of such persons as having broken the law or having failed to meet their legal obligations or having interfered with other people's legal rights. Even in clear cases (a bank robber or a

wilful breach of contract) when we are confident that someone had a legal obligation and broke it, we are unable to give a satisfactory account of what that means or why that entitles the state to punish or coerce him. We may feel confident that what we are doing is proper but until we can identify the principles we are following we cannot be sure that they are sufficient or whether we are applying them consistently. In less clear cases when the issue of whether an obligation has been broken is for some reason controversial, the pitch of these nagging questions rises, and our responsibility to find answers deepens."

Lawyers are sometimes curiously naive. If a lawyer employed an architect to design a house and asked whether the walls will hold the roof up, he would have little confidence in the architect who told him that they should, but that he was not quite sure since roofs are tricky things and at the end of the day it would be a question of doing the best he could and then crossing his fingers. But this is the kind of response many lawyers would give the architect wanting legal advice in what Dworkin terms the "clear case"; and in the less clear cases, what the Americans called "reckonability" of decisions assumes the proportions of judicial roulette.

It is disappointing to find no real attention given to Dworkin's case, not least the arguments that judges not only do not, but should not, embark on arguments of policy when deciding hard (or any other) cases. As part of his "right answer" thesis, Dworkin's views are nothing if not controversial. They represent, as Hart has said, another clear challenge to Benthamite jurisprudence and hence, indirectly, to his own. Bentham's views have been the dominant legal philosophy in England for a very long time and there are those who would maintain strongly that their influence on legal education and training has by no means been one of undisguised benefit.(26)

Dworkin himself has drawn attention(27) to the challenge to positivism through his analysis of such cases as **D** v. **NSPCC**(28), **BSC** v. **Granada Television**(29) **and Bushell** v. **Secretary of State for the Environment.**(30) Some of the judgments in **McLoughlin** v. **O'Brien**(31) reverberate with rejection of the view that questions of policy are not for the judiciary. This is obviously an important question in a democracy in which the constitutional fiction is that decisions as to what constitutes the public good are taken by officials who are responsible and answerable to our elected representatives. Prof. Griffith has drawn a picture(32)

based on facts of an English judiciary educated through an elite, fee-paying system with values, interests and income far removed from the average. If the picture is even half accurate, than at least the normative side of Dworkin's challenge to positivism has every right to be taken seriously by those with an interest in justice.

It may be that MacCormick's judgment of Dworkin's challenge is correct, but it surely deserved more of his time and it surely is pitifully under-described as an "amendment" to "the Hartian theory of judicial discretion."(33) In all this the need is not for mere cosmetic attention to Hart's theory, but it is for Hart to become involved in legal reasoning(34); the standards and values which judges do (and should) employ in their decision-making; and the assessment of the end product (the judgment) by reference to criteria which reflect Hart's own views of the objects of law and decision-making in the United Kingdom in the latter part of the twentieth century.

Conclusion

This review article has already referred to the demands of the new jurisprudence, the hallmarks of which are the ever closer association of traditionally discrete areas of study (economics, sociology, political theory) together with the re-assertion of the central importance of individual rights. This re-emphasis emanates especially from the political centre - or far right, and highlights the status of the individual as an independent moral agent with an autonomy which ought to protect him from incursions into his liberty justified in the name of utility or other goal-based theories.

Whatever the personal political standpoint of its author, Concept of Law seems to be the product of an age in which it was either necessary or fashionable to eschew reference both to any particular political perspective and consideration of the crucial role which law plays in the achievement of political and social goals.

The lesson to be observed from positivism is, surely, that law has only instrumental value and that it can, therefore, be made to reflect for better or worse the values and interests of those with access to the levers of legal machinery in any society. If this is so, the work of analytical jurisprudence is finished, and the task for the new generation of jurists is to demonstrate how a theory of law can accommodate the legitimate and disparate desires and interests of individuals within a just and democratic society. In particular this involves grasping the pluralist nettle of equality and liberty how can the former be advanced with sacrificing the latter?

How is this to be done? To the extent that it will involves the jurist immersing himself in political and economic theory, it is no hardship to endorse the views recently expounded by Professor Griffith.(35) Whether his strictures on rights theorists are also to be endorsed is a different issue altogether. It cannot, however, be done if we lose sight of the object of undergraduate law teaching. This is not to produce lobby-fodder for the professions. We have been doing this for too long; the trend is continuing and the dismal consequences of it are available for all who consume legal services at any level.

Crucial to the task is the central place of legal theory. Yet this article is written at a time - and in a Polytechnic - when legal theory is being downgraded to yet another option.(36) We shall get the lawyers we deserve.

(1) H L A Hart by Neil MacCormick. Published by Edward Arnold (1981). All references are to the book unless otherwise indicated.

(2) Page 7.

(3) Legal Philosophies by J W Harris gives a more thematic treatment though to a disparate and wide ranging group of topics.

(4) As with many of the so called introductory books in the Clarendon Law Series though not, significantly, Concept of Law (hereafter CL).

(5) MacCormick calls this the hermeneutic approach, a term he applies in particular to the jurist understanding but not necessarily accepting the rules.

(6) Indeed they are on the offensive Finnis, Natural Law and Natural Rights.

(7) CL 114.

(8) CL 196.

(9) Twining, 1979 LQR 575 footnoted by MacCormick but not considered further.

(10) Note Hart's claim in the Preface to Concept of Law that it is an essay in descriptive sociology.

(11) Page 122.

(12) CL, 137-144.

(13) CL, 121-132.

(14) CL, 144.

(15) CL, 79.

(16) We may note that in part, MacCormick's defence of Hart seems to miss the point. MacCormick appears to believe that Hart DID refer to standards other than rules and he mentions this especially in connection with Hart's discussion of laws and morals (pages 42, 43). The point of Dworkin's attack is that Hart excluded standards other than rules from his account of law and legal systems not from his account of morality.

(17) Page 17.

(18) In Hohfeld's terminology the relationship is one of power/liability and not as MacCormick claims in Chapter Six control over the creation or release of obligations alone other changes (such as a change in status) may follow.

(19) Hart's Concept of Law; (1962) 71 Mind 395.

(20) Pages 112-114.

(21) Pages 115-120.

(22) Page 83.

(23) CL, 94.

(24) Page 126.

(25) Taking Rights Seriously (Duckworth) (1977), 15.

(26) What Next in the Law (Butterworth) Denning 1982.

(27) Crime, Proof and Punishment (Clarendon) Essays in memory of Rupert Cross, 193.

(28) (1978) AC 171.

(29) (1981) 1 All ER 417'

(30) (1980) 2 All ER 608.

(31) (1982) 2 WLR 982.

(32) Politics of the Judiciary (Fontana) 2nd Edition 1982, passim.

(33) Page 130.

(34) Perhaps in time, Hart's contribution to such debate in the area of causation will come to be considered his major achievement. Hart and Honore, Causation in the Law (1959).

(35) The Teaching of Law and Politics 16 J.A.L.T. (1982) 1.

(36) Of the "protected" type.