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EDITORIAL

It behoves every editor of a new journal to justify its existence, if only because of the constant criticism, often with merit, that there are too many legal journals, causing constant duplication of effort and material. The Polytechnic Law Schools have grown up over the last decade, partly in answer to the call for more trained lawyers to enter the professions, commerce and industry. The Law Department at Trent Polytechnic is one of the largest of these institutions. Synonomous with the philosophy under which the Polytechnics were established, the main emphasis has been on the teaching of law at graduate, post-graduate and professional levels. Perhaps too often, however, research in the form of legal writing has not received the emphasis granted by older institutions. Again, this is understandable. The growing pains of youth must first be overcome. Yet how much better is any institution which can successfully marry the two? Indeed, legal writing is an essential element of law teaching, so that any medium which encourages this, is justification in itself. As editor, I am, therefore, extremely grateful to those of my colleagues both internally and nationally who have shown an enthusiastic willingness to participate in this new venture.

In this first volume, Molly Geraghty's article on co-operative legal education in the U.S.A. will be of great interest to those who advocate vocational courses in law. The advantages of such an approach are considerable, both to the student and the profession. Yet still most degree courses cling to the traditional approach and only two institutions in the United Kingdom cater for this type of student. Many of the problems faced by our colleagues in the U.S.A. are equally faced by advocates of the system of here. It is hoped that as economic difficulties are resolved some of these at least will be removed.

An interview with Sir Barnett Cocks is timely, in that there has been constant criticism in recent months of the non-constitutional workings of Parliament and the assertion of ministerial powers. Recent figures published by the United Nations show that more than two thirds of the peoples on this earth live in a society which is not free. One of the yardsticks by which such freedom was measured was by reference to the freedom of the judiciary of the country concerned. We are fortunate indeed in this country that political influences are rare. The vigilance of the courts during recent months, e.g. in the Tameside and Laker cases indicate the watchfulness of the judges in this respect. All but a few would rejoice at this attitude.

TRENT POLYTECHNIC, NOTTINGHAM

Department of Legal Studies

The Department of Legal Studies at Trent Polytechnic is now one of the largest and major law teaching institutions in the United Kingdom. The Department offers two law degree courses: a three year course leading a CNAA (BA) Honours degree in Law, and a four year sandwich course leading to a CNAA (BA) Honours Legal Studies degree in Law. The aims of these two courses are to provide an education by the study of legal subjects and to lay the basis for a career in the legal professions, business and commernce, etc..

The Department also provides courses for the Law Society Part I Qualifying Examinations and the Law Society Final Part II Qualifying Examinations.

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THE TRENT LAW JOURNAL

Why Should We Control Multinational Companies?

A J BRISCOE*

Within the last twenty-five years the multinational company has emerged as the largest and most controversial form of corporate capitalism. As multinational enterprise expands, so does the volume of literature which it has generated. Much remains unsettled. There is no generally accepted definition of a 'multinational company' and even the terminology itself is not yet agreed by all the commentators. The variety of terms adopted include, for the adjective global, transnational and international and for the noun enterprise, corporation and business.

To the lawyer, a company cannot strictly be described as 'multinational' because each national legal system only recognises a company as having one nationality. The concept of the 'multinational company' has rather been developed by economists and political scientists. They generally regard two characteristics as essential that the enterprise operates on a significant scale in several countries and that it is governed by a centralised management structure.

The application of these criteria indicates that there are some two hundred and fifty corporations which currently qualify as 'multinational' (of which approximately two hundred are of US origin)[1], including companies whose names are household names through the western world Ford, General Motors, ITT, General Food, ICI and Esso. The economic resources of the larger companies are equivalent to those of some medium-sized European nations. For example, in 1967, the sales turnover of General Motors Ltd was twenty billion dollars, a figure slightly lower than the gross national product of Sweden (23.9) but higher than that of Belgium (19.7).[2]

It was partly because of the size of multinational enterprise that Mr Wedgwood Benn, then Minister of Technology, presented this view to the House of Commons,

> 'As the international companies develop, national governments, including the British Government, will be reduced to the status of a parish council in dealing with the large international corporations which will span the world'.[3]

1 J N Behrman 'National Interests and the Multinational Company (1970) p 10
2 L Turner 'Invisible Empires' (1971) p 5-6
3 'The Times' Nov 28 1968.

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The ensuing debate on multinational companies has proceeded on a public plarform. ITT, one of the largest companies, has recently enlisted full page advertisements in the national press which set out the 'facts' about how its investments benefit the British economy.[4] Characteristic of political debate in general, that which centres upon the multinational company has consisted of assertion and counter-assertion, allegation and denial. The multinationals' contribution to our balance of payments, for example, is extolled without them a deficit (or greater deficit) seems inevitable - but then we are reminded that the repatriation of multinational profits constitutes a drain on capital flows.

How is the lawyer to approach this debate? Conventional analyses of the impact of the multinational company attempt an assessment of the benefits and costs of multinational operations, setting off the latter against the former. [5] In this manner, the effects of multinational investments upon exchange rates, the balance of payments, technological advancement and so on have been investigated. But there are inherent difficulties in such an approach. Opinions differ over the appropriate criteria for the assessment of 'benefit' and 'cost', althought most commentators have concluded that the 'benefits' are primarily economic and the 'costs' primarily 'political'. Comparative analysis finishes at this point, for how, one is asked, can apples be compared with oranges, or economic benefits with political costs? [6]

An alternative approach is to detach ourselves from factual questions concerning the behaviour of multinational companies, and to examine instead the values which underpin the range of responses that the debate on the multinational company has evoked. Such a detachment will not tell us very much about how the companies are operating, but released from the boundage of facts and statistics we may examine the competing value choices that might otherwise be obscured. Hopefully, there will emerge an index of values against which we may guage our own political preferences and prejudices. Within this framework, alternate strategies for the legal control of multinational companies may be discussed, for any policy of control rests upon value decisions as to what behaviour is acceptable or unacceptable.

When this approach is adopted, two oppositional stances towards the multinational company can be discerned immediately, one **welcoming** the multinational company and the other **antagonistic** towards it. Each of these postures incorporates a contrasting cluster of attitudes and suggests its own recipe for legal regulation. The third standpoint may be described as **sceptical**, but this should not appear as esoteric nor as a compromise between the other two. Scepticism has a distinctive complexion of its own.

4 For example 'The Guardian' June 10 1975
5 For example L Turner supra; J H Dunning 'The Multinational Enterprise' (1971).
6 The analogy drawn by S E Rolfe. 'The Multinational Corporation in the World Economy' (1972) at p 22.

THE WELCOME

There are two themes which constantly recur in the welcome accorded to the multinational company: one proclaims the companies' economic efficiency and the other declares the obsolescence of the nation state. Underlying both the proclamation and the declaration is the assumption that man has a universal desire for improved living standards, better technology, secure employment and a peaceful, orderly environment. The multinational company is the only institution which can satisfy these needs on an international scale, which is capable of 'serving people and nations everywhere'.[7]

The Welcomers emphasise that natural resources are dwindling at a time when the global demand for goods is increasing. The efficient distribution of capital and factors of production demands an integrated world economy in which companies may concentrate manufacturing activities where costs are lowest. From a commercial perspective, national boundaries are an arbitrary restraint upon modern business requirements, hindering the free movement of goods and production facilities.

Already nations have benefited greatly from the 'unique package deal'[8] which the multinational company offers. These benefits include the contribution of foreign capital to the gross national product, the creation of new jobs, the diffusion of the latest technological developments and managerial techniques, stimulus to regional development, and access to export markets which would otherwise be inaccessible. Moreover, if the companies are permitted to move technology, materials, personnel and capital in accordance with their organisational ability, the benefits of international production will spread throughout the world economy, leading to the elimination of poverty and ultimately to the equalisation of national living standards.

The greatest threat to the continued growth of multinational enterprise is political nationalism, a reaction based upon xenophobia and prejudice which has already caused endless wars and human suffering. In the modern world nationalism is both economically and politically indefensible. The multinational company offers intercorporate statemanship at a global level, a way of bringing nations together by peaceful means to their mutual advantage. The vision of Professor H V Perlmutter might be telescopic but it is worth sharing

> 'If the worldwide firm is helped to achieve its standards of performance, if its transideological character develops, this kind of institution could be a force for world economic integration and order. With the risks associated with its increasing economic power come the prospects of a world in which it would be absurd to bomb customers, suppliers, managers and workers and shareholders.'[9]

7 The slogan with which ITT advertised its fiftieth anniversary in 1970.
8 J H Dunning, supra at p 42.
9 H V Perlmutter, essay in H Gunter (ed) 'Transnational Industrial Relations' (1973) at p 49.

But in order that these economic and political benefits can be realised, argue the Welcomers, the management of multinational business must be given maximum freedom to develop international enterprises. A commitment to 'freedom' in this context entails belief in the market as the most efficient determinant of economic activity, and the minimisation of governmental interference. Strict controls are unnecessary, the multinational company has a natural interest in being 'a good corporate citizen' wherever it operates, for antisocial behaviour can only harm its public image and market strength.

However, the complete absence of any control is perhaps beyond the dreams of even the most avid admirer of multinational enterprise. Who would deny the need to tax corporate income? Systems of company law, without which that artificial person 'the company' has no legal existence, control the framework within which the multinational company operates; regulations must govern pollution, consumer protection and so on. In these and many other areas, the multinational company like all business enterprises must be supervised to a degree. But what the Welcomers argue is that these controls must be kept to a minimum. In particular, the multinational company should not be subjected to any legislation which discriminates against it in comparison with the domestic company, for such would amount to an artificial distortion of market factors and limit the benefits which flow from multinational investment.

The maximisation of these benefits is the philosophy underlying the two major strategies for control which advocates of the multinational company have proposed. Professor C P Kindleberger argues that

> '. . . if the most effective use of the international corporation is to be made, so that it will neither distort efficient economic allocation by sliding between overlapping independent tax and rule-making jurisdictions nor find itself pinned down by overlapping sovereigns, it is necessary to harmonise national policies toward the international corporation'.[10]

With greater harmonisation, the multinational company can operate smoothly from state to state, unhindered by discriminatory legislation. This strategy has been pursued in the European Economic Community's programme for the harmonisation of company law throughout the member states.

The proposal of Mr G Ball, chairman of Lehman Bros. International Ltd, represents an alternative to the pursuit of harmonisation. A logical corollary to the growth of international companies is the creation of a supranational law to regulate the multinational company. This body of law would govern the company's status and constitution, prohibit monopoly practices and provide guarantees against uncompensated expropriation by individual governments. Further protection against the evils of political nationalism would be granted by excluding national interference in those matters regulated by the supranational statute. Thus, the 'corpor-

10 'American Business Abroad' (1969) at p 201.

ate world citizen' would be granted the greatest possible freedom to ensure 'the most economical and efficient use of world resources'.[11] In this respect the EEC has answered the Welcomer's plea and has proposed the establishment of a European Company with regional characteristics analogous to Mr Ball's 'Cosmocorp'.[12]

THE ANTAGONISTS

The Antagonistic stance towards the multinational company takes two forms. In Marxist analysis, the multinational company is regarded as an exaggerated expression of the evils of capitalism, an international manifestation of monopoly and exploitation. Alternatively, a concern for the plight of local businessmen, threatened by the competitive strength of large international enterprise, leads to a protectionist standpoint. Of these two views, the former represents a more comprehensive idealogical challenge to those who advocate greater freedom for the multinational company.

The Antagonists deny the basic assumptions on which the Welcome is extended, rejecting outright the notion that what is good for General Motors is good for mankind. In many instances, the contrary is true. Multinational companies pursue a policy of global profit maximisation; decisions are based upon cold calculation rather than altruism; the underdeveloped world is shamelessly exploited, its resources stripped and workers paid at or below subsistence level. The companies encourage a level of mechanisation which results in unemployment and offer a range of consumer goals which the majority of the populus cannot attain. Underdevelopment is thus generated by the multinational company

The claim of the Welcomers that international investment tends to eradicate poverty and to equalise world living standards presupposes that reasonably perfect competition exists between nations. In reality, the geographical distribution of resources is uneven, and national economic policies distort the global market-place. Free trade tends to maintain and magnify the comparative advantages possessed by the industrialised nations. Those production facilities which are located in underdeveloped countries are characterised by out-of-date technology and the financial 'benefits' which the multinational companies bestow are enjoyed by only a priviledged elite. Inequality is thus created.

Essentially, multinational enterprise represents a new form of imperialism. Although the legal sovereignty which characterised colonial imperialism has disappeared, multinational companies maintain the economic and political dependence of poorer nations upon decisions made overseas. In this era of neo-imperialism, hierarachical structures of status, authority, income and levels of consumption radiate outwards from the decision-making centres which control international business, sustaining depend-

11 Cosmocorp: 'The Importance of Being Stateless', Atlantic Quarterly Review vol 6 p 163 at p 169.
12 Bulletin EEC Supplement 4/75.

ence and inequality. The underdeveloped nations become 'branch-office countries' in the multinational structure with a severely restricted influence over crucial decisions that affect their future. From corporate headquarters, the level of capital growth, technology, employment and income of the underdeveloped world is controlled.

Imperialism continues in another sense. The multinational company is an instrument through which the laws, foreign policy and culture of one nation are imposed upon others. The United States in particular has regarded foreign investment as a legitimate channel for the extraterritorial application of legal controls. Foreign subsidiaries are obliged to comply with US antitrust policies and to refrain from trading with certain 'enemy states', although the laws of the host country in which they operate impose no such restrictions, and the countries affected protest to the United States.

To the indigenous cultures of the third world, twentieth century capitalism and technology constitutes an alien, disruptive and aggressive force. Dr Ivan D Illich writes that

> '. . . the plough of the rich can do as much harm as their swords. United States trucks can do more lasting damage than United States tanks. It is easier to create mass demand for the former than for the latter. Only a minority needs heavy weapons, while a majority can become dependent on unrealistic levels of supply for such productive machines as modern trucks. Once the Third World has become a mass market for the goods, products and processes which are designed by the rich for themselves, the discrepancy between demand for these Western artificats and the supply will increase indefinitely.'[13]

But it is not only the smaller nations whose well-being is threatened by the continued expansion of multinational enterprise. Mr J-J Servan-Schreiber has envisaged the prospect of industrial Europe being controlled by American capital:

> 'A few leading firms, subsidiaries of American corporations, would decide how much European workers would earn and how they would live work methods, human relations on the job, standards for wages and promotion, and job security . . . They will take a majority interest in, and then control, the firms that dominate the market in publishing, the press, gramaphone recording and television production. The formulas, if not all the details, of our cultural 'messages' would be imported . . .'[14]

This is the vision from the other end of Professor Perlmutter's telescope.

In addition to these general concerns, a distinct plank in the Antagonists' platform has been laid for the protection of local business interests. The flexibility and size of the multinational company offers the possibility of concentrating its competitive effort on a particular national market. Thus,

13 'The Celebration of Awareness' (1973) at p 131.
14 'The American Challenge' (1968) p 153.

Professor J N Behrman documents the fear of French manufacturers who calculated that General Foods could reduce the price of its French 'bonbons' by ten per cent and thus drive all competitors out of the market within three years, whilst only suffering a drop in its total profit margin of 0.1 per cent during those three years.[15]

Antagonism to the Multinational company has provoked a contrasting range of injunctions for action. Those who wish to protect local industry advocate the exclusion of foreign-controlled companies from the whole or part of the economy by the erection of barriers against foreign investment. Socialist and Marxist governments have often nationalised such enterprises or required that a controlling interest be divested to local entrepreneurs. The comparative merits of these approaches to legal control will be examined later.

More radical action is urged for the underdeveloped world by Dr J O'Connor. Multinational companies, he argues, are already so powerful as to be capable of reconciling their activities with any strategy of control which the underdeveloped nations might adopt. Only social revolution can break their grip.[16]

THE SCEPTICAL APPROACH

The sceptical stance is characterised by a degree of uncertainty, engendered both by a lack of information concerning the complexities of multinational enterprise and partly by a disbelief in the panacea-like responses of both the Welcomers and the Antagonists. Nevertheless, Scepticism should not be equated with agnosticism, for the 'Multinational Sceptic' does believe in certain principles upon which a policy for control might be constructed, although the actual techniques of control tend to remain obscure.

The Sceptic shares many of the Antagonist's concerns over the Welcome given to the multinational company, and is deeply suspicious of the notion that the future of mankind holds few things more valuable than the continued determination of business to expand overseas. But this is not to deny that some benefits may accrue to a country acting as host to international investment, especially in terms of capital growth, the efficient utilisation of resources, access to new products or services, and the development of tochnology. At this point, however, important questions arise. In what sense, one might ask, are these developments 'beneficial'? How 'beneficial' is an increased reliance upon the multinational company? What alternative sources of investment are available and how 'beneficial' are they in comparison with the multinational company?

Beneath these concerns lies an idealogical belief that the multinational company as a private (and normally foreign controlled) institution is neither appropriate nor competent to decide upon the allocation of the benefits of international production between nations. The absence of

15 J N Behrman, supra at p 34-5.
16 'International Corporations and Economic Underdevelopment', Science and Society' vol 34 at p 42.

governmental control over such allocation results in a dependence upon the decisions of multinational management, and constitutes a loss of political sovereignty for the nations affected. It means, as Professor J N Behrman has observed,

> '. . . handing over to private groups a series of economic decisions which have become increasingly the responsibility of governments. The multinational enterprise not being a 'duly elected representative' of the people over whom it has power, is, in a sense, exercising illegitimate power.' [17]

All corporations, of course, are notionally responsible to their shareholders in respect of company policy, although in the large public corporation this responsibility is mythical rather than real. Multinational enterprises operate discretely and the shareholders of the parent corporation know little or nothing of the activities of overseas subsidiaries. But shareholder responsibility is a largely irrelevant issue from the host nation's point of view. The host nation has no legal jurisdiction over the foreign parent company or the ultimate shareholders of that company. Any unilateral attempt to assert control over a locally-incorporated subsidiary can be thwarted by the capacity of the parent corporation to move operations to a less restricted environment.

Concern over the legitimacy of the power wielded by multinational companies evidences a more general sentiment in the Sceptical approach, the belief that the Welcomers place unjustifiable emphasis upon economic efficiency and internationalism. There are other, more important criteria for judging the quality of life, many of which conflict with the commercial interests of private enterprise. These priorities include the promotion of social welfare, the protection of the environment and, most important, a commitment to territorial autonomy. The nation state, as the institution which most powerfully embodies the principle of territorial autonomy, is regarded as the foundation upon which any structure for the control of multinational companies must be based.

National autonomy is a concept closely associated with other legal ideals such as sovereignty, self-determination and the equality of nations. These ideals must be maintained even at the expense of a slower or different kind of economic progress. The task for the Sceptic is to attempt to devise a structure of control which adheres to these principles but which also permits the economic benefits associated with multinational enterprise to be realised.

The techniques of control will be examined in a subsequent article of this journal.

17 Supra, at p 225.

A U.S. Experiment: Co-operative Legal Education

Mr. Dobbin goes to Law School

MOLLY T GERAGHTY*

Northeastern University School of Law is in Boston, Massachusetts. It is an unique school. It insists on, rather than tolerates, a mixture of classroom work and job experience. This does not sound like a particularly revolutionary idea. It is, though, the only program of its kind in the United States. The British tradition of articled clerks has long acknowledged the necessity of a combination of academic study and practical experience to produce a finished attorney. However, for most of this century the bulk of the time and energy in United States law education has been devoted entirely to academic study.

The classic pattern in the United States is that students attend an undergraduate four year college (usually from age 17-21) and then attend law school for three years. After that the student may take a bar examination in the state in which he or she desires to practice and, if successful, be fully admitted to all segments of the practice of law in that state. There are a few states which still require a brief period of practical experience or residence before being admitted to the bar, but these are residual formalities of an older clerkship system.

There are a number of different ways to become a lawyer in the United States: Three examples are:

(a) Mr Sedley attends Pinkerton College for four full time years. He then proceeds directly to law school for three years. He passes the bar examination, and is qualified to appear in court, write wills, obtain divorces, and do all the things attorneys do.

(b) Mr Osborne completes a college education in more than four years. He occasionally must leave school to earn tuition money and help support his parents.
After college he spends several years in the Armed Forces. By then he has a family of his own and cannot afford to go to law school full time. He, therefore, goes to a night law school which takes a minimum of four years. After completion of that curriculum he will be able to take the state bar exam and compete with Mr Sedley in any forum in that state in which they practice.

(c) Mr Dobbin completes his college career and sometime after decides to

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become a lawyer through Northeastern's program of co-operative legal education. For the first nine months he will follow a full academic curriculum: contracts, torts, property, civil procedure, criminal law, constitutional law and income taxation. It is a rigorous first year program. Thereafter, he will alternate three month full-time working periods with three month academic quarters for a period of eight quarters. At the end of eleven quarters, he will have fulfilled the academic requirements of a three year school (in seven quarters) and had one full year (four quarters) of full time professional employment. After the bar examination he is ready to do battle and/or serve with Sedley and Osborne.

HISTORY

Northeastern Law School is what it is because of Northeastern University itself. The University has long had a commitment to the idea of co-operative education. In all fields and departments it recognizes the value of mixing classroom study and learning at work. The University evolved from a turn of the century law school. The then more established law schools found it inappropriate, undignified or unnecessary to teach law classes at night. Nonetheless, several Harvard Law School professors and Boston practitioners started holding law classes at night in the YMCA in Boston. This night law school was the type Mr Osborne now attends. (This is not the time or place to tell the story of how Northeastern come to be (in terms of size and enrolment) the largest private University in the world. That is however, the story of the success of co-operative education).

The YMCA Law School, which became Northeastern University law school and had been the first school in the entire University, closed in the early fifties. It had been both a full time day school (Mr Sedley) and a night law school (Mr Osborne) which did not operate on the co-operative scheme. By the 1950's, most segments of the University (liberal arts, accounting, engineering, etc.) offered the opportunity of participating in a co-operative program. But the original law school had no structured program combining legal study and working experience in a law office. Northeastern Law School had provided a school for Mr Sedley and Mr Osborne - but no-one had yet considered Mr Dobbin's option.

Northeastern Law School re-opened in 1968. This time, it followed the rest of the University and adopted the co-operative plan. This was considered an extremely innovative and daring move for a law school in the 1960's. Many American legal educators were, and are still skeptical about the value of co-operative legal education. The revived law school has graduated five classes. For the 125 places available in each class there are more than 2,500 applicants each year. Among law schools in the United States it is one of the most difficult to get into. Its success has pleased many and disturbed some. Applicants to the law school are eager to be a part of the co-operative program. Undoubtedly, there are reasons other than the co-operative program that attract so many applicants: the school is located in Boston, one of the most attractive cities in the United States; half the students are women; and it is a small intimate law school in which students participate in making important

decisions.

The school has no numerical or letter grades so it provides a less competitive environment than other law schools. Students receive a grade of pass or fail and they also receive a written evaluation in each course from each professor, and in each co-operative quarter from each employer. This is a more realistic basis for judging a student's ability and competence than a mere letter or numerical grade. There are many explanations why students apply to Northeastern School of Law, but it is clear from students' response that the co-operative program is the most compelling one.

HOW THE CO-OPERATIVE PROGRAM WORKS

To understand the Northeastern Law School, let us follow Mr Dobbin through his student days.

> After completing his first nine months in school, Mr Dobbin takes a job with the legal department of the Commercial Union Assurance Company in Boston. He writes legal research, memoranda, and improves his legal writing skills. He then returns to school for three months and takes second year courses. After that academic quarter, he might serve as a law clerk for the Massachusetts Attorney General working on criminal appeals; then he returns to school for another academic quarter. His next job might be with a private labour law firm in Anchorage, Alaska; after which he again returns to school for three months of academic courses. Then perhaps, he might serve his final co-operative work period with Organizaiones Unidas representing farm workers in San Benito, Texas.

This illustration of geographic and substantive diversity is by no means unusual. The school provides information and reliable contacts about possible positions in many parts of the country and areas of speciality. The preponderence of all jobs are obtained through the school but every quarter many students develop and secure their own positions. Half of the students work outside the Boston metropolitan area, some have gone to Hawaii; Lisbon, Portugal; Miami, Florida; and Window Rock, Arizona.

EVALUATION OF CO-OPERATIVE PROGRAM

Not all student jobs are fabulous learning experiences, fun, exotic, or well paying. But, many of them are. The school has a four way system of attempting to insure the quality of the work experience:

(1) Before a student takes on a position, the employer is informed that the clerkship is an integral and indispensible part of the student's legal education.

(2) The faculty and staff make periodic on-site visits to students and employers. These visits help to solve problems, and improve the quality of work. Each faculty member critiques the position for the guidance of future students.

(3) After the co-operative work quarter is completed each student pre-

pares a lengthy form describing the work and his or her reaction to it. This report is available to subsequent students selecting co-operative positions.

(4) Finally, the employer evaluates the quality of the student's work. The employer's evaluation has the same status as faculty evaluation of academic courses. Successful completion of four co-operative quarters is required for graduation. Also, since most employers are required to pay the students, at fair and competitive rates, there is a built-in incentive for both parties to take the endeavour seriously.

WHAT'S BAD ABOUT THE CO-OPERATIVE PROGRAM

As a program, co-operative legal education is sufficiently new so that there is little data about how well the program works or what difference it makes. However, the faculty has hunches, doubts, compunctions and fears. One recurrent concern is that the co-operative approach is anti-intellectual. The argument is that Mr Sedley's purely academic education provides the time and incentive to be reflective, to improve his scholarly interest and aptitude, and to engage in sophisticated writing and that Mr Sedley will have a reservoir of three contemplative years upon which to draw for the rest of his professional life. Has Mr Dobbin been short-changed?

Another problem is that Mr Dobbin may be flung out into the hurly-burly of practice too soon. He may participate in vital decisions about a client's interest when he has only the first primer of legal education. Some argue that the need to serve as clerk at the end of the first year may put too much pressure and emphasis in the first year courses on skills rather than analysis. And Mr Dobbin may be so apprehensive about the imminent prospect of almost-practising-law that he is deprived of many of the pleasures of thinking followed by re-thinking.

Mr Dobbin may also be physically and emotionally exhausted by the time he completes the co-operative law school. He may have lived in five different communities from Boston to Anchorage. He may have made five different sets of friends and had to leave them. He may have worked in four vastly different situations, from an established and prosperous Boston law firm with almost limitless resources to the rough and often frightening criminal defence of the Oglala Sioux at Wounded Knee in South Dakota, with very little support. The diversity may engender confusion rather than understanding. Further, school quarters and work quarters are only three months long, perhaps not long enough for either.

To some critics, the Northeastern program is suspect as being but a 'trade' school education. Much of the literature on legal education stresses 'professional' learning which is intended to convey a sense of high and vigorous standards as well it should. However, there is a lurking hint that dreary issues of getting a job, making a living, handling client's problems are incidental and should have little or no effect on legal education. Thus, to some, Northeastern's program may seem overly pragmatic.

A not insignificant aspect of the co-operative program is that it is ex-

pensive. Northeastern's tuition is high but competitive with other private institutions. At first glance, the co-op program would seem to be a money-making rather than a money-losing proposition. During the second and third years, students spend half their time out of the law school building and do not need classroom space, the library or most University services during those periods. Also, they are earning some money to help towards tuition which reduces the need for scholarships and loans. Whilst this is true, a very real but hidden expense is inherent in the co-op system. In order to make upper level courses available to all students, most courses must be taught twice each year - once for each of the two alternating sections. This means running two law schools side-by-side. For example, a professor teaches Trusts and Estates in the summer quarter for the half of the upperclass students in school. He must then teach the course again in the fall quarter for the other half who have returned to school. This limits the number of courses that a faculty member can teach. This results in a harried full time faculty, and reliance on part-time instructors to make certain that the school has a rich and varied curriculum. There is, of course, a cost in running the co-operative program itself, but it probably compares favourably with the cost of running a typical clinical program. An Assistant Dean, Assistant Director and one staff member devote most of their time to administering the co-operative program. Faculty members also spend time developing and visiting jobs.

Whilst a number of United States, British and Australian law school representatives have come to visit Northeastern, no other school has adopted the co-operative plan. Further, trying to change a traditional law school like Mr Sedley's to Mr Dobbin's program presents tremendous problems in the transition from one approach to another. Northeastern Law School was fortunate in that it reopened as an entirely new school able to make a fresh start.

Many of Mr Sedley's and Mr Osborne's schools have found a middle ground. Under the general canopy of 'clinical education' many law schools are offering Mr Sedley and Mr Osborne some practical experience during their law school years. Typically, students in clinical programs will work for several hours each week at a legal aid office with clients unable to afford lawyers. This work is often done in conjunction with courses offered at the school.

For example, Mr Sedley might take a law school course in family law. For several hours each week he would work usually as a volunteer, at the Cohasset Legal Aid Office; talk to an indigent client about a divorce; prepare the case for trial, and in some jurisdictions conduct the trial himself. His work would be supervised by a faculty member of his law school, who is also attached to the Cohasset Legal Aid Office. For the most part, these clinical programs are connected either with legal services offices representing the poor, or government agencies. Whilst many schools are expanding clinical programs for law students, only Northeastern requires prolonged work experience. Also, Northeastern is the only law school which looks at the full range of legal jobs in government, private practice, legal aid - to find positions for its students.

Another concern some have about the co-operative plan is that the level of on the job supervision and teaching may be uneven and difficult to control. At Mr Sedley's school, the faculty is thought to know what Sedley is doing, and how well he is doing it. Even in a 'clinical' course Mr Sedley's instructor is employed by the law school and Sedley's work is connected with a particular course. At Northeastern, students are located in many different parts of the country. Even when a member of the full time faculty visits a student on a job, the substantive work may or may not be within that faculty member's area of expertise. Because it will always be a relatively brief visit, the Northeastern faculty member may miss major problems, sloppy work, or may not have any reliable view of the quality of the educational experience being provided by the employer. The faculty member must hasten back to teach Trusts and Estates or evaluate examination papers. The co-operative program relies heavily on the maturity and responsibility of students and the goodwill, patience and legal ability of employers.

WHAT'S GOOD ABOUT THE CO-OPERATIVE PLAN

Having mentioned the liabilities of the co-operative plan, let us progress to the assets.

Students demand more, or something different, of their teachers. Mr Dobbin having been involved in actual cases on co-op, may well be more expert on an issue or case than the professor. He will feel free to enlighten both professor and class of his knowledge and views. On occasion, he will demand more practical information, in addition to the theoretical framework. It is difficult for a professor at Northeastern to feel comfortable skating on intellectual thin ice there may be a student who is intensively and professionally prepared. It keeps the faculty on their toes and humble. Classes are frequently more animated and tied to reality than at other schools. It is rare that Mr Sedley says 'I think you're wrong', it is frequent that Mr Dobbin says 'The firm I was working at felt . . .' or 'I found a case that says . . .'

Our curriculum, is in turn, enriched. The course of studies offered in United States law schools tends to be stagnant, traditional or perfect (depending on your view). In most schools, Northeastern included, there is a predominant core of course offerings surrounded by flourishes, perceived by faculty and students alike as frills. Because of the co-operative program students return with strong and informed opinions about which courses ought to be taught. Not that every student request for a course is acceded to, or delivered. But students have bases in fact for their opinion on course offerings. Student experience at work has been an important element of planning the curriculum. Further, the diversity of co-operative jobs directly enlarges the curriculum. In a very real sense, Northeastern has dozens of additional courses and teachers scattered about the country. Each participating lawyer is a potential teacher; his firm, a school, and his practice, a course.

Another benefit is that ethics or professional responsibility, as well as other upper class courses, need not be taught in a vacuum. Students who

have been in working situations find nothing arcane or abstruse about problems of conflict of interest or confidentiality. The students bring to the classroom a sense that there are issues that must be answered for actual clients. The long term hope is that a constant intermingling of practice and academic reflection may heighten the sensitivity of the US practitioners of questions of ethics and professional responsibility.

From the student's perspective, there is a great deal to be said for the co-operative plan. Mr Sedley, after four years of college and three years of law school is likely to be bored. Seven years of reading lists, note-taking and exams tire patience. The urge 'to get on with it', to see what lawyers do, and what lawyers are like, frustrates Mr Sedley as he must only sit and wait.

Since Messrs Osborne and Dobbin have been born with something less than a silver spoon, they face a very real question about how to finance their legal education. Mr Osborne has taken the most difficult path to work all day to earn a living at any job he can find and go to law classes at night. Mr Osborne is surely brave and commendable but he may be tired and find more pain than pleasure in his legal education. Mr Dobbin may not get rich on his law school co-operative jobs but at least his work is related to his academic experience.

Mr Dobbin has another advantage. Co-operative education can be, and often is, an adventure. Mr Osborne will never tell his grandchildren about the fascinating day time job as a bank teller. But think of the fun, and fright Mr Dobbin has working on the defence of Patricia Hearst; helping to represent native Americans in Copper Center, Alaska; or being a part of the suit which resulted in the Alabama penal system being found (lock, stock and barrel) to be cruel and unusual punishment. Think of the fun and fright of being paid a princely salary to work on Wall Street and then be able to love it and be good at it or walk away to the next co-operative job.

One purpose of the co-operative program is to give Mr Dobbin a chance to make an informed choice, based on first hand experience as to his talents, aspirations and plans. Northeastern Law School tries to help Mr Dobbin take the initiative, and encourage him to have the courage to make mistakes. In the long run, it is an effort to make the US legal profession diverse, imaginative, caring and responsive to clients who want and need counsel. Many Northeastern students gain a real and justified sense of independence. They can in fact intelligently set up their own law firm, or participate immediately and skillfully in other firms and more unusual and unique experiences.

The profession can gain a great deal from the co-operative plan. Because there is a constant and lively link between the Northeastern Law School and the co-op employers the traditional resentful gap between educators and practising attorneys is often bridged. Practising lawyers who employ co-op law students do not feel superior (or inferior) to law school faculties, because they share in the responsibility of teaching and evaluating a law student's work. And the faculty finds it harder to condescend to the

student or practitioners. Faculty research and writing benefits from the infusion of real and concrete problems made insistant by conversations with students and employers. A co-operative law school faculty is almost compelled to give a good deal of thought to what it means to be a lawyer and to the place of clients and lawyers in the process. In the United States, the bridge between practising attorneys and law teachers is a long one. We think we have made some steps in the right direction in our co-operative plan.

It is also in the attorney's financial interest to take a law student into his practice (be it private firm, government office, or legal aid office). In virtually all cases it is as much an act of self-interest as a philanthropic contribution to legal education. It is a mutually beneficial relationship. The supervising attorney has the student doing work which is interesting and constructive for the student, but an expensive waste of time for the attorney. The supervising attorney is getting more work done, more efficiently, and at less cost by employing a law student. Attorneys who employ law students under the co-operative plan concur in the view that the program fosters their own interests as much as those of legal education.

A word is in order about what sorts of students attend Northeastern. As mentioned before, the school has a wealth of applications. We are, therefore, in a position to select carefully those students who have the most to offer the program. Our students tend to be somewhat older than most other law students. They often have had careers, graduate degrees in other fields or raised families. They are a high-powered lot. This is the single greatest reason for the success of the co-operative program. The students are astonishingly bright, caring, eager, energetic and brave.

Co-operative legal education is not a theological approach to legal education - it is simply an idea which has worked on a modest scale for a few years. It is a system which encourages academics, practitioners and students to learn from one another. It is an experiment that might collapse but we think not. We surely hope that staying in touch with Trent's Law Journal we have a forum to exchange ideas. We believe that Mr Dobbin has the best of several worlds. We would like both to test the belief and improve the reality.

It is the author's passion to write, talk and explain co-operative education. Should any one reading this article have questions, comments, criticisms about Northeastern's program, please feel free to contact me.

Aspects of the Police Act 1976

T C WALTERS*

On 23 February 1973 during the second reading of the Police Act (Amendment) Bill[1] the Home Secretary, the Right Honourable Robert Carr MP first accepted the principle that an independent element was needed in the procedure for handling complaints against the police by members of the public. He admitted that this represented a substantial change in Government policy regarding the procedure.[2] Indeed, only fifteen months earlier the Right Honourable Reginald Maudling MP, Home Secretary at the time, had rejected the idea of any independent element being introduced.[3] He was reporting to the House of Commons on a Working Party set up in 1969 which had recently completed its deliberations. The Working Party was specifically appointed to look into the matter of complaints against the police. Mr Maudling stated that encouraging police authorities to develop their supervisory roles under S. 50, Police Act 1964, encouraging chief officers of police to borrow officers from other forces to conduct investigations of serious complaints, and advising the chief officers to take greater trouble in explaining to complainants what action had been taken, would make the procedure more effective. It was pointed out by the Right Honourable James Callaghan MP (the Home Secretary who had originally appointed the Working Party in 1969), that the changes would not remove the disquiet which was felt about the police judging their own cases, and that the introduction of an independent element would 'give general confidence not only to the police but to the public'.[4] Still Mr Maudling responded that these suggestions of an independent element were 'open to considerable practical objections and . . . they would not command general confidence'. The internal changes were implemented in order to satisfy two points of concern, that of assuring people that complaints against the police are investigated properly and that of maintaining the morale of the police.[5]

In September 1972 the Select Committee on Race Relations and Immigration, Police/Immigrant Relations recommended that,

> 'the Secretary of State take urgent steps to introduce a lay element into inquiries into complaints against the

1 Parliamentary Debates HC Vol 85, Cols 934-1030.
2 Ibid. Col 998.
3 Ibid. Vol 827 Cols 652-657.
4 Ibid. Col 654.
5 Ibid.

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> police, possibly by setting up independent tribunals to consider appeals by complainants or police officers dissatisfied with police inquiries into complaints.'[6]

This recommendation was echoed in the Police Acts (Amendment) Bill 1973, a private members Bill, introduced by Mr Philip Whitehead MP on 29 November 1972.[7] The aim of the bill was to introduce into the procedure an independent element in the form of Police Complaints Review Tribunals which would be to review complaints from complainants and policemen dissatisfied with the investigation into complaints. It was to be ex post facto review, and the findings of the Tribunal would have no effect on any decision in a particular case. The true value of such a procedure would be that if the exposure showed that there was nothing wrong it would increase the confidence of the public. If it showed that something was wrong there would be enormous pressure on the police to raise their standards.[8] The Bill was not Government sponsored and it was withdrawn at the end of the second reading debate. But not before the Home Secretary had accepted the need for an independent element, and promised to have 'consultations with the police service and the police authorities . . . on . . . working out and introducing arrangements with an independent element for ex post facto reviews of the handling of complaints'.[9]

This promise was fulfilled by setting up in April 1973, a working group 'to consider how an independent element might be introduced into the arrangements for dealing with complaints against the police in England and Wales.'[10] The group's report was presented to Parliament in March 1974.[11] The purpose of the group was limited to consulting with the police representative bodies,[12] but it did consider proposals from non-police bodies including Justice, Community Relations Commission and the National Council for Civil Liberties. Because of the different proposals put to the group, the deliberations ranged wider than the consideration of ex post facto review only. The way in which the group reported was to examine and criticise the proposals put to it by the various bodies one at a time. The group, as evidenced from its report, seemed to reject most of the proposals put to it because of the lack of evidence in support of the proposals. But then the report continues;

> 'We have expressed . . . our own belief, based on the extensive experience of members of the Working Group, that the present system works satisfactorily and produces just results.'[13]

6 Report of Select Committee on Race Relations and Immigration Police/ Immigrant Relations, September 1972, Vol 1, Para 333.
7 Parliamentary Debates HC Vol 847, Col 426.
8 Ibid Vol 851. Cols 997-998 per. Home Secretary Mr Robert Carr MP
9 Ibid. Cols 996-997.
10 Cmnd 5582. Page ii
11 Cmnd 5582.
12 Ibid Para 9.
13 Ibid Para 64. See also paras 72 and 75.

This belief is opinion. To criticise one body for not producing evidence in support of its proposal, when the critic has no evidence for his counter proposal does not make for convincing argument. It detracts from the value of the report.

However, it is not surprising that the group should express such an opinion. Of the eighteen full time members of the group six were from the office of the Director of Public Prosecutions; two were from the Association of Chief Police Officers; the Commissioner of Police for the Metropolis; one chief superintendent; three from the Police Federation; two from the County Councils Association; and two from the Association of Municipal Corporations.[14] It would have been astonishing if the view had been any different. The report of the group must be of limited effect. From its nature, its composition and the manner of its inquiry it fails to prevent itself from being identified with the police. It cannot then instil confidence since it is not apparently objective and free from bias. But it is open to public scrutiny unlike the report of the earlier working party.

The group favoured ex post facto review as the element of independence to be introduced should any change be made.[15] Any proposals for reform in the procedure would have to be subject to four basic points. The group 'strongly and unanimously' endorsed this.[16] These points were:-

1) that the investigation of complaints in the first instance must remain in the hands of the police;
2) that there should be no interference with the role of the Director of Public Prosecutions in deciding whether police officers should be prosecuted;
3) that the chief officer's responsibility for the discipline of his force should not be undermined.
4) that no police officer should be placed in jeopardy twice in respect of the same complaint.

A year after the report of the group was presented to Parliament echoes of these four principles could once again be heard in the House of Commons. On 15 July 1975, the Right Honourable Roy Jenkins MP, Home Secretary, in a written reply announced that in the near future there would be a change in the procedure for dealing with complaints against the police.[17] He outlined the proposals which were to be subject to the above principles. These proposals have now been embodied into the Police Act 1976.[18] Whether the Act does give regard to the four basic points will be examined.

14 Ibid Appendix 1.
15 Ibid. Paras 20 et seq.
16 Ibid. Para 14.
17 Parliamentary Debates HC Vol 895 Cols 423-428.
18 1976, chapter 46. It received Royal Assent 6 August 1976 Parliamentary Debates HC Vol 916 Col 2328.

The Act introduces two independent elements into the procedure, a Police Complaints Board and a tribunal for hearing disciplinary charges.

The Police Complaints Board will consist of nine members, one of whom will be a chairman and not more than two will be deputy chairmen. The members will be appointed by the Prime Minister.[19] The first person has already agreed to act as chairman of the Board. He is Lord Plowden and he will be part time and will not be paid.[20] Members are removable for specific reasons found in the Schedule to the Police Act 1976.[21]

The Board is only concerned with disciplinary matters arising from complaints made by the public. Where the chief officer receives such a complaint it must be investigated under S. 49 of the Police Act 1964. On receipt of the report of such an investigation under S. 2 of the 1976 Act he must send certain documents to the Police Complaints Board. They are a copy of the report, a copy of the complaint, whether he has preferred disciplinary charges, and if he has, particulars of the charges and any exceptional circumstances affecting the case by reason of which he considers that the disciplinary hearing should be held by one of the new tribunals.[22] These need not be sent where disciplinary charges have been preferred in respect of the complaint and the accused has admitted the charges and not withdrawn his admission.[23] Nor need they be sent where the complaint has been withdrawn or the complainant has indicated that he does not wish any further steps to be taken.[24] If disciplinary charges were preferred and the accused had admitted them and not withdrawn his admission, and thus no report had been sent to the Board, then after the conclusion of the disciplinary proceedings, which includes any appeal to the Secretary of State, the chief officer must send to the Board a copy of the complaint and of the report of the investigation, particulars of the disciplinary charges preferred and of any punishment imposed.[25] This latter point should prevent any possible use by the police of an admission to cover up a complaint. The Home Secretary has been given powers to set a time limit on the reporting by the chief officer, notwithstanding that the investigation has not been completed.

There is a further limitation on the reporting by the chief constable to the Board. If there is a need to send the matter to the Director of Public Prosecutions because the chief officer is not certain that no criminal offence has been committed,[26] then no report need be sent to the Board until the question of criminal proceedings has been dealt with by

19 Police Act 1976 S. 1(1).
20 The Times 17 July 1976.
21 Para 3(4).
22 Police Act 1976, S. 2(1)(a) and (b).
23 Ibid. S. 2(2)(a).
24 Ibid. S. 2(2)(b).
25 Ibid. S. 2(3)(a) and (b).
26 Police Act 1964 S. 49(3).

the Director.[27] This means that the Director of Public Prosecutions retains his independence in the decision on whether or not criminal proceedings should be instituted giving effect to one of the four basic principles. It also retains the Chief Constable as the channel of communication to the Director, an important point in demonstrating that police suspects are dealt with in the same way as private individuals, in this respect at least. However, the Board has power to request the Chief Officer to supply additional information as it may reasonably require.[28] The Board also has power to request the Chief Officer to send any information the Board receives **in this way** [29] to the Director and the chief officer must do so unless it has already been sent or 'the chief officer is satisfied that it cannot be relevant.'[30] It is unlikely that a chief officer would refuse to send such information, indeed in practice the fullest information is sent to the Director.

The Board clearly has sight of all complaints investigations at some stage. But it cannot interfere with the independence of the Director of Public Prosecutions. Nor do the powers it has concerning reports to the Director undermine the chief officer's responsibility for the discipline of his force. However, the Board has other functions and powers which at first sight appear to come very close to this.

If the chief officer has not preferred disciplinary charges and the Board disagrees with that decision, after having taken note of the relevant reports and documents, then it may recommend that certain disciplinary charges which it considers appropriate should be preferred. If the chief officer is still unwilling, after consultation with the Board, the Board may direct him to prefer such charges as they may specify.[31] The Board must give the chief officer a written statement of their reasons for making such a direction.[32] Where disciplinary charges have been preferred under this power they cannot be withdrawn except by leave of the Board,[33] and the hearing of the charges must be by a disciplinary tribunal.[34] It is difficult to see how such a power in the Board conforms with the principle that the chief officer's responsibility for the discipline of his force should not be undermined. Some of that responsibility has been taken out of his hands and placed into the hands of the Board. In practice it is unlikely that this situation would arise except rarely, particularly in view of the fact that the Board in discharging its functions in respect of disciplinary charges have a statutory duty to pay

27 Police Act 1976 S.5(1).
28 Ibid. S. 3(1).
29 My emphasis. Only information received by virtue of S. 2 and S. 3 Police Act 1976 is included.
30 Police Act 1976, S. 5(2).
31 Ibid. S. 3(2).
32 Ibid. S. 3(3).
33 Ibid. S. 3(4).
34 Ibid. S. 3(5).

regard to any guidance given by the Secretary of State to them and to chief officers.[35]

The decision as to the preferment of disciplinary charges is made in practice by the deputy chief constable not by the chief officer. There exists an express power to delegate[36] though it is probably not necessary. Where a statute requires that functions be performed by or on behalf of a chief officer of police a senior police officer can validly perform these functions without expressly being delegated the power to perform them.[37] But the fact that the power is exercised under delegated authority does not detract from the undermining effect of the powers of the Police Complaints Board.

The Board may direct that the hearing of any other disciplinary charges may be dealt with before a disciplinary tribunal if there were 'any exceptional circumstances affecting the case.'[38] The tribunal would consist of three members, the chief officer as chairman and two members of the Police Complaints Board not being members who were concerned with the decision as to the preferring of disciplinary charges.[39] The decision of a tribunal may be a majority decision.[40] No tribunal hearing will be allowed if the accused officer admits the charge and does not withdraw his admission before the beginning of the hearing.[41]

Again this appears to undermine the responsibility of the chief officer for the discipline of his force by partially taking another decision out of his hands, that of the guilt or innocence of an accused policeman. Indeed it is possible that a situation could arise where a deputy chief constable does not think that discipline proceedings should be brought, the Police Complaints Board directs that disciplinary proceedings must be brought, the chairman of the disciplinary tribunal (the chief constable) does not think the officer is guilty, but the two other members of the tribunal think he is. This clearly undermines the chief officers responsibility, though probably justifiably should such a situation arise.

The award of punishment is a matter for the chief officer. If the hearing was by a tribunal then it would be the task of the chairman after consulting the other members of the tribunal.[42] In most cases the chairman of the tribunal will be the chief officer of the accused policeman.[43] If not it will be a chief officer from another force to whom the task has been delegated by the chief officer of the accused because he is interested in the case otherwise than in his capacity as a chief officer or is a material witness or considers it appropriate to remit the case to another

35 Ibid..S. 4(1).
36 Police (Discipline) Regulations 1965 (as amended) Reg 5.
37 Nelms v Roe [1970] 1 WLR 4.
38 Police Act 1976 S. 3(5).
39 Ibid. S. 4(1)(a).
40 Ibid. S. 4(3).
41 Ibid. S. 3(b).
42 Ibid. S. 4(1)(b).
43 Ibid. S. 4(1)(a).

chief constable.[44] In such a situation the chiarman of the tribunal after consultation with the other members makes a recommendation to the chief officer of the accused and he would then determine the punishment.[45] This is presumably intended to satisfy the point that discipline should be in the hands of the chief officer. But that assumes that discipline and punishment are one and the same thing.

'Where a member of a police force has been acquitted or convicted of a criminal offence he shall not be liable to be charged with any offence against discipline which is in substance the same as the offence of which he has been acquitted or convicted.'[46] The purpose of this section appears to be to prevent 'double jeopardy' so far as it is possible. It seems to apply the principles 'antrefois convict' and 'autrefois acquit' to disciplinary charges. However, the House of Lords thought that the chief officer could still bring disciplinary charges in some cases even where a criminal offence had been dealt with. An example given by the House was of a policeman acquitted of bribery and corruption, but who might nevertheless have mishandled money, and this could be an offence against discipline and the chief officer should be free to bring disciplinary proceedings if he wished.[47] With respect it is submitted that the section would preclude disciplinary charges in this and most other circumstances. The only time for certain that disciplinary charges could be brought is 'in respect of an offence against discipline which consists of having been found guilty of a criminal offence.'[48] The Police Act 1976 brings into its scope constabularies maintained by authorities other than police authorities[49] eg British Transport, Ministry of Defence, Port of London Authority, a welcome change to give uniformity. It contains provisions creating an offence of disclosing information by members, officers or servants of the Police Complaints Board unless authorised.[50] It requires the Police Complaints Board to report annually to the Secretary of State and otherwise as he directs, while it gives power to the Board to conduct research into any matters for this purpose. The Secretary of State must lay the annual reports of the Board before Parliament and cause them to be published. Copies must also be sent to every police authority.[51] The Act also makes a change in appeals procedure. The Secretary of State will only be able to vary punishments by substituting less severe and not more severe penalties.

The Police Act 1976 is a compromise. It introduces into the procedure an independent body whose functions are to decide upon whether disciplinary proceedings should be brought and how they should be heard.

44 Police (Discipline) Regulations 1965 as amended by Reg 15.
45 Police Act 1976, S. 4(4).
46 Ibid. S. 11(1).
47 Parliamentary Debate HL Vol 373 Cols 437, 438 per Lord Harris of Greenwich.
48 Police Act 1976, S. 11(2).
49 Ibid. S. 7.
50 Ibid. S. 9.
51 Ibid. S. 8.

The body does not usurp the powers of the Director of Public Prosecutions nor interefere with them in any way. Neither does it replace completely the role of the deputy chief constable. It is a further check to ensure that his decision whether to bring disciplinary proceedings is a proper one based upon the evidence unearthed during the investigation. The semi independent tribunal does not take away totally the chief officer's responsibility at a disciplinary hearing. He is still involved in the decision as to guilt and it is he alone who finally determines punishment. S. 11 of the Police Act 1976 caters for the principle conserving the question of double jeopardy.

The only one of the four original principles not mentioned is that of the investigation remaining in the hands of the police. The Act is silent on the point and indeed the provisions made by the Act only come into play after the investigation. There will be no change in this as it appears. This is probably to the good. Whatever the merits or demerits of independent investigation one point must be borne in mind. It was reported in The Times on 19 July 1976 that there was some doubt whether members of the 90,000 strong Police Federation will even recognise the new Police Complaints Board, let alone take part in its proceedings. If the police who are being investigated withdrew their co-operation during the investigation, and this could happen with non police investigators, then the system would become wholly inoperable. No amount of independent elements could help in those circomstances.

Strange Cases of Living Together

R N SEXTON*

Section 1(2) of the Matrimonial Causes Act 1973[1] provides that there is a presumption that a marriage has irretrievably broken down, (and as a result of section 1(4) a presumption that a divorce shall be granted) if '(d) . . . the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted . . .' or

'(e) . . . the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition . . .'

In practical terms this means that a spouse can obtain a divorce if he can prove either that he and his fellow spouse have lived apart continuously for at least two years and the fellow spouse expresses positive agreement to divorce, or that they have lived apart for five years whether or not the fellow spouse consents. This is subject to the possibility that the judge may find as a fact that the marriage, despite the lengthy living apart, has not irretrievably broken down, but the possibility of such a finding is in practice a very remote one.

It does not take a great deal of imagination to realise that difficulties can arise in practice as to whether or not spouses are 'living apart'. Let us examine a number of possibly difficult examples.

Suppose, as in the 'old' desertion case of *Naylor*[2] the spouses still live in the 'matrimonial home' but occupy different parts of the building, having nothing to do with each other. The husband pays the wife no housekeeping, and she performs no domestic services. Overall they are like two strangers living in a house divided into two flats, though like flat-dwellers in such circumstances they may continue to share the use of essential facilities such as toilet, bathroom and kitchen. Are such spouses living apart? *(Case No 1)*

Alternatively, suppose *(Case No 2)* the spouses continue to live in the 'matrimonial home' having as little to do with each other as possible. Their love for each other has completely gone, but they continue to love

1 Throughout the text of this article statutory references are to the Matrimonial Causes Act [1973] rather than to the Divorce Reform Act [1969] which it supercedes. Section 1(2) of the MCA was formerly DRA section 2(1).
2 [1962] P. 273; [1961] 2 All E.R. 129; [1961] W.L.R. 751.

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their young children, and exercise a joint authority over them. Are such spouses living apart?

Case No 3 is very different from the previous examples, yet very simple. A husband is sentenced to a long term of imprisonment, and his wife visits him as often as she can. Are they 'living apart'?

In *Case No 4* the husband is a diplomat posted to a distant and particularly troublesome country 'Uriquana'. Conditions in Uriquana are so bad that by mutual agreement the wife does not accompany him, but remains in Britain though they write to each other frequently. Are they 'living apart'?

Finally, *Case No 5*, is a variation of 4 above. While in Uriquana the husband is captured by terrorists and held hostage for several years. He is unable ever to communicate with his wife. Are they 'living apart'?

Parliament, to its credit, has not left us totally unclear on this point. The first part of section 2(6) of the Matrimonial Causes Act 1973 [3] provides 'for the purposes of section 1(2)(d) and (e) and this section a husband and wife shall be treated as living apart unless they are living with each other in the same household. . .'

When this provision was first enacted in 1969 it caused neither surprise nor concern amongst family lawyers. There were already 2 Court of Appeal decisions laying down the test for de facto separation as one of the elements of the matrimonial offences of desertion. *Hopes* [4] and *Naylor* [5] decided that there could be a desertion provided the spouses formed two *'entirely separate households'*. *Naylor*, as already indicated, was like Case No 1 above, and the Court of Appeal held there to be a *de facto* separation. If on the other hand the spouses though on bad terms with each other, still acted as one household for at least some purposes, they are living together, and there could be no desertion. The test in *Hopes* and *Naylor* is thus one of how the spouses organise their lives. If they form two completely distinct organisational units they are living apart. If they have some degree of common economic or social organisation, they are living together.

In 1969 it was generally assumed that by enacting what is now the first part of section 2(6) of the Matrimonial Causes Act, Parliament was telling the courts that in determining whether spouses are living apart for the purposes of section 1(2)(d) and (e) the courts should apply the familiar *Hopes/Naylor* test in all cases. Thus in cases 1, 3, 4 and 5 above the spouses would be 'living apart', while in case 2 they would probably not be.

The apparent correctness of this assumption was confirmed by the

3 Formerly DRA Section 2(5).

4 1949 P 227; 1948 2 All E.R. 920

5 1962 P 253; 1961 2 All E.R. 129; 1961 2 2.).4. 751.

decision of Wrangham J in *Mouncer* [6]. This case was a variation of case 2 above. After a short period away the husband returned to live in the matrimonial home. A complete reconciliation was attempted but failed. Nevertheless, the husband remained in the home for a further 18 months before finally leaving. During that time the spouses had separate bedrooms, and sexual intercourse did not occur between them. They shared, however, a common living room; the husband ate meals cooked by the wife; they shared the job of cleaning the *whole* house. The judge expressly found that the only reason why the husband continued to live in this way was his wish to continue to live with and help look after the children.

A petition was brought by the husband under section 1(2)(d) relying on, as part of the two years living apart, most of this critical 18 months period. Despite attempts of learned counsel to persuade him to lay down a test more favourable to the parties before him, Wrangham J, adamently refused. There was no doubt in his mind that Parliament by what is now section 2(6) was merely restating the accepted common law test for living apart.

'In my view, the test to be applied to determine whether parties are living apart or not is unaltered by section 2(6) which is really declaratory of the existing law upon this question. For these reasons I have come to the conclusion that it is not proved that these spouses were living apart between November 1969 and May 1971. On the contrary I think that during that period they were living with each other in the same household. The fact that they did this from the wholly admirable motive of caring properly for their children cannot change the result of what they did.'

Mouncer was decided in November 1971. It was a simple, common sense, and welcome decision. For a brief period the writer (and many others) felt that any doubts about the meaning of living apart had been firmly settled. The state of euphoria was shattered in March 1972 by the decision of the Court of Appeal in *Santos* [7]. The spouses were living in Spain However, in the autumn of 1966 the wife left her husband and son, and returned to live in England. She presented a petition for divorce on the basis of section 1(2)(d) early in 1971. Undoubtedly, ever since 1966 her home had been in England, her husband's in Spain. The facts which caused all the difficulty in this case are stated very concisely at [1972] Fam 255A.

'In the summer of 1969 she was at Sitges for about a month to see her son and during that time again shared a bedroom with her husband at his flat. She made a similar visit in the same circumstances in the summer of 1970. Then at Christmas she again spent a week at Sitges as before and went on for a week to Andorra, where they shared a bed in an hotel belonging to her husband'.

6 [1972] 1 W.L.R. 321; [1972] All E.R. 289.
7 [1972] Fam. 249; [1972] 2 All E.R. 246; [1972] 2 W.L.R. 889.

Before progressing any further, one must now introduce the provision which is now section 2(5) of the Matrimonial Causes Act 1973.[8]

'In considering for the purposes of section 1(2) above whether . . . the period for which the parties to a marriage have lived apart has been continuous, no account shall be taken of any one period (not exceeding six months) or of any two or more periods (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties resumed living with each other shall count as part of . . . the period for which the parties to the marriage have lived apart.'

A natural reaction to this is that the facts of *Santos* represent a situation where section 2(5) should be allowed to operate, and that the living apart should be deemed to be 'continuous' and thus to satisfy section 1(2)(d). Indeed the immediate reason for *Santos* reaching the Court of Appeal was that the trial judge totally overlooked the special statutory qualification to the word 'continuous'. He accepted that the spouses had been living apart since Autumn 1966, but held that the visits to Spain by the wife (about 11 weeks in all), broke the continuity of the living apart.

The Court of Appeal, while accepting that the trial judge was in error on the 'continuous' point, introduced a completely new factor. They held that for spouses to be 'living apart' it is not sufficient that they be physically separated. There must, in addition, be a mental element. Living apart does not commence until one or other spouses forms 'a *recognition that the marriage has irretrievably broken down*'.

Not surprisingly no evidence as to the mental state of the parties had been proffered at the original trial, so the Court of Appeal sent the case back for retrial.

It is not the purpose of the writer to make a lengthy analysis of the many arguments which can be brought for and against the decision in *Santos*, but to concentrate upon a peculiar side effect which necessarily flows from the decision in *Santos*, a side effect which is all the more strange in the light of the decision in *Fuller*.[9] Before dealing with *Fuller* and with the peculiarity referred to, it is essential to emphasise three points made by the court in *Santos*.

Firstly, for living apart to commence only one of the spouses need form the recognition of breakdown. That spouse may either be the petitioner or the respondent.

Secondly this recognition of breakdown need not be communicated to the other spouse.

Finally the court is not obliged to believe a petitioner (or respondent) who in evidence asserts that he/she formed a recognition of breakdown on such and such a date. The court should be particularly cautious where

8 Formerly DRA Section 3(5).
9 [1973] 1 W.L.R. 730; [1973] 2 All E.R. 650.

the date for the recognition being asserted by a spouse is inconsistent with his/her actions at the time. Eg suppose a wife asserts that she recognised her marriage as broken down five years ago. At that time her husband was in prison. She visited him regularly, and wrote frequent affectionate letters. Her assertion is unlikely to be believed.

It can thus be seen that *Santos* quite seriously reduces the number of situations in which spouses can be held to be 'living apart'. To return to the cases set out at the beginning it is apparent that in the light of *Santos* the spouses in cases 3, 4 and 5 are not 'living apart'.

While the decisions in *Santos* restricts the meaning of 'living apart' in one direction, the decision in the later case of *Fuller* expands the meaning of the phrase in a different direction.

Mrs Fuller left her husband in 1964 and went to live with a Mr Penfold. She assumed the name 'Mrs Penfold', and undoubtedly she and Mr Penfold behaved as husband and wife. In 1968 Mr Fuller suffered a severe attack of coronary thrombosis. 'Mrs Penfold' heard of this, and when Mr Fuller came out of hospital the three parties adopted a highly civilised arrangement. Mr Fuller went to live with 'the Penfolds' as their lodger. He behaved like most lodgers, having a separate bedroom, but eating his meals with the rest of the family. He paid £5 a week (later £7 a week). His landlady Mrs Penfold also did his washing for him.

Clearly Mr Fuller (like any other lodger would be) was a member of the Penfold household. 'Mrs Penfold' petitioned for a divorce under section 1(2)(e). Not surprisingly the County Court judge dismissed the petition on the grounds that the parties were not living apart.

The Court of Appeal disagreed, and found an ingenious way of granting a decree. They studies the statutory phrase 'a husband and wife shall be treated as living apart unless they are living with each other in the same household', particularly the words 'with each other'. They held that the provision should be read as 'a husband and wife shall be treated as living apart unless they are living with each other as *man and wife* in the same household'. Clearly the Fullers were not living as man and wife; and therefore in law they were 'living apart'.

(*Mouncer*, was considered to be correctly decided, but was distinguished)

So far only part of section 2(6) has been quoted. It is now necessary to look at the section in full.[10]

'For the purposes of section 1(2)(d) and (e) above and this section a husband and wife shall be treated as living apart unless they are living with each other in the same household and references in this section to the parties to a marriage living with each other shall be construed as references to their living with each other in the same household.'

The provision thus not only defines 'living apart', but also defines

10 The latter part of MCA 2(6) was formerly DRA Section 3(6).

'living with each other'. This definition applies not only to sub-section 6 itself, but to the rest of section 2 as well, the phrase 'living with each other' occurring in sub-sections 1, 2, 3 and 5 as well as 6. Subsection (5) has already been quoted in part during the discussion on *Santos*. The purpose behind these sub-sections was expressed as part of the long title to the original Divorce Reform Act:- to facilitate reconciliation in matrimonial causes'. The sub-sections achieve this purpose by providing that periods of living with each other of up to six months shall be ignored in determining whether one of the paragraphs in section 1(2) is proved.

There are of course differences of detail between these subsections. Sub-section (5) is intended to operate so that periods of living with each other of up to 6 months do not break the continuity of the living apart, though neither do they count as part of the period of living apart.

Subsections (1) and (2) of section 2[11] relate to section 1(2)(a) of the Matrimonial Causes Act. Section 1(2)(a) itself provides that a presumption of irretrievable breakdown shall arise if 'the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent'. (The feeling of intolerance must be a genuine one, but need not be reasonable, nor need it be derived from the respondent's adultery.)

Section 2(1) provides
'One party to a marriage shall not be entitled to rely for the purposes of section 1(2)(a) above on adultery committed by the other if, after it became known to him that the other had committed that adultery, the parties have lived with each other for a period exceeding, or periods together exceeding, six months'.

Section 2(2) is a much more liberal provision
'Where the parties to a marriage have lived with each other after it became known to one party that the other had committed adultery, but subsection (1) above does not apply, in any proceedings for divorce in which the petitioner relies on that adultery the fact that the parties have lived with each other after that time shall be disregarded in determining for the purposes of section 1(2)(a) above whether the petitioner finds it intolerable to live with the respondent'.

Thus (in effect) 'living with each other' after discovery of adultery can be ignored provided it lasts no more than six months after the discovery. Once the critical six months is passed, the adultery can no longer be used as a basis for a petition.

Returning to the terms of section 2(6) it is clear that it envisages that only *two* states of affairs are possible between spouses, namely 'living with each other' and 'living apart'. From the brief explanation of the decision in *Santos* given earlier one might be forgiven for thinking that the case creates a third 'in-between' state of affairs, a state of affairs where the spouses have separate homes, but neither of them recognise the marriage is irretrievably broken down. On reading the judgment in the

case it is plain that the Court of Appeal do not envisage such an 'in-between' third state. The judgment clearly accepts that spouses can only be either 'living apart' or 'living with each other'.

It follows, therefore, that the decision in *Santos,* although expressed as a decision on the meaning of living apart, is by necessary implication also a decision on the meaning of 'living with each other'.

It further follows that if under *Santos* spouses are physically separated but neither recognises that the marriage has irretrievably broken down, they are still in law 'living with each other'. In turn it follows from *Fuller* that such spouses are 'living with each other as man and wife in the same household'.

To return to the cases mentioned at the beginning. In Case No 3, the husband, although in prison for a long spell, will probably vigorously contest any suggestion that his marriage is a dead one. The wife regularly visits him, so it will hardly be possible for her to assert that she regards the marriage as finished. Therefore they are not living apart. They are instead 'living with each other as man and wife in the same household'!

It is well known that some penal reformers advocate 'conjugal visits' being introduced. Under such a system a husband and wife would enjoy the benefits of married status despite the imprisonment of one or other of them. Surprising as it may seem the Court of Appeal has achieved the ends sought by the penal reformers. A husband and wife continue their married life in the same household despite the imprisonment of one or other of them. What more can the reformers want?

In Case No 4 let us imagine that His Excellency is giving a dinner at the Embassy for the President of Uriquana. The President enquires why waiters are solemnly serving food to the place on the ambassador's left, even though the seat is unoccupied. 'It's for my wife' says the ambassador, 'and, by the way, what do you think of the latest revolution in Glarusombo?'
The President is not so easily deflected.
'Your wife is in England', he protests. 'She refuses to trust her safety to our highly efficient Uriquan police!'
'You do not understand our English ways' replies His Excellency, trying to disguise his annoyance. 'Our English law, which of course is totally without blemish, provides that we are still living as husband and wife in the same household. As she's my wife, and we are in the same household, it is only natural that we have our meals together!'

The Ambassador would of course not be in any mood for joking if he found himself in Case No 5. Yet, assuming both he and his wife hope for his eventual release they are of course not 'living apart' during the captivity. They are . . .

Case No 5 is not, of course, a purely hypothetical situation. Perhaps the Court of Appeal would like an opportunity to explain to Sir Geoffrey and

Lady Jackson that throughout Sir Geoffrey's captivity by the Tupamaros guerillas, the Tupamaros were total failures. They were completely unable to prevent the Jacksons from living together as man and wife in the same household.

It is natural to conclude from the foregoing discussion that what the Court of Appeal has done, in *Santos* and *Fuller*, is create another legal fiction, a fiction which can perhaps be best called 'constructive living together'. Leaving aside the broad question as to whether legal fictions should have any place at all in what claims to be an advanced legal system, the reader may be forgiven for thinking that 'constructive living together' is a highly amusing, but perfectly harmless fiction.

That it is not 'perfectly harmless' will be seen if we introduce a further case, No 6. Before examining this situation the reader should refer back to section 1(2)(a) of the Matrimonial Causes Act and to section 2(1), quoted earlier.

In Case No 6 the husband discovers his wife is committing regular adultery with X. The husband packs his bags and leaves. Obviously at that time he recognises that the marriage has broken down. Later she writes to him indicating that she has given up X and is anxious for a reconciliation. He replies that he accepts that she is telling the truth about the ending of the relationship with X. He indicates that he has had second thoughts and that he would like a reconciliation. Discussions then ensue between the spouses as to the conditions for the reconciliation. Difficulties arise on such issues as where the spouses should live, who should pay for the maintenance of the children, (perhaps there is an illegitimate child by X), and on what should happen if the reconciliation is a failure. Both spouses genuinely want a reconciliation (and therefore do not now recognise the marriage as broken down) and negotiations drag on for more than 6 months. After (say) nine months the husband realises the lack of progress, gives up thoughts of reconciliation and, having met another woman whom he is anxious to marry, petitions for a divorce under section 1(2)(a) relying on W's adultery with X.

His petition will fail. During the negotiations for reconciliation neither spouse recognised the marriage as broken down. Therefore the spouses were not living apart during the period of negotiation. They were, of course, living with each other . . . It automatically follows that as the period of negotiation exceeded six months the husband is debarred from relying on the adultery by section 2(1).[11]

And was not one major purpose of the new Divorce Law to facilitate reconciliation in Matrimonial Causes?

11 Formerly DRA Section 3(3)(a) and (b).

When Homer Nods

P M RANK*

"Twill be recorded for a precedent;
And many an error, by the same example
Will rush into the state: it cannot be.'
(Portia The Merchant of Venice, Act IV, Scene 1),
quoted with approval by Lawton L.J in *Farrell v Alexander* [1976].[1]

Abstract justice requires like cases to be treated in like manner, and dissimilar cases differently. A vehicle of such justice in the English Legal System is the doctrine of *Stare Decisis*,[2] which in its reliance upon so-called RULES of precedent, has placed the greatest weight upon the need for consistency in decision making, that consistency in turn making for rules of law which are reasonably certain and reasonably predictable of application by the courts.

Mention of these rules of precedent tends to give the casual enquirer a misleading impression of their achievements, since they admit of a flexibility which cannot be reconciled with complete certainty of judicial decision-making. Indeed, anything like complete certainty could only be achieved at the expense of some equally lofty ideals, namely, of treating each case on its own particular merits in order to achieve a fair solution, and of keeping the law apace, or at any rate not far behind, the ever developing attitudes and mores of the society which it purports to serve.

The seemingly antithetic nature of certainty on the one hand, and flexibility on the other, has not until recent times caused any judicial schizophrenia, since by and large the overriding concern of our judges has been the dogged adherence to binding case-law, no matter how strange or harsh the outcome has sometimes been for litigants. But the last thirty years or so has seen a clearly discernible change in judicial attitudes to past cases, with at least one important modification to the rules of precedent. The Practice Direction of 1966 [3] stands witness to a monumental change in attitude, though possibly its promise of speedy revision of archaic case-law has been sacrificed in practice to a rather conservative preference for well-established principles.[4]

Much contemporary interest in *Stare Decisis* and its development has focused upon the position of the Court of Appeal, with Lord Denning MR.

1 All E.R. 129 at 143 (f).
2 Meaning 'To stand by things decided'.
3 House of Lords [1966] 1 W.L.R. 1234.
4 See, for example, the attitude of the House to the Practice Direction in Jones v Secretary of State for Social Security [1972] 1 All E.R. 145.

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on numerous occasions staunchly asserting the right of that Court to depart from its own previous decisions where it felt it right to do so.[5] Despite this call for a new rule, few members of the court have shown any real enthusiasm for change,[6] and the impression that the self-binding rule is in a state of flux[7] may have to yield to the great weight of authority against it, and also to an apparent change of heart by Lord Denning himself.[8]

Nor has the attack on this aspect of precedent in the Court of Appeal been a single-pronged one. Much attention of late has centred around the EXTENT of the self-binding rule, and the exception to it expounded in the celebrated case of *Young v Bristol Aeroplane Co. Ltd*[9]. Of the three exceptions[10] described by Lord Greene MR. in that case,[11] the exact operation of per incuriam[12] remains as fascinating as it is elusive, though not surprisingly in view of its basic tenet that a case decided in error need not be followed by later courts.

In view of its potential for undermining the rules of Stare Decisis, one would expect its operation to be within narrow and well-defined limits, and whilst this has generally been the position, its treatment in some recent cases[13] has prompted the writer to survey the battlefield of past authorities in search of some clear and precise rules as to its ambit of operation.

In *Young's* case, counsel for the appellant found himself in the difficult position of having to argue that two previous decisions of the Court of Appeal were wrongly decided, and therefore not binding upon the Court. This argument was rejected by Lord Greene who felt that the Court was bound by the previous decisions because (a) they covered the question raised, and (b) they did not conflict with previous decisions of the same court 'or a court of co-ordinate jurisdiction'.[14] Nevertheless, in a judgment which has been followed and cited with approval on countless occasions, Lord Greene took the opportunity of considering the position where a previous decision had been made per incuriam. He said:-

5 Gallie v Lee [1969] 1 All E.R. 1062, at p. 1072.
Barrington v Lee [1971] 3 All E.R. 1231, at p. 1238.
Hanning v Maitland (No 2) [1970] 1 All E.R. 812, at p. 815.

6 But see the view of Salmon L.J. in Gallie v Lee (Supra), at p. 1082 (G).

7 Walker & Walker, The English Legal System, 4th edition (Butterworths), commenting on the self-binding rule, reads (at p. 132) 'Those principles may be taken to be more firmly entrenched than ever and it is not to be anticipated that any further attempt will be made, in the foreseeable future, to suggest that the Court of Appeal is free to depart from its own previous decisions (save in the exceptional cases indicated in Young's Case).

8 Expressed in Miliangos v George Frank (Textiles) Ltd. [1975] 1 All E.R. 1076, at p. 1085 (a). But there appears to have been another change of heart in Farrell v Alexander (supra), at p. 137 (f).

9 [1944] 1 K.B. 718.

10 In Miliangos v George Frank (Textiles) Ltd. [1976] A.C. 443, at p. 496 (D-E) Lord Cross added a fourth exception.

11 At pp. 729 and 730.

12 Meaning 'Through want of care'.

13 Including Broome v Cassell & Co. Ltd. [1971] 2 All E.R. 187;
Miliangos v George Frank (Textiles) Ltd., (supra); Farrell v Alexander (supra).

14 Presumably the Court of Criminal Appeal (as it was then called), and the Courts-Martial Appeal Court.

'. . . where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision[15] and is bound to follow a decision of its own given when that provision was not present to its mind . . .'[16]

Apart from the specific examples of incuria given above, Lord Greene recognised that the doctrine may operate beyond those categories,[17] but he declined to give further and better particulars. Whilst any sphere of operation left open will have to be considered later, it must be noted at this stage that the above judgment was concerned only with the position of the Court of Appeal.[18] As a preliminary to further discussion therefore, it must be asked whether:-

(a) the doctrine may apply also in High Court and House of Lords decision making, and
(b) a court may ignore the decision of a HIGHER Court by dubbing it per incuriam.

INCURIA IN THE HOUSE OF LORDS

In theory, the notion of incuria is just as appropriate to the House of Lords as to the Court of Appeal, unless some brave mortal would wish to argue the infallability of the highest court in the land as against the fallibility of lower courts. In fact, in the much quoted case of *London Street Tramways Company v London County Council,*[19] Lord Halsbury L.C. (who gave the only judgment) expressly stated that a decision of the House made in ignorance of an Act of Parliament would have to be ignored in a later case.[20] But whilst there can be no doubt either in principle or on authority, that incuria does not fall short of decisions in the House of Lords, it is highly unlikely that their Lordships would need to rely upon the doctrine today in view of their recently declared power to depart from unsatisfactory decisions 'where it appeared right to do so.'[21]

INCURIA IN THE HIGH COURT

Where the decision impugned is that of only one judge, the position is much the same as in the House of Lords, because a High Court is never

15 This would, of course, include delegated legislation, for example the Land Registration Rules, 1925 (on which see Morelle Ltd. V Wakeling [1955] 1 All E.R. 708), and the Rules of the Supreme Court.
16 At p. 729.
17 Ibid. But His Lordship did mention two further examples of incuria, which he said fell outside the scope of the inquiry:-
(a) where the court has acted in ignorance of a previous decision of its own; in later cases a choice would have to be made; and
(b) where it has acted in ignorance of a House of Lords decision; in such a case, the latter would prevail.
18 Recognised also by Professor Allen in Law in the Making, 7th edition, (Oxford Paperbacks). See his discussion at p. 245.
19 [1898] A.C. 375.
20 At pp. 380 & 381.
21 The Practice Direction (Judicial Precedent) (supra).

bound to follow such a decision, though judicial comity requires that in normal circumstances previous authorities are followed.

So far as decisions of Divisional Courts[22] are concerned, the position is different because usually they bind both themselves and judges of the same division.[23] Thus a High Court may be faced with a decision which it believes is wrong or otherwise unsatisfactory, but because of the orthodox rules of precedent, may have to apply it, unless recourse can be had to the doctrine of incuria. The Divisional Court of the Queen's Bench Division found itself in that very position in *Penny v Nicholas*,[24] and held itself not bound by a previous decision[25] on the ground that:-

> 'Two remarkable cases which might have been cited to the court . . . were not cited to it, and those cases, I think, would have had a considerable influence on that decision.' [26]

The question of incuria may therefore arise before any Divisional Court faced with its own previous decisions, but if the precedent which rankles is that of an ordinary High Court, incuria need not be proved because the earlier case can simply be overruled by the later Court. Conversely, if a single High Court judge is referred to a previous Divisional Court ruling, he may need to rely upon incuria if he wishes to side-step it.

THE USE OF INCURIA AGAINST HIGHER AUTHORITIES

It is, of course, inevitable that a system so heavily dependent upon sifting through a vast stock of precedents, the number of which increases daily, will yield up imperfections of decision-making from time to time. When the imperfections present themselves, the choice is between an inordinate adherence to the binding rules, thus perpetuating manifestly erroneous decisions, or an element of flexibility by which subsequent courts are enabled to reject the occasional 'wrong' decisions. English law has shown no hesitation in making that choice, preferring the latter solution. Nevertheless, in reaching this position, it has been necessary to confine the doctrine within very narrow limits, for to have allowed the notion of incuria free-play would very soon have proved a real threat to the continuing existence of Stare Decisis. But restrictions on the categories of incuria may not be enough if, within their narrow confines, a High Court is entitled to side-step a decision of the Court of Appeal,[27]

22 i.e. a High Court in which at least two judges sit.
23 Presumably subject to the same exceptions as those in the Court of Appeal, described in Young's case (supra). In criminal cases, there is another exception; i.e. where adherence to a past case would result in an injustice; Younghusband v Luftig [1949] 2 K.B. 354. Thus, the Queen's Bench Divisional Court is in a similar position to the Court of Appeal, Criminal Division: See R. v Taylor [1950] 2 K.B. 368.
24 [1950] 2 All E.R. 89.
25 Melhuish v Morris [1938] 4 All E.R. 98.
26 Per Lord Goddard C.J. at p. 91.
27 This was attempted by Bristow J. in Miliangos v George Frank (Textiles) Ltd. (supra), pp. 1078 - 1080, though admittedly his Lordship felt obliged to follow a House of Lords decision, which he regarded as in conflict with a subsequent Court of Appeal decision. (He was reversed on appeal).

or the latter feels free to topple a decision of the House of Lords.[28]

The argument is that the 'reject-hatch' through which some unsatisfactory decisions are consigned, should not only be limited in size, but also carefully controlled in access, so as to prevent a court rejecting a higher authority on the ground that in that case, 'Homer nodded'.[29] It was to this point that Lord Diplock directed his attention in *Cassell & Co. Ltd. v Broome,*[30] where he said:-

> 'The Court of Appeal found themselves able to disregard the decision of this House in *Rookes v Barnard* by applying to it the label per incuriam. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal.'[31]

Lord Hailsham's judgment echoed much the same point of view.[32] Of the other judges who sat, Lords Reid, Morris, Wilberforce and Kilbrandon would appear to go along with the views of their brethren expressed above,[33] whilst Viscount Dilhorne, on the contrary, expressed the clear and categoric view that where the Court of Appeal was faced with two clearly inconsistent decisions of the House, it could choose which to follow, presumably by application of per incuriam to the precedent disapproved of.[34]

There is every likelihood that on occasions the Court of Appeal will be confronted with seemingly conflicting decisions of the House, and on these occasions it may be felt that strict regard for the rules of precedent would have to yield to the exercise of a choice by the lower court. In fact, the dilemma of the Court of Appeal in that situation is lessened where decisions of the House (in issue) are made AFTER The Practice Statement of 1966; in such a case, the latest decision would have to be regarded as

28 Attempted by the Court of Appeal (consisting of Lord Denning M.R., Salmon and Phillimore L.J.J.) in Broome v Cassell & Co. Ltd. (supra).

29 Scarman L.J. in Farrell v Alexander (supra) at p. 145 (f) said of 'per incuriam' that it is:-
'. . . a phrase in a foreign tongue which I translate as 'Homer nodded'.'
Doubtless this was an allusion to Ars Poetica (Horace):- 'Indignor quandoque bonus dormitat Homerus.'

30 [1972] 1 All E.R. H.L. 801.

31 At p. 874 (h). He reiterated a similar point of view in Baker v The Queen [1975] A.C. 774, at p. 788 (G-H).

32 In particular at p. 809 (d-h).

33 Though admittedly their Lordship's judgments are not entirely free from difficulty on this point. Lords Wilberforce and Kilbrandon merely expressed agreement with Lord Hailsham's judgment; and Lord Reid, whilst denouncing the Court of Appeal's direction to lower courts to ignore Rookes v Barnard [1964] 1 All E.R. 367, ducked the question as to whether the Court of Appeal could use the doctrine of incuria against decisions of the House. He felt that Rookes v Barnard could not have been a decision made per incuriam.
In any event, judicial comment as to whether the Court of Appeal could legitimately use incuria as against a higher decision, could not have found the ratio of the case.

34 At p. 854 (c-e). His Lordship did, however, feel that it was unusual' to describe a decision of the House as given per incuriam (e-f).

overruling the earlier, at any rate to the extent of the conflict. Even where both conflicting decisions were made before the Practice Statement, the use of the incuria doctrine could be restricted to one specific situation, namely, where the later decision had TOTALLY OVERLOOKED the earlier authority. But in those cases where the gist of the dilemma is merely that decision A conflicts with decision B (both being decisions of the House of Lords, and A being the earlier, THOUGH DISCUSSED IN B) it could be argued that the problem reduces itself to a matter of opinion whether A and B conflict. In such a case incuria is inapplicable because:-

(a) The House of Lords in decision B has already expressed an opinion on the matter [35] - and that opinion should be followed, and

(b) a difference of opinion [36] is insufficient to ground the doctrine. [37]

Viscount Dilhorne's comments would then only be applicable to those cases (before the 1966 Practice Statement) where the House had obviously overlooked (rather than misconstrued) an earlier decision of its own; and in those rare cases where 'Homer has nodded', it seems hard to resist the conclusion that the Court of Appeal would have to consider afresh the point of law in issue, applying the earlier decision if circumstances warranted it. A fortiori where the House of Lords had overlooked a statute applicable to the case before it. [38]

The question as to whether a decision of a superior court could be renounced on the grounds of incuria was also raised in *Miliangos v George Frank (Textiles) Ltd.* [39] The Plaintiff in that case contended that he was entitled to an award of damages in Swiss Francs, and for that proposition pointed to the Court of Appeal decision in *Schorsh Meier GmbH v Hennin.* [40] Mr Justice Bristow rejected this argument, ruling that *Schorsch Meier* had been decided per incuriam because it was inconsistent with *Re United Railways of the Havana and Regla Warehouses Ltd.* [41] a previous decision of the House of Lords. The Court of Appeal reversed the High Court decision, being of the opinion that *Schorsch Meier* had considered the judgments in *Havana* and had ruled that it did not govern the point before them. Consequently both the Court of Appeal and the High Court were bound to follow the decision in *Schorsh Meier* to the effect that damages could be expressed in a currency other than sterling. Appeal was then made to the House of Lords, where the main issue was whether their

35 Whether expressly or by implication - that there is no conflict.

36 i.e. between the Court of Appeal and the House of Lords as to whether A conflicts with B.

37 This would seem to follow from the remarks of Scarman L.J. in Farrell v Alexander (supra) at p. 145 (h & i).
Note also the comments of Lords Simon and Cross in Miliangos v George Frank (Textiles) Ltd. (supra) about the decision of Bristow J. (in the same case) to side-step a previous Court of Appeal decision.

38 The view of Lord Halsbury L.C. in the London Street Tramways Case (supra) to the effect that the House of Lords would not be bound by a previous decision made in ignorance of a statute, seems just as valid for a later Court of Appeal, or indeed, a High Court.

39 Supra.

40 [1975] 1 All E.R. 152.

41 [1960] 2 All E.R. 332.

Lordships should make use of the power vested in them by the 1966 Practice Statement [42] and thereby overrule their previous decision in *Havana*.

Not surprisingly, some of the judgments took a wider brief, adverting to the attempt made by Mr Justice Bristow to renounce the Court of Appeal decision in *Schorsch Meier*, Lord Simon was of the opinion (which Lord Cross shared) that *Schorsch Meier* had not been made per incuriam [43] and that the Court of Appeal was correct in following its previous decision.[44]

His Lordship went further and took the view that even if Homer had nodded in the Court of Appeal, he would not have countenanced the use of incuria by the HIGH COURT to side-step the resulting decision. On the wider aspect of the High Court's approach to *Schorsch Meier*, he said:-

> '. . . It involved such departure from the rule of binding precedent based on a gradation of courts as both offends legal and constitutional principle and is potential of grave practical disadvantage.' [45]

Lord Cross, also commenting on the wider aspect of precedent, but this time with regard to the Court of Appeal's behaviour in *Schorsch Meier*, said:-

> 'It is not for any inferior court - be it a county court or a division of the Court of Appeal presided over by Lord Denning - to review decisions of this House.' [46]

In the final analysis, therefore, we are confronted with the views of Lords Simon, Hailsham and Diplock that incuria should be confined in its use to previous decisions of the same court which seeks to apply it. Indeed, the grave danger of a partial or even total collapse of Stare Decisis if incuria were to have the wider operation which Lord Denning (amongst others) has sought for it, militates against any other solution to this difficult question. Nevertheless, the existence of that very real threat to the doctrine of precedent, and the great weight of judicial views which have anticipated it, must be weighed against the following points:-

(a) In neither of the two recent decisions [47] was the House of Lords satisfied that incuria had been made out,[48] and therefore statements to the effect that the doctrine may only be used by a court against its own decisions, rank only as dicta.[49] It does not follow, of course, that such dicta can be lightly disregarded, particularly since it stems from the

42 Supra.
43 Thereby endorsing the Court of Appeal view on this point.
44 Lord Cross, on the contrary, felt that the Court of Appeal should have rejected their earlier decision.
45 At p. 477 (e).
46 At p. 496 (c).
47 i.e. Cassells Ltd. v Broome (supra); and Miliangos (supra).
48 Significantly, nowhere in the Court of Appeal judgments in Miliangos is there a rejection of the use of incuria by a High Court against a decision of the Court of Appeal.
49 Minority dicta at that!

highest court in the land; but at any rate it is a salutary reminder to proceed with caution when seeking a RULE OF LAW on this point.
The decision of the Privy Council in *Baker v The Queen* [50] cannot be so easily accounted for, since Lord Diplock's judgment therein represented the majority point of view that incuria could not be used by the Appeal Court of Jamaica against a Privy Council decision. But even in that case the decision of the lower court was upheld on another ground.[51]

(b) However objectionable the use of incuria may be against the decision of a superior court, the fact remains that even when Stare Decisis is strictly applied, contradictory cases are likely to arise occasionally. [52] Thus the High Court may be faced with a decision of the Court of Appeal made in complete ignorance of a binding authority, and in such a case, a very real problem arises as to which decision should be followed. [53]

Far more problematical is the situation where a court finds itself faced with the choice of either following a decision of a superior court, or applying an earlier statute which it is clear has been overlooked by the higher court. To reject a statute where it is clearly applicable, in preference for a decision made per incuriam

> '. . . offends legal and constitutional principle and is potential of grave practical disadvantage.' [54]

no less than where the statute is chosen in preference to an otherwise binding decision.

THE CATEGORIES OF INCURIA

On numerous occasions courts have stated that the operation of the incuria doctrine must be 'of the rarest occurrence';[55] and in the great majority of cases where it has been raised, the court has considered the point, only to reject it as inappropriate to the facts before it.

The view that a decision made in ignorance of a statute or a previous binding decision may be labelled per incuriam is now too well established to challenge, but even as regards this incontrovertible proposition it must be noted that mere oversight may not be enough by itself to ground the doctrine; it must be such oversight as renders 'some part of the decision or some step in the reasoning on which it is based . . . DEMONSTRABLY

50 Supra.
51 Technically, of course, decisions of the Privy Council are not binding on other English Courts.
52 Viscount Dilhorne in Cassells Ltd. v Broome (supra) at p. 854 recognised that this problem could arise, and in that event felt that the Court of Appeal would be justified in rejecting a previous decision of the House. On this point, see the discussion in the text (supra).
53 This is not an intractable problem when contradictory decisions are considered in the House of Lords, since they can overrule any decision they wish. Nor is it a real difficulty where the Court of Appeal is faced with two contradictory decisions of its own (Young's Case (supra) will apply), or of the House of Lords, one of which was made after the Practice Direction of 1966.
54 Lord Simon, in Miliangos (supra) at p. 477 (E).
55 Per Lord Greene M.R. in Young's case (supra), at p. 300; approved in Morelle Ltd. v Wakeling (supra), at p. 717 (I).

WRONG.'[56] It would not, therefore, be sufficient to show that the court could have reached an alternative decision, or that its decision MAY have been different had it not been for the oversight. Mere conjecture as to what the final outcome would have been is insufficient. Also, it appears that courts sometimes consult authorities which do not receive mention in the judgments,[57] and so oversight is not necessarily established by showing that a relevant authority has not been cited to or by the court concerned. This, coupled with the fact that counsel is not privy to all the court's deliberations, makes it extremely difficult to impugn a decision unless the reasoning used makes it clear beyond a peradventure that the authority alleged to have been overlooked could not possibly have been considered.

The difficulty confronted by counsel in this type of situation was highlighted in the case of *Farrell v Alexander*,[58] where an abortive attempt was made to establish per incuriam. Counsel for the Plaintiffs pointed out that no reference had been made in the report of *Zimmerman v Grossman* [59] to s. 13 of the Rent Act 1968. Now whilst the majority of the court would not have regarded that omission as decisive, the law reporter's notes of *Zimmerman* were nevertheless used to establish that s. 13 had in fact been referred to by the earlier court.[60]

Apart from the specific example of incuria mentioned above, the courts whilst entertaining the possibility of a wider operation for the doctrine,[61] have for the most part studiously avoided spelling out further examples. On the assumption therefore that the categories of incuria, like those of negligence, are not closed, the question remains as to what further scope the doctrine may have.

Sometimes, dissatisfaction with an earlier authority has centred around the inadequacy of argument before the court, either because of some oversight or other imperfection of counsel,[62] or because one side was not represented,[63] thereby depriving the court of the necessary dichotomy of views. Lord Denning in *Miliangos*, said of these suggestions:-[64]

> '. . . a decision is not given per incuriam because the argument was not 'fully or carefully formulated', or was 'only weakly or inexpertly put forward'; nor that the

56 Morelle Ltd. v Wakeling (supra) at p. 718 (B) (Sir Raymond Evershed M.R.).
57 Per Lord Denning M.R. in Miliangos (supra) at p. 1084 (g).
58 Supra.
59 [1971] 1 All E.R. 363.
60 Per Lawton L.J. at p. 141 (d-e).
61 Thus, Sir Raymond Evershed, M.R. in Morelle Ltd. v Wakeling (supra), at p. 718 (B).
62 E.g. that counsel did not dispute a point which the court therefore took for granted - Josceleyne v Nissen [1970] 1 All E.R. 1220, referring to Crane v Hegeman Harris Co. Inc., which took for granted a ruling of Clawson J. in Shipley Urban District Council v Bradford Corporation [1936] Ch. 375. Russell L.J. (in Josceleyne at p. 1223 (b) who gave the only judgment, was not prepared to say that Crane's case had been decided per incuriam.
63 As in Schorsch Meier (supra). In Miliangos (supra) at p. 478 (D) Lord Simon felt that the absence of a 'contrary argument' would sometimes make it easier to establish a per incuriam exception.
64 At p. 1084 (e-g).

> reasoning was faulty . . . To these I would add that a case is not decided per incuriam because counsel have not cited all the relevant authorities or referred to this or that rule of court or statutory provision.'[65]

The reason why the court will not countenance any of the above suggestions is that it can and does conduct its own research, and may consult authorities which are not mentioned in the judgments.[66] Similarly, the absence of argument where a party is unrepresented is more than set-off by the duty imposed on the other side to put both sides of the case to the best of his ability, and by the fact that the court will always consider both sides of the argument in order to protect the interests of the party who lacks representation.[67]

Nor is a previous decision to be regarded as made per incuriam because a necessary party to the proceedings was not before the court. An abortive attempt to establish incuria on this ground was dismissed by Sir Raymond Evershed MR. in *Morelle Ltd. v Wakeling*[68] where he said:-

> 'A decision cannot, in our judgment, be treated as given per incuriam, simply because of a deficiency of parties'.[69]

It does seem clear then, that imperfections of representation will not ground the doctrine; but nor will various imperfections of the court itself. Thus, per incuriam is not established by showing faulty reasoning[70] or faultiness of expression, or simply where the decision was manifestly unjust or absurd.[71][72] In fact, the mistaken assumption upon which many of these unsuccessful challenges have proceeded is that the doctrine of incuria is established merely by showing that a previous decision has

65 On the latter point, see also Lord Simon in Miliangos (supra) at p. 477 (G).

66 Per Lord Denning M.R. (supra). Two riders were added to this proposition by Lord Simon (in Miliangos (supra) at p. 478 B & C). He said:-
'. . . where research throws up an authority or argument which is material . . . it is better that it should be mentioned in the judgment . . .' and
2 'where a court does its own researches itself' . . . it should proceed with special caution since it is thereby acting without the benefit of adversary argument'.

67 Per Lord Denning M.R. in Miliangos (supra) at p. 1084 (g).

68 Supra.

69 At p. 718 (G). It was argued that the Crown should have been represented in Morelle Ltd. v Waterworth [1954] 2 All E.R. 673.

70 Per Stephenson L.J. in Barrington v Lee (supra) at pp. 1244 & 1245 (h-a); also in Miliangos (supra) at p. 1086 (c-e).

71 In Barrington v Lee (supra), Stephenson L.J. was not prepared to ignore Burt v Claude Cousins & Co. Ltd. [1971] 2 All E.R. 611, simply because it perpetrated an injustice; see p. 1245 (a-e).
Edmund-Davies L.J. appeared to be of the same view - p. 1239 (h).

72 In Miliangos (supra), Lord Simon felt that the incuria doctrine could not be invoked 'merely because that authority appears to be open to practical or policy objections which have not apparently been envisaged or sufficiently weighed.'

been WRONGLY decided.[73] This is far from the position, for as Lord Greene said in *Young's* Case:-[74]

> 'Cases in which the court has expressed its regret at finding itself bound by previous decisions of its own . . . are within the recollection of us all . . . When in such cases the matter has been carried to the House of Lords it has never . . . been suggested that . . . this court could itself have done justice by declining to follow a previous decision of its own which it considered to be ERRONEOUS.' [75]

The above survey does suggest that the courts will keep incuria within the narrowest of confines, and that attempts to enlarge its scope will in most cases be unsuccessful, Yet despite this, the cases have tended to keep alive the possibility that in appropriate circumstances extensions will be countenanced; [76] and there can be no doubt that in theory at any rate, the 'categories' of incuria are not closed. Indeed, in *Farrell v Alexander*,[77] Lord Justice Scarman appeared to hint at a new category. [78] The real issue in that case was the meaning of the words 'any person' in s.85(1) of the Rent Act 1968. Lord Denning registered a strong protest at the construction put upon these words in *Zimmerman v Grossman*, [79] and was of the opinion that it should be ignored on the grounds of per incuriam. Lord Justice Scarman, on the other hand, dismissed that suggestion as 'smacking of absurdity' since 'mistake, not a difference of opinion is the criterion'.[80] But he did envisage a situation in which the interpretation of a statute by an earlier court could be rejected as incuria. To achieve this, however:-

> 'We must be able to demonstrate that the words of the statute are capable of only one meaning and that the meaning attributed to them by the previous decision is an IMPOSSIBILITY.' [81]

CONCLUSIONS

1. There has been a deliberate policy of confining per incuriam within a narrow field of operation. The following factors preserve its narrow ambit:-

73 Stephenson L.J. in Miliangos (supra) at p. 1087 (e) made it clear that incuria is not grounded simply on this basis. Also Geoffrey Lane L.J., ibid, at p. 1088 (b).
In Farrell v Alexander (supra), Lord Simon (at p. 741) referred to Lord Denning's judgment in the court below. He said:-
'. . . he must have concluded that Zimmerman v Grossman was neither distinguishable nor decided per incuriam, for he based his dissent on the ground that Zimmerman v Grossman was 'wrongly decided'.'

74 Supra.
75 At p. 723. Capitals supplied.
76 See footnote 61.
77 Supra.
78 At p. 145 (h).
79 Supra.
80 Supra, at p. 145 (h-j).
81 Ibid.

(a) For the sake of the integrity of Stare Decisis, it is necessary that decisions of higher courts should be loyally accepted by courts lower in the curial order.[82] In future, therefore, and with two possible exceptions,[83] a court will be unlikely to side-step the decision of a higher court by dubbing it per incuriam.

(b) Incuria has little or no application in those cases where a court is asked to ignore a decision which is not, in any event, binding upon it.[84] Thus it is unlikely to be relied upon by the House of Lords. Similarly, since a High Court is not bound by a previous decision[85] of its own, it could simply overrule any decision which it felt was inconvenient to follow.
It is with regard to cases in the Court of Appeal that incuria will have the greatest currency. This is because the court still regards itself as bound by its own previous decisions subject to the three exceptions enunciated in *Young's* case.[86]

(c) The only category of incuria widely accepted in the cases is where a decision has been made in ignorance of a relevant statutory provision or previous binding authority.[87]

(d) The question as to whether a previous decision has been made per incuriam is in no way determined by the DEGREE to which the earlier court was mistaken.[88] It is determined by the application of hard and fast rules.[89] Nevertheless, it appears that cases in which the doctrine has been applied 'must be dealt with in accordance with their special facts'.[90]

2. In theory, however, the 'categories' of incuria are not closed. Lord Justice Scarman has hinted at a new category in *Farrell v Alexander*.[91]

82 See Lord Hailsham's remarks in Broome v Cassell Co. Ltd. (supra) at p. 809 (g & h).
83 See the discussion in the text (supra).
84 According to the rules of Stare Decisis.
85 Of a single judge.
86 In some cases where a previous decision conflicts with another decision of the same court it may be side-stepped as falling within Lord Greene's first exception; but it may also fall within the incuria category.
87 Penny v Nicholas (supra).
In Miliangos (supra) ap p. 1084 (h) Lord Denning M.R. was of the opinion that in Tiverton Estates Ltd. v Wearwell Ltd. [1974] 1 All E.R. 209, the Court of Appeal had 'in effect overruled Law v Jones on the ground that a material line of authority was not before the court.'
Similarly, in R. v Northumberland Compensation Tribunal [1951] 1 K.B. 711, the Divisional Court of the King's Bench disregarded the decision of the Court of Appeal in Racecourse Betting Control Board v Secretary of State for Air [1944] Ch. 114, on the ground that a decision of the House of Lords had not been cited.
Note also, of course, two recent, but unsuccessful attempts to side-step authority in this way - Miliangos (supra) in the High Court; Broome v Cassell & Co. Ltd. (supra) in the Court of Appeal.
88 Morelle Ltd. v Wakeling (supra) at p. 717 (G & H).
89 By implication from the judgment of Sir Raymond Evershed M.R.
90 Per Lord Greene M.R. in Young' s case (supra) at p. 729. This would appear to suggest that these cases ware not to be regarded as pecedents, or at any rate they are not to have the weight ordinarily accorded to precedents. See Glanville Williams, Learning the Law, 9th edition (Stevens) pp. 77/78.
91 Supra.

3. In many of the cases where the issue of incuria has been raised, it has been rejected as inapplicable to the facts of the case under consideration. In fact it will often be the last desperate resort of counsel who can find no other peg upon which to hang his client's claim, just as the argument that a term should be implied in a contract is sometimes the last desperate resort of counsel in a contract case.[92] The expression 'Flushing the Moorcock' [93] then becomes 'Flushing the nods of Homer'!

92 See the comments of MacKinnon L.J. in Shirlaw v Southern Foundries (1926) Ltd. and Federated Foundries Ltd. [1939] 2 K.B. 206 at p. 227.
93 Per MacKinnon L.J. in Shirlaw (ibid).

Railways in the Law Reports

MICHAEL J GOODMAN*

As in so many areas, the volumes of law reports of the nineteenth century are a rich source of the social history of the emergent railways. They provide a fertile field for the discovery of factual oddities and legal sophistries, of which it is proposed to give a number of examples in this article.

Take, for example, the case of *Powell Duffryn Steam Coal Company v Taff Vale Railway Company*.[1] The Learned Lord Justices were considering sect 92 of the Railways Clauses Consolidation Act, 1845, which enacted that 'upon payment of the tolls at the time lawfully demandable all companies and persons are entitled to use the railway with properly constructed engines and carriages'. In other words, to quote Lord Justice Mellish 'the legislature seems to have considered that there was no more difficulty about running over a railway than over a turnpike road'.[2] Of course, even in 1874, the idea of all and sundry cheerfully exercising their statutory right to drive their own trains over a public railway had become wildly impracticable. This did not, however, deter the Coal Company.

The setting was one of the Welsh mining valleys, where the plaintiffs' colliery siding led to the defendents' railway. The plaintiffs had, by 1871, wearied of paying the defendents for their wagons to be hauled a few miles only to a point where the defendents' railway was engulfed by the Great Western.

And so, shortly before Christmas, 1871, the Coal Company gave notice to the Taff Vale Railway that they desired to run their own trains in future. They offered to allow inspection of the proposed engine which, optimistically, they had names 'Progress'. The Taff Vale Company promised to inspect 'Progress' after Christmas. But, the festive season over, a sinister note was heard in a letter from the Coal Company saying that they now proposed to use engines belonging to the Rhymmey Railway Company. This reference to its rival caused the Taff Vale Company

1 (1874) LR 9 Ch. App. 331.
2 Ibid at p. 334.

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instantly to retire into dignified silence. Undaunted, the Coal Company obligingly sent a timetable of the ten trains per day it proposed to run, commencing on the 1st February. At the eleventh hour on the 31st January the Taff Vale broke its silence by forbidding the running of these trains. On the 1st February the first of the Coal Company's trains ground its menacing way along the siding, towards the Taff Vale line. But the 'engineer', as the report calls the engine-driver, found that locked gates barred the way to the main line. The Taff Vale Traffic Manager was there in person but, strangely enough, he did not forbid the train to go forward but contented himself by saying to the engineer, 'If you insist you must take the responsibility; but our men shall not move the signals for you.' The engineer replied simply, 'If that is the case we cannot proceed', and the train was run back.

However, if the engineer's discretion was greater than his valour, his employers were determined to fight. A bill was filed for an injunction to restrain the defendants from (*inter alia*) interfering with the proposed use of the railway by the plaintiffs. But all the judges were unanimous in deciding that the court was powerless to enforce the plaintiffs' undoubted statutory right. 'How,' asked Lord Justice Mellish, 'can the court see to the defendants working the points and signals day after day for a series of years?' Clearly the decision was impeccable in the law of injunctions but, with great respect to the judges, they cannot have been true railway enthusiasts, thus to have declined the opportunity to supervise the running of the railways.

In 1885 there came before the House of Lords a Scottish appeal in which Sir Robert Burnett, Bart, challenged the unfavourable decision of the Court of Session in his action against the Great North of Scotland Railway Company.[3]

Sir Robert Burnett was the owner of Crathes Castle and its surrounding lands lying in the valley of the Dee to the west of Aberdeen. Along this valley ran the line of the respondent railway as far as Ballanter, whence it was only six miles to the royal residence at Balmoral. Some thirty years before, when the Deeside Railway (the respondent's predecessor) was constructing the line, Sir Alexander Burnett, the then owner of Crathes Castle, had entered into an agreement with the Railway that they should construct a siding on the Burnett estate and near to the castle. At this siding must stop any passenger train, 'although not appointed by the company's time bills so to do, on a preconcerted signal to be arranged by the company with the proprietor of the said estate.' One wonders what this 'pre-concerted signal' might have been. Romantic fantasy conjures up a vision of a Highland piper 'skirling' the express to a standstill, or the baronial pennant being hoisted from the castle battlements! It might well have been such a signal for, after some years, convenience demanded a proper station with all its conveniences. Consequently a grant of

3 (1885) LR 10 App.Cas.147.

land was made in 1863 by the next in line of the Burnetts, one Sir James, to the respondent company subject to the condition that the company should erect a station containing 'proper accommodation for first-class and other passengers, *at which all passenger trains shall regularly stop,* to be called the 'Crathes' station.' The passing reference to 'other passengers' is illumined by the information later in the report that 'first class passengers are allowed to travel by the 3.5 pm up train from Ballanter and third class tickets are issued to the servants of gentlemen who are travelling first class.' [4]

The grant of land was subject to the further condition that 'the said railway company shall be bound to have a signal post erected at the said station, on which a signal visible from Crathes Castle shall be displayed whenever any passenger or parcel for Crathes shall arrive at the station'. And so visibility from the castle continued to be a vital factor in the operation of the railway.

Some ten years or so later, however, Sir Robert Burnett, the present appellant complained of the company's failure, not only to signal clearly to the castle, but also to stop all trains at Crathes station. The trains which failed to stop were of various kinds. There were excursion trains whose purpose 'was chiefly to allow the members of the labouring class to spend their half holiday in the country'[5]. Then there were Queen's messenger trains and Post Office trains which ran only while the Queen was in residence at Balmoral, though they carried ordinary passengers as well.

The company proving unrepentant when reproached by Sir Robert by letter, he began proceedings for a declaration that all passenger trains should stop at Crathes station, excepting only trains hired by an individual for his exclusive use. But he received little sympathy from the Scottish Courts. It is clear from the report that the Scottish judges considered that Crathes was adequately served without stopping these special trains. No-one would expect Sir Robert to wish to board one of those trains replete with the labouring classes and, as for the other trains, even the Baronet must defer to the requirements of the Queen's messenger and the Postmaster-General. Moreover, the respondent company had plans to push the line on to join the Highland Railway and the consequent through trains would be seriously impeded by having to stop at Crathes. In these circumstances, the claim to have all trains stopped was deemed unreasonable.

The Scottish Courts, then, would not assist Sir Robert but the House of Lords put the unfortunate railway company firmly in its place. It may have been imprudent in entering into an absolute obligation to stop all passenger trains, but, asked the Lord Chancellor, the Earl of Selborne, 'why should that contract be regarded with more disfavour than any

4 Ibid at p. 153.
5 Ibid per the Lord Advocate at p. 157.

other between parties capable of contracting together?'[6] Lord Bramwell in characteristically trenchant phrase, says 'I protest that I have great difficulty in giving any other judgment than this, that a 'passenger train' is a passenger train. The words are not words of art - they want no explanation either by railway people or by experts of any sort or kind.'[7] The Scottish Courts had thought that Sir Robert should be content with most of the trains stopping, but Lord Bramwell, stigmatised this as 'the pound of flesh argument; the judgment of the Scottish Court is not that the appellant shall have none, but about three-quarters of his pound. His right is to all; whether as a reasonable man he should exact all is another matter.'[8] Consequently, Sir Robert obtained from the House of Lords his declaration except for the excursion trains which he conceded to the company.

Lord Justice Mellish's remark in the *Powell Duffryn*[9] case that 'the legislature seems to have considered that there was no more difficulty about running over a railway than over a turnpike road' is also true of the slowness of Parliament to respond to the growing problem of railway accidents.

Some twenty years after its 'turnpike' Act of 1845, Parliament, alarmed at the frequency and magnitude of railway accidents, passed the Regulation of Railways Act, 1868, to compel the companies to adopt many safety precautions. Among these was that enjoined by sect 22, namely that 'every company shall provide, and maintain in good working order, in every train worked by it which carries passengers, *and travels more than twenty miles without stopping,* such efficient means of communication between the passenger and the servants of the company in charge of the train as the Board of Trade may approve.'

It is clear, however, from *Blamires v Lancashire and Yorkshire Railway Company,*[10] that in the 1870's humble excursionists to the seaside had no communication of any kind with the servants of the L & Y Railway. The plaintiff had set forth at 5 am from Cleckheaton in the defendants' train. bound for Blackpool. Shortly after Blackburn station a severe shock was felt in the carriage in which he was travelling, 'described by one of the witnesses to have been as if the end of the carriage had been lifted up and suddenly let fall.' A further shock was felt, followed by continuous jerks, and then the plaintiff's carriage was suddenly thrown down an embankment, injuring him severely.
At the trial of the plaintiff's action for damages for personal injuries negligently caused, it was proved that the accident was primarily caused by the breaking of one of the carriage wheels across a rivet hole. The jury found that no negligence for this could be attributed to the Lanca-

6 Ibid at p. 159.
7 Ibid at p. 166.
8 Ibid at p. 167.
9 Supra.
10 (1873) L.R. 8 Exch. 283.

shire and Yorkshire Railway. The plaintiff was therefore obliged to rely on the absence of any communication cord and prayed in aid sect. 22 of the 1868 Act. It appeared that the train was scheduled to pass through several stations and thus to exceed 20 miles without stopping, but the railway company's somewhat disingenuous answer to this was that general instructions had been issued to the servants of the company not to travel more than 20 miles with excursion trains without stopping, without regard to the time-tables. The cynical traveller is not surprised to learn that the train had not in fact at the time of the accident travelled any distance of 20 miles without stopping. The jury rejected the company's plea and found that this particular train was within sect. 22. But the problem was whether the plaintiff's injuries were within 'the mischief which the statute was intended to prevent.' The plaintiff's witnesses were certain that if there had been a communication cord they would have pulled it and in time to prevent the accident happening. The jury found, despite the railway company's denials, that the company's failure to provide means of communication had 'materially conduced to the accident' and awarded the plaintiff £350 damages.

The railway company appealed to the Court of Exchequer Chamber on the ground that the Lord Chief Baron had misdirected the jury by telling them that this particular train could come within sect. 22 and by not withdrawing from the issue of negligence. Baron Blackburn was, however, in no doubt that the application of sect. 22 had been properly left to the jury. He could not believe that its application could depend on anything so capricious as what the engine driver might happen to do after the train had started. Nor would he interfere with the jury's finding that non-compliance with sect. 22 had conduced to the accident, though the learned Baron added, 'I am far from saying that if I had been on the jury I should have found that the existence of means of communication would have produced this beneficial effect.' [11]

Both Brett J and Grove J whose judgments follow, were careful to say that their concurrence was because of 'evidence that not only was this precaution enacted, but that it was in fact a habit with railway companies to carry the enactment into effect.'

The Law Reports of the nineteenth century are equally a faithful mirror of the public attitude towards the sudden brash intrusion of the railway on to the ordered English scene. In the early Reports are heard judicial echoes of the uncompromising hostility of the vast majority of the people. For example, in 1850 a Master of the Rolls spoke scathingly of how the railway companies were able 'to interfere by imperial powers with the private property of any individual whose property happens to be in the line of the projected railway, for the purpose which is supposed to be to the public good.' [12] Four years before, the same Master of the

11 Ibid at p. 288.
12 per Lord Langdale in Carlisle v South Eastern Ry (1850) 38 Digest 249: 3

Rolls had emphasised how mistaken it was 'to look upon a railway company in the light of a common partnership and as subject to no greater viligence ' than common partnership may be.' [13]

In *Eton College (Provost) v Great Western Ry* [14] The College had petitioned the House of Lords against a Bill for the formation of the railway and, by way of appeasement, the promoters inserted a clause into the Bill that 'no depot, station yard, wharf, waiting, watering, loading or unloading place should be made within three miles of Eton.' However, a public-house near to the railway line was seen to be enjoying a vastly increased trade. Further inquiry showed that the GWR had hired a couple of rooms where nothing more intoxicating was sold than tickets for travel on the new railway and 'time please' had a new time-table significance. One hopes that the licensee had discretion enough not to put out the sign 'Railway Inn'! The Provost of Eton sued the railway, alleging breach of the three-mile restriction previously mentioned but it was held that 'the house in question was not a station or waiting place within the Section'. One is left only to wonder whether the public-house could be said to be a 'watering place' within the meaning of the Act.

A volte-face was, however, soon to be observed on the part of some landowners. For example, some thirty-five years after the *Eton College* case, an exasperated landowner was suing a railway company because it would not erect a station on his land. A Mr Wilson possessed of a freehold estate of some 326 acres in the County of Northampton, sued the Northampton and Banbury Junction Ry. Not content to accept mere damages for breach of contract Mr Wilson appealed against the refusal of the court of first instance to grant specific performance of a contract by the railway to erect a station on his land.[15]

It appears that in 1863 Mr Wilson had opposed a Bill, then before the Lords, for the construction of a railway passing through his newly acquired estate but was bought off by the railway company with an agreement to erect at its own cost 'a station to be made on Nos 24, 25 and 26, parish of W _____, or on some part or parts thereof.'

As often happened with the hasty optimism of railway promotion it was found when eventually the line was constructed in 1871 that the original plan was inconvenient. The railway company had changed its mind and now desired to build the station in question some two miles away from the plaintiff's land. Mr Wilson's offer to relinquish his right to the station on Nos 24, 25 and 26 for an annual rentcharge of £100 was not accepted by the railway, which, without further ado, started to erect the station two miles away. Mr Wilson lost no time in applying to the court for a decree of specific performance. In court, counsel for the railway had the embarrassing task of making what Sir James Bacon VC stigmat-

13 See Colman v Eastern Counties Ry (1846) 38 Digest 249: 1.
14 (1839) 38 Digest 296 : 260.
15 Reported (1874) LR 9 Ch App 279.

ised as an 'unblushing avowal of a dishonest intention', namely that the company declined to erect the station, relying on the unwillingness of the court to decree specific performance of building contracts. The railway pleaded that there were engineering difficulties in the way of constructing a station at the spot the plaintiff wished, but the plaintiff was sure that any such difficulties could readily be overcome. The railway company would not even accept Mr Wilson's offer to take a third-class station, whatever that might have meant in terms of draughtiness and gloom. Sir James Bacon thundered, 'I confess that I should have been better pleased if I could have seen my way to decree the erection of such a station, as I have the power of enforcing the erection of, by the defendants at the proper time and in the proper place', but he felt constrained by the vagueness of the words 'on Nos 24, 25 and 26 . . . or on some part or parts thereof' to refuse a decree and instead directed an inquiry as to damages.

The Lord Chancellor, Lord Selborne, who heard the appeal, cynically pointed out another practical hurdle in the plaintiff's path. Mr Wilson might secure a beautiful station with every amenity that Victorian architecture might offer, but who was to say that any trains would stop there? 'If it had been the intention of the parties to exclude any contract as to the use of the station when erected, they could hardly have adopted better words for the purpose.' As the court could not extend the agreement by decreeing that trains should stop, Lord Selborne expressed surprise that the plaintiff should not prefer damages for then the court could, in assessing the amount, presume that the railway would in fact have stopped trains at the station. Dismissing the appeal but refusing costs to the errant railway, the Lord Chancellor compared the missing station to a diamond which, in an earlier case, had disappeared from its setting, He recalled that the judge in that case had directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there.

But the law reports also reveal that very different sentiments animated those litigants who introduced level-crossings into our jurisprudence. The early railway companies had statutory powers to cross the turnpike roads on the level with their newly constructed railways, so long as they protected the crossings with those gates that have become such a familiar feature of our landscape. Parliament clearly intended that the man in the street should tolerate this interference with his right to pass and repass in that street in return for the dubious benefits of third-class travel at a statutory minimum of twelve miles per hour. And yet in *Caledonian Ry Co v Ogilvy*,16 Mr Ogilvy, a determined Scot protested against this invasion of public rights so violently that his struggle with the Caledonian Railways was to take him to the House of Lords.

Having in 1835 spent the not inconsiderable sum of £12,150 on an estate, house and grounds at Clove, Dumfriesshire, he was doubtless displeased

16 (1856) 2 Macq 229.

to receive some ten years later a notice from the Caledonian Railway that they proposed to sever his estate with a new railway line crossing the highway on a level at a point indecently near to the house itself. They invited him to 'treat' with them for compensation. In addition to the usual legitimate claims Mr Ogilvy also required an additional £500 for 'impairing the privacy and retirement of the house' and because ' the impossibility of communicating with the high road without crossing the railway will render it dangerous and alarming to ladies and others passing to and from the house from the risk of the startling of horses.' etc.

Scotland was sympathetic to Mr Ogilvy, for he succeeded in his claim before a sheriff's jury and before the Court of Session. But the Caledonian Railway appealed to the House of Lords, where the logic of of feminine alarm came under the dispassionate scrutiny of those two conveyancers Lord Saint Leonards and Lord Cranworth. Both were unsympathetic. Lord Saint Leonards was moved to take judicial notice of a level-crossing near to his own house. Lord Cranworth was scarcely less scornful. The argument that there was damage to the estate was 'a mere play upon words.' He saw no analogy with a public-house proprietor's previously having recovered damages from a railway for boring a tunnel close to stores of vintage wine.

From Scotland we move across the sea to the Ireland of 1895 for the next of the level crossing cases. To those for whom this conjures up a vision of dreamy countryside where everyone had nothing to do and all day to do it in, the case of *Boyd v Great Northern Ry.*[17] comes as a surprise. For time was money to Dr Boyd, surgeon, poor-law officer and private practitioner. When he found the defendant company's level-crossing gates firmly across the road he wished to take to see a patient, he was not content to contemplate the sight with equanimity. For twenty whole minutes the gates remained shut and the infuriated doctor was not even rewarded by the sight of a train puffing its desultory way along the line, for never a train appeared. He thereupon, with a promptitude in inverse proportion to the railway's dilatoriness, brought an action against them for damages for his loss of professional time. Their defence was simple - the gates had not been shut at the time in question. The judge at first instance, rather perhaps than hold that the leprechauns had exercised some supernatural influence over the gates, found as a fact that the gates had been shut, and assessed Dr Boyd's lost twenty minutes at ten shillings. However, the judge was troubled by the novelty of the action and stated a case for the opinion of a higher court. The railway company did not even trouble to be represented in the higher court and that court had no difficulty in finding that Dr Boyd had a valid cause of action. He was, therefore, awarded his ten shillings, together with £10 for the costs of argument.

Although Dr Boyd wanted the trains to pass more quickly, if indeed they

17 1895 2 I.R.555.

came at all, the Attorney-General four years later observed that the express trains of the London and North-Western Railway Company (the self-styled 'Premier Line') passed over a level crossing adjoining Atherstone station at a fast speed, whereas section 48 of the Railways Clauses Consolidation Act, 1845, stated 'Where the railway crosses any turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour; . . .' The Attorney-General therefore, on the relation of the Warwickshire County Council, applied to Bruce J for an injunction to restrain breach of section 48 by the LNWR.[18] The railway protested that, as it was, the gates were shut for an average of twenty-five minutes in every hour between six in the morning and six at night. They painted a fearsome picture of what would happen if the injunction were granted and every train reduced to a crawling speed. The judge was beguiled with fascinating evidence about the block system of signalling over the level crossing but he was unmoved, granting the injunction even though no public inquiry had been proved to have resulted from breach of the statute. An appeal to the Court of Appeal to be railwaymen rather than lawyers was unavailing and the injunction stood.[19]

Thus was upheld the full rigour of this ancient statutory relic, so reminiscent of the man with the red flag walking in front of the early motor-car. Only in 1933, by the Road and Rail Traffic Act of that year did Parliament repeal the four mph requirement.

It is hoped that these few random samples will stimulate those interested in the social and legal history of railways to pursue, if one may use the metaphor, further lines of research into the Law Reports.

18 Reported at 1893 1 QB 73.
19 Reported at 1900 1 QB 78.

The Defence of Duress in Criminal Law

P H J HUXLEY*

INTRODUCTION

The defence of Duress exhibits many of the marks of Common Law development - piecemeal evolution, deep suspicion by judges who assert unswerving hostility towards any innovation and a total absence of any theoretical basis. Notwithstanding this struggle, Duress has survived to become a defence of general application,[1] the scope of which though regretfully not the theoretical basis is almost entirely settled.

Current problems relate mainly to the offence of murder and to rather more fringe issues such as whether it is possible to formalise the consequences of failure by an accused to report the coercion to the relevant authorities.

This article concentrates primarily on the operation of Duress in murder cases but a brief résume of other cases will be given first.

Duress and offences other than murder

The defence is available where the accused has broken the criminal law because of a threat of violence to him or others by some other person and its basis is that

> 'threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance should be accepted as a justification for acts which would otherwise be criminal.'[2]

Traditionally treason and murder were always said to be exempted from the scope of operation of the defence but close inspection of the authorities on treason[3] shows that view to be unsound, provided that the case did not involve killing. Thus it was accepted in *Oldcastle's Case*[4], *McGrowther's Case*[5] and in *Stratton*[6] where Lord Mansfield explained that the defence was admissible if the 'threat of force (was) such that human nature could not be expected to resist.' The principle was also admitted in *Purdy*[7] where the accused had, under fear of death, worked

1 Law Commission Working Paper No 55, Para 4.
2 per Murnaghan J.in A-G v Whelan [1934], I.R. 518; 526.
3 Murder is dealt with below.
4 (1419) Hale I P.C. 50.
5 (1746) 168 E.R. 8.
6 (1779) 21 St. Tr. 1045.
7 (1946) 10 Jr. CL. 182.

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for the Germans as a translator and had prepared propaganda documents; and in *Steane*[8] where the accused had broadcast for the Germans in order to save himself and his family from a concentration camp.

In relation to all other offences, it may be observed that there has been a steady tendency to widen the scope of the operation of Duress and since it was upheld in *Crutchley*[9] as applicable to the offence of causing malicious damage it has been accepted in principle in relation to receiving stolen goods,[10] larceny,[11] arson,[12] unlawful possession of ammunition,[13] assisting a prisoner to escape[14] and perjury.[15]

Duress and murder

The authority normally cited in this context was *Tyler & Price*[16] in which Lord Denman said that

> 'no man from fear of consequences to himself has a right to make himself a party to committing mischief on mankind.'

The case has been criticised[17] and in *Lynch*, Lord Morris said[18] that there was no real evidence of Duress in *Tyler & Price*; it would have been relatively easy for the defendants to have detached themselves from the mob. Nevertheless, Lord Denman's view was by no means untypical of 19th century judges and Stephen expressed his view of the defence of Duress generally in these words:[19]

> 'Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder 'If you do I will hang you.' Is the law to withdraw its threat if someone else says 'If you do not do it I will shoot you.'?

During the later part of this century, however, Courts in other jurisdictions have adopted a less rigorous approach. In three South African

8 [1947], 1 All E.R. 813. Strictly Steane's offence was not Treason but was contained in the Defence Regulations and was akin to Treason. The decision seems sound in principle although Williams has vigorously criticised the judgment: C.L.G.P. 40-41. See also: Smith & Hogan (3rd ed); 44.
9 (1831) 172 E.R. 909.
10 A-G v Whelan [1934] I.R. 518.
11 Gill [1963] 2 All E.R. 688. This case also decides that the accused bears an evidential burden; the burden of disproof of Duress is on the Crown.
12 Shiartos (1961) (unreported) but fully reported in Gill.
13 Subramaniam v Public Prosecutor [1956] 1 W.L.R. 965 (P.C.)
14 Hurley & Murray [1967] V.R. 526.
15 Hudson & Taylor [1971] 2 All E.R. 244.
16 (1838) 173 E.R. 643.
17 Williams C.L.G.P. 759
18 [1975] 1 All E.R. 913, 920.
19 History of the Criminal Law; 107, 108.

cases, all of which are concerned with the liability of the accused as a principal in the second degree of murder, such a movement may be discerned. In *Hercules*[20] it was said that evidence of Duress might well reduce murder to manslaughter. In *Bradbury*[21] the Court rejected the defence of Duress in relation to murder because the case had heavy overtones of gangsterism and it was considered that it did not lie in the mouth of an ex-member of a very violent gang to argue that he acted only out of the fear of what that gang might do to him. However in *Goliath*[22] it was held that Duress was capable of being a complete defence. In that case, D^1 accosted P and asked for a cigarette and money; P said that he had none, whereupon D^2 stabbed P in the chest. D^2 ordered D^1 to bind P and, when D^1 demurred, D^2 threatened to kill D^1. D^1 tied up P and D^2 then stabbed P in the chest 12 times. P died. D^2 then ordered D^1 to assist him to carry the body out of sight and remove P's clothes. When D^1 demurred he was again threatened with death. D^2 was convicted of murder as a principal but D^1 was acquitted of aiding and abetting murder. The Crown's appeal against that verdict was dismissed.

The defence of Duress was raised in the Australian case of *Brown & Morley*[23]. D^2 killed P and was charged with murder as a principal in the first degree. D^1 was charged with aiding and abetting D^2 in that he had been outside the room in which the killing had occurred, and had made some relatively slight noise in order to disguise any sound which D^2 might make as he approached the room. Both accused were convicted as charged. The Supreme Court of South Australia dismissed D^1's appeal, holding that he was not to be excused because of the threats of D^2 against himself, his wife and his parents. The case is notable for the powerful dissent of Bray C.J. who considered that although he was generally prepared to accept Blackstone's proposition that 'he ought rather to die himself than escape by the murder of an innocent', the learned Chief Justice was prepared to depart from that view in two circumstances. First, it was by no means clear that it applied to an accused whose degree of participation was relatively minor. Second, it might not apply where it was by no means certain that, even if the accused complied with the threat, the death of another person was a necessary consequence. Thus Bray C.J. considered that 'the direction of the learned trial judge that threats can never be an excuse for the taking of an active part in murder, such as coughing to disguise the approach of a murderer, was too wide.[24]

Until very recently, there were grounds for believing that a reasoned and consistent approach to the defence of Duress was at work among

20 [1954] 3 S.A. 826. (AD)
21 [1967] 3 S.A. 387. (AD)
22 [1972] 3 S.A. 1. (AD)
23 [1968] S.A.S.R. 467.
24 [1968] S.A.S.R. 467; 497.

the English judiciary in both the Court of Appeal and House of Lords. In *Kray*[25] B was charged with aiding K to murder M by carrying a gun to K with the knowledge that K would use it to kill M. B admitted, at his trial, that he had done the act, but pleaded that he was in fear of K. He was acquitted of this offence. On appeal by K and others against their convictions, it was, apparently, accepted by Counsel for all the appellants involved that B ought, in law, to be able to plead the defence of Duress. Lord Justice Widgery considered[26] that B 'had a viable defence . . . he was so terrified that he ceased to be an independent actor; evidence of violent conduct by K . . . was relevant and admissible.'

In *Lynch v DPP*[27] the appellant had been convicted in Belfast of murder as a principal in the second degree and had raised the defence of Duress. The trial judge ruled that the defence was not available on the particular charge and his view of the law was unanimously upheld by the Northern Ireland Court of Criminal Appeal. That Court certified two points of law of general importance, the first of which was directly concerned with the trial judge's view of the law. By a majority, Lord Morris of Borth-y-Gest, Lord Wilberforce and Lord Edmund-Davies, the House of Lords held that the defence was available, and ordered a re-trial.[28] Although there are differences of emphasis between the judges in the majority, their general view may, perhaps, be reflected in the words of Lord Morris of Borth-y-Gest, who said:[29]

> 'The law must, I think, take a common-sense view. If someone is forced at gun point either to be inactive or to do something positive, must the law not remember that the instinct . . . of self-preservation is powerful and natural? The law would be censorious and inhumane which did not recognise the appalling plight of the person who suddenly finds his life in jeopardy unless he submits and obeys.'

Lord Edmund-Davies considered[30] the case from the aspects of law, logic, morals and public policy but found that it was impossible to say there were any grounds upon which it was possible to justify withholding the plea in the instant case.

Of the judges who dissented, Lord Simon considered the plea of Duress

25 (1969), 53 Cr. App. Rep. 569. The case was referred to in detail by Lord Morris of Borth-y-Gest in Lynch [1975], 1 All E.R. 913; 921. See also Smith; A Note on Duress; [1974], Crim. L. Rev. 349.
26 (1969) 53 Cr. App. Rep. 569; 578.
27 [1975] 1 All E.R. 913. The facts are set out in the judgment of Lord Morris of Borth-y-Gest at page 916.
28 Lynch was re-tried at the Belfast City Commission on 27-29 May 1975. He was found guilty and sentenced to life imprisonment. One of the other men involved, Bates, was re-tried and acquitted on the basis of Duress.
29 [1975] 1 All E.R. 913; 918.
30 [1975] 1 All E.R. 913; 956.

not only in relation to criminal law, and concluded[31] that the effect of it was to 'deflect' not to 'destroy'. His Lordship concurred[32] with Stephen's view of the nature of criminal law, to which reference has already been made. In what may be considered a fairly remarkable statement, Lord Simon overcame[33] the problem of the fixed penalty for murder[34] by encompassing Duress under the auspices of Diminished Responsibility, in the way in which he stated the South African Court had done in *Hercules*. Duress, to Lord Simon, could never excuse, but could only mitigate. Lord Kilbrandon took the same view[35] in relation to Diminished Responsibility, stating that legislation would be necessary to achieve it. His Lordship expressed concern about the fact that in his view, the appeal raised policy questions which the House was possibly not fitted to answer due to its inadequate appreciation of public needs and public opinion.

Although *Lynch* was concerned with the availability of Duress on a charge of murder as a second degree principal, each of their Lordships addressed himself[36] to the question of whether it could be pleaded by a principal in the first degree. Their views will be considered in detail below, because they were of great importance in the subsequent case of *Abbott v Reginam*[37]. In that case, the accused had been charged with, and convicted of a murder as a principal in the first degree in Trinidad, the trial judge having refused to leave the defence of Duress to the jury. The Privy Council advised Her Majesty that the trial judge was correct and that Abbott's appeal should, accordingly, be dismissed.

The author regards that advice as at best unfortunate and, at worst, misguided. As Lord Wilberforce observed[38] in an outspoken, joint[39], dissenting judgment, the most striking feature of the majority judgment in *Abbott* is the 'flat declaration' that Duress is not available to a first degree principal in murder, without any real reason being advanced, to support that view. The decision may be criticised on two major grounds. The first ground is that Lord Salmon[40] was highly selective in the use he made of the views expressed in *Lynch*. In particular, he appears to have overlooked the extremely tentative nature of the opinions of Lord Morris of Borth-y-Gest, upon whose judgment - at least for purpose of diminishing the value of his obiter remarks[41] Lord Salmon apparently

31 [1975] 1 All E.R. 913; 938.
32 [1975] 1 All E.R. 913; 933.
33 [1975] 1 All E.R. 913; 940.
34 The penalty is life imprisonment: Murder (Abolition of Death Penalty) Act, 1965. sl.
35 [1975] 1 All E.R. 913; 946.
36 The remarks were clearly obiter, though in Abbott [1976], 3 All E.R. 140; 143, Lord Salmon appeared to feel that there might even be doubt about that issue.
37 [1976] 3 All E.R. 140.
38 [1976] 3 All E.R. 140; 151.
39 With Lord Edmund-Davies.
40 Speaking for himself, Lord Hailsham and Lord Kilbrandon.
41 [1975] 1 All E.R. 913, 918e to 919f.

placed considerable reliance. Thus Lord Morris, in speaking of first degree principals, said in *Lynch*:

> 'It *may be* that the law must deny the defence to an actual killer.'[42]
> 'There *may be* manifest factual differences' between first and second degree principals.[42]

The House of Lords decision in *Lynch* is welcome for (at least) two reasons. First it represents a rejection of a 'censorious and inhumane' approach to the problems of the person suffering the coercion. Second, and in some ways this is a balance to counter the first, it allows a jury to decide whether, on the facts of any particular case, the plea has been out to its satisfaction.[43] As Lord Wilberforce observed in *Lynch*,[44] the more serious the offence, the more difficult to establish the defence; in effect, the burden may become almost impossible. The decision in *Abbott*, conversely, represents a retreat from both of these positions. With particular reference to the latter, Lord Salmon observed[44] the traditional courtesies of 'confidence in the ability of the jury' but previous experience of such judicial niceties leads to a tendency to treat them with suspicion.[45]

It may seriously be questioned what literature Lord Salmon has been reading recently if he considers that the proposition that Duress is a defence for a principal in the first degree in murder is 'novel'.[46] The paucity of his argument is exemplified by the traditional judicial last resort - the appeal to rhetoric. If no cogent reason can be advanced for rejecting the defence, then characterise it as a charter for 'terrorists, gang leaders and kidnappers'. The technique is standard; the hypothetical examples dredged up to support it are most charitably described as banal.

The second ground is that the majority judgment contains inaccuracies. Lord Salmon asserted[47] that in *Lynch*, Lord Wilberforce expressed the view that Duress was not available to a first degree principle. A careful study of his judgment makes it quite clear that this is inaccurate. Lord Wilberforce did say [48] that while he considered the balance of judicial pronouncements had supported the inadmissibility of the defence to first degree principals, it was a view which would probably have to yield in an actual case. He added that it might well be impossible for an accused to prove (sic) that he was entitled to an acquittal where he had done the

42 [1975] 1 All E.R. 913; 918. Emphasis added.
43 The accused bears an evidential burden; not a burden of proof.
44 [1975] 1 All E.R. 913; 927.
44 [1975] 1 All E.R. 913; 927.
45 Examples are to be found in relation to Necessity, Provocation, Diminished Responsibility and Automatism; the author does not consider this list exhaustive.
46 [1976] 3 All E.R. 140; 147.
47 [1976] 3 All E.R. 140; 144.
48 [1975] 1 All E.R. 913; 927.

actual killing. In so far as he was misinterpreted, Lord Wilberforce put the matter beyond doubt in *Abbott*.[49]

The refusal of Lord Wilberforce to make a distinction in principle between the admissibility of Duress to principals in the first and second degrees was based upon the absence, as he saw it, of any valid ground for making a distinction. Lord Morris of Borth-y-Gest alone did not refer specifically to this issue in *Lynch*, but the remainder of their Lordships did consider it and came to the same conclusion; the distinction could not be supported morally or juridically. However Lord Salmon interpreted the dissenting judgments of Lords Simon and Kilbrandon in *Lynch* as meaning:

(i) that the defence was not available to principals in the first degree;
(ii) that no distinction could logically and morally be drawn between first and second degree principals;
(iii) that accordingly, Duress was not available to second degree principals, and that in so far as *Kray*, and *Brown & Morley* suggested the contrary, they should not be followed;
(iv) that even if their Lordships view on (iii) were rejected, still the defence should not be available to a principal in the first degree.

The necessary consequence of asserting point (iv), as Lord Salmon considered their Lordships did, is to invalidate point (ii). But Lord Salmon accepted that no distinction could be drawn and that neither Lord Simon nor Kilbrandon advocated any distinction. The inescapable - but unspoken - conclusion is, then, that *Lynch* is wrongly decided. Small wonder that, observing this, Lord Wilberforce called for respect for the decision in *Lynch* on two grounds. First that it is a decision of the highest Court of Appeal in the country; and second because it contains a proper review of all the relevant authorities as well as a detailed consideration of other factors 'scarcely adverted to by' the majority in *Abbott*.[50]

It may be added that on the facts of *Abbott*, as stated by Lord Salmon, there is every reason to assert that the accused was guilty - if at all - as a principal in the second degree rather than the first. As has been observed[51] an analogy might be drawn between the facts of *Abbott* and an instance of rape; 'One who holds the girl down is obviously only an abettor of the man who has intercourse with her without her consent.' In any event, the distinction has never before been critical to the substantive criminal law. Is the distinction between Lynch's activities, on the one hand, and Abbott's activities, on the other, so clear that it can be discerned and justified by reference to a clearly articulated principle of criminal law? It is submitted that it cannot.[52]

49 [1976] 3 All E.R. 140; 149.
50 [1976] 3 All E.R. 140; 149.
51 [1976] Crim. L. Rev. 564.
52 Lord Wilberforce illustrated succinctly the type of problem which could arise if any such distinctions were drawn: [1976], 3 All E.R. 140; 151.

One further inaccuracy in the majority judgment concerns the statement of Lord Salmon on codified provisions and the attitude of courts towards killings in time of war. While it is apparently true that Commonwealth Codes do exempt murder from the operation of Duress, a number of Foreign jurisdictions have no such exceptions.[53] Again while accepting the accuracy of the statement that mass killings and inhuman experiments have not been excused on the ground of Duress or Superior Orders, two points should be made. First, the author's own researches have found instances of war-time killings justified by the defence of Necessity, close cousin of Duress[54] and second, it may be questioned whether such facts are relevant to the case of *Abbott*.

After *Abbott*, the common law is in a state of confusion - an inevitable consequence of their Lordship's apparent desire to demolish the authority of *Lynch* at almost any price. An interesting parellel can possibly be drawn. In *Hedley Byrne v Heller*[55] a unanimous House of Lords accepted the principle of liability for negligent misstatement, but seven years later, the majority of the Privy Council in *Mutual Life and Citizens Assurance v Evatt*[56] placed an interpretation upon *Hedley Byrne* as would greatly have restricted the potential width of that previous decision. The minority in *Evatt*, Lord Reid and Lord Morris of Borth-y-Gest, had sat in *Hedley Byrne*. Lord Morris was also 'explained' in *Evatt*, on this occasion by Lord Hodson who had also sat in *Hedley Byrne* and who had concurred with Lord Morris on that earlier occasion. It was left to a single judge of the Queens Bench Division, Lawson J, and the Court of Appeal to rectify matters in *Esso Ltd v Mardon*[57] by repudiating the narrow and almost universally disliked view of the majority in *Evatt*. Perhaps in any future cases involving Duress and murder, the criminal courts will adopt a similar solution to that which prevailed in *Esso Ltd v Mardon*. Accordingly the view of the majority in *Lynch* would be extended with the consequence that the decision of the Privy Council in *Abbott* would cease to govern first degree principals.

The nature and immediacy of the threat

What is the nature of the threat which will enable the accused successfully to plead Duress? Apart possibly from the case of murder as a first degree principal, it appears that a threat of death is certainly sufficient; the cases of *Crutchley* and *Hudson* are authority for the view that a threat of bodily harm is probably sufficient for lesser crimes. Apart from murder - where the basis of the defence is probably that any normal man might very well have done as the accused did - the best approach to the question of the type of threat employed is the 'value choice'. Williams

53 By way of illustration, the German Penal Code has no such provsion and none is proposed in the draft American Penal Code, Section 2.09.
54 'Necessity as a defence to a Criminal Charge.' Unpublished Thesis of the University of Keele. (1976).
55 [1964] A.C. 465.
56 [1971] A.C. 793.
57 [1975] 1 All E.R. 208, (first instance); [1976], 2 All E.R. 5 (CA)

considers[58] that

> 'most persuasively, it is allowed where the breaking of the letter of the law is less than the evil which was illegally threatened against the accused.'

A threat to a third party's life or safety should, in principle, be sufficient, even if, for example, he is a hostage, who is not known personally to the coercee. It was sufficient in the Australian case of *Hurley* where the threat was against the coercee's wife.

What of the immediacy of the threat? It is often said that only 'present fear' of death or violence is sufficient. In *Hurley*, it was said that if the accused had failed to take an opportunity to submit himself to the police, then he might not be able to plead Duress, though on the particular facts, that view was obiter. On the other hand, the Court of Appeal in *Hudson* considered the accused to be under Duress when she saw the coercor sitting in the public gallery of the trial court. Although she could have put herself under police protection then,the fact that she did not do so did not render the defence inadmissible.

The view taken in *Hudson* is preferable; the approach in *Hurley* brings many problems. For example, can the police protection be really effective? Does it apply where there are hostages involved? Apart from hostage cases, what of the situation where there was close surveillance of the coercee?

It is part of the ratio of *Hudson* that it is a question of fact for a jury to decide what effect a failure to seek police protection should have.

The theoretical basis of the defence of Duress

This has been the subject of a great deal of confusion. In *Steane*, the Court of Criminal Appeal took the view that the appellant had not intended to aid the Kings enemies for the reason that he had made the broadcasts only because he was under Duress. As Williams has pointed out[59]

> 'there was no discussion of the question whether foresight that the broadcasting was bound to assist the enemy was equivalent in law to an intent to assist the enemy . . . a more satisfactory way of deciding that case would have been to say that the accused did in law intend to assist the enemy but that Duress was a defence.'

Confusion was again evident in *Bourne*[60] where Lord Goddard CJ considered that the wife, by pleading Duress, was admitting that she had committed the crime, but in effect, pleading to be excused punishment:

58 C.L.G.P. 755. Williams also considers that the deterrent theory of punishment is an important element in admitting the defence. Once the 'value choice' is conceded, however, he argues that a sufficiently serious threat must excuse a sufficiently minor crime.

59 C.L.G.P. 41.

60 (1952) 36 Cr. App. Rep. 125.

> 'She could have set up the plea of Duress, not as showing that no offence had been committed, but as showing that she had no mens rea because her will was overborne.'

The issue was raised again in *Lynch* as the second point of law of public importance, but the background to it is not at all clear from the judgment in the House of Lords. In the Northern Ireland Court of Criminal Appeal, consideration had been given to the question of whether on these facts, in order to obtain a conviction for aiding and abetting murder, it was necessary for the Crown to prove that the accused had intended to assist the coercors, in the sense that he had desired the particular end in question: the death of the policeman. That kind of intent was referred to in the Appeal Court on occasions as 'specific intent'; and while one of the judges, O'Donnell J, considered that proof of that 'specific intent' was necessary before the accused could be convicted, the majority, Lowry C.J. and Curran L.J. held that it was not.

The second point of law certified by the Appeal Court was whether an accused can be convicted of aiding and abetting murder where it can be shown that he acted intentionally, with knowledge of the probable result of his act, *without also proving his willingness to participate in the crime.*

What may be observed at this point is that the discussion referred to in the Appeal Court on the one hand and the second point of law certified on the other, are by no means the same. The first is concerned with mens rea, while the second is concerned with the voluntariness of the actus reus. Two factors must be borne in mind when considering the judgments in the House of Lords; first, that this distinction did exist; and second, that it was scarcely enunciated by their Lordships. All of the judges agreed with the judgment of Lowry C.J.[61] but Lords Simon and Kilbrandon answered the second point of law in the affirmative. This was consistent with their view that Duress was not, in law, capable of being a complete defence to murder. Of the judges in the majority, only Lord Edmund-Davies answered the second point expressly[62], though the judgments of Lord Morris of Borth-y-Gest and Lord Wilberforce clearly imply[63] that they also consider that it must be answered in the negative. Again, this is consistent with their view that Duress is capable of being a defence to murder, at least in respect of secondary liability. The conclusion which, it appears, can be drawn from this analysis is that Duress does not operate as a defence to negative mens rea; it might be expressed by saying that the accused's actus was not reus. Or, as Lord Wilberforce said, that Duress is superimposed on the other elements which make up a crime.[64]

61 [1975] 1 All E.R. 913; Lord Morris (924); Lord Wilberforce (926), (though not expressly); Lord Simon (941); Lord Kilbrandon (946) and Lord Edmund-Davies (946).
62 [1975] 1 All E.R. 913; 946.
63 [1975] 1 All E.R. 913; 924, 926.
64 [1975] 1 All E.R. 913; 926.

Conclusion

As noted above, the common law is now in a state of some confusion as to the admissibility of Duress in murder cases. In the present condition of society, it is unlikely that such confusion will remain outside the ambit of the Courts for any length of time. One remedy has been suggested, but it would seem that the proper solution lies now in legislation along the lines tentatively proposed in the Law Commission's Working Paper. It is also hoped that such legislation would reflect the progressive movement towards the admissibility of Duress to all offences and would not seek to except some offences on the supposed ground of their particular heinousness. To do that would be to take out of the law with one hand what was being put in with the other, and would lead, as the decision in *Abbott* shows, to inequality and injustice.

The Author's Moral Right*

R D SMALL*

INTRODUCTION

The term 'copyright' is, in many respects, a misnomer not simply confined to the right to copy alone but embracing a number of other rights. The writer intends to examine in detail the extent to which the rights of an author consisting solely or partly of a moral nature are recognised, and whether there are adequate safeguards for the author and his work. There are several reasons rendering such a discussion necessary at the present time.

Firstly, it appears likely that the present copyright law (which is entirely statute based[1]) is about to undergo fundamental changes. The primary enactment currently in force is the Copyright Act 1956 and the legislature could not have at that time envisaged the rapid development and widespread use of photocopying machines. This has resulted in ever-increasing pressure on the legislature to introduce some measure of control to protect the authors' and publishers' economic interests in original works. Secondly, the United Kingdom, as a member of the Berne Convention, an international agreement providing for mutual protection of copyright between member states, must amend current legislation particularly in the area of moral rights if, as it is anticipated, we are to accede to or ratify the latest modification of the convention by the Paris Act 1971.

Historical Background

As already stated, the term 'copyright' is a misnomer in that it conveys far more than the right to copy. Because of the impersonal nature of the word, the term has to some extent become dissociated from and exists independently of the author as an individual. This is largely due to the historical development of copyrights and a historical review is essential in order to understand the attitude of the legislature today towards the author and his rights.

Until the late fifteenth century there was little need for copyright legislation. It was the common practice to write, compose, paint, etc. for patronage, the public only benefiting indirectly. However the introduction of the printing-press into England by Caxton in 1476 made

1 S.31 of the Copyright Act 1911 abolished all rights of copyright existing at common law with the exception of the equitable remedy for breach of trust or confidence.

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reproduction of works, especially literary works, viable for the first time, the author and publisher required protection from piracy and unlawful publication. The first legal rights were privileges granted by the Sovereign for the sole rights to reproduce specific works and such licences were normally granted to the publisher and rarely to the author. They conferred only a right to publish and nothing else with no protection afforded to the author except in the rare case where the licence was granted to him. The reasoning behind such a limited form of control appears to have been to encourage printing and make the works freely available to the public and to provide a lucrative source of revenue for the Crown.

It was along these lines that much of the subsequent legislation developed until the Copyright Act 1911. The first statute relating to copyright was the Importation of Books by Aliens Act 1485 which, rather than protect even the publisher, encouraged the printing of books in England and the importation of books from abroad.

A significant landmark in the legal development of copyright was the Star Chamber Decree of 1556 which granted a Charter to the Stationers Company to control printing in the interests of the Church and State. The Stationers Company consisted mainly of publishers. No person could print a book unless he was a member of the Company. It was also obligatory to enter in the Company's Register each book in which a member claimed to have the right to copy. Thus copyright was dependent on formalities i.e. ownership was entry in the Register rather than an inherent right vested in the author or his assigns; censorship rather than ownership was the dominant factor. Further Decrees strengthened the Stationers Company's position and the necessity for formalities.

In 1640 the Star Chamber was abolished and the former Decrees lost their validity. In an attempt to fill the void, the Long Parliament enacted the Act for Redressing Disorders in Printing 1643, which in effect reenacted the harsh Star Chamber Decree of 1637. Nor was the situation altered by the Licensing Act 1662. These legislative measures expired in 1694 and no other legislation was forthcoming until 1709 during which period the Stationers Company was left with only common law remedies.

Anne's Act of 1709 has often been described as the first true copyright Act and whilst the provisions of the statute did little to affect the former practices, the principles underlying the statute changed the course of the development of copyright away from the necessity for formalities and the consequential lack of recognition of the author's rights. S.1 provided that the author of any book had the sole rights to print and publish that work for a period of 14 years(renewable for a further 14 years if the author was still alive at the end of that period). For the first time, the legislature recognised the rights of an author due to him as an individual with an inherent interest in his own work, although nowhere in the Act was the term 'copyright' used, and the only effective right in reality was the right to print. But, most impor-

tant of all, this sole right subsisted independently of any requirement to register the work with the Stationers Company to acquire protection. Regrettably, much of the effect of this was lost in practice, since if a work was not registered then the right to damages awarded under the Act was lost.[2]

Also, for the first time a statutory period of protection was established for published works whereas prior to 1709, copyright had existed in perpetuity. The Stationers Company felt that much of its earlier hold on copyright had been lost since entry in its Register was no longer obligatory due to the introduction of a statutory term of protection. But its members strenuously asserted that their right in perpetuity on expiration of the statutory period had not been abrogated by the 1709 Act.[2a]

The issue was not finally resolved until the Copyright Act 1911 which abolished all common law rights except the equitable remedies for breach of trust or confidence.[3] The reasoning for this appears to have been that whilst an author should be entitled to protection for financial reasons and for the sake of his reputation, this right should exist only for a limited period of time and not in perpetuity and should be balanced with a duty to make his works readily available to the public.

It was this dilemma between protecting an author's right and the rights of the public in his works which dominated Copyright legislation throughout the nineteenth century, the main issue being the period of protection. This was finally settled by a Bill enacted in 1842[4], which provided for a term of seven years protection after the death of the author or forty two years after the date of first publication, whichever was the longer.

This conflict still continues today and is well illustrated by the apparent contradictions in Article 27 of the Universal Declaration of Human Rights:-

Article 27(1) 'Everyone has the right to freely participate in the cultural life of the Community to enjoy the arts and to share in the scientific advancement and its benefits.'
Article 27(2) 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

The twentieth century saw a need for sweeping reform in copyright law. There were too many overlapping statutes in force, making the law unnecessarily complicated. More efficient and less costly methods of printing, reproduction and distribution made an author's work a more viable commercial enterprise requiring greater protection than was currently in vogue. Also ratification of the Berne Convention in 1886,[5] the first international copyright agreement, necessitated substantial

2 S.2.
2a But see Donaldson v Beckett (1774) 4 Burr 2408 H.L.
3 S.31.
4 Copyright Act 1842.
5 As revised at Paris (1896) and Berlin (1908).

reform of the law. Thus, in 1909 a Committee was appointed and the eventual result was the Copyright Act 1911, which substantially repealed all prior copyright legislation.[6] Further revisions of the Berne Convention at Berlin (1924), Rome (1928) and Brussels (1948) resulted in the Copyright Act 1956 the main copyright legislation currently in force. The major developments have been the suppression of virtually all common law rights, the end of the necessity for registration of works in order to obtain damages for infringement, the extension of the term of protection for published works to fifty years from the end of the calendar year in which the author died (as regards Part 1 of the 1956 Act[7]) and a widening both of the acts restricted by copyright[8] and the areas in which copyright subsists.[9] The author is now given very real protection albeit relating very much to practical matters and property rights.

It is evident that the earliest rights conferred by statute related almost exclusively to the rights to print and publish, a right given to and required more by the printer or publisher rather than the author - an impersonal property right. Slowly, the author's right to reward for his work was recognised until today he stands at least on a par with the publisher and the printer. But legislation, including current legislation, has largely been concerned with the protection of the material forms of the work rather than the intellectual qualities of the author which become, in part, implanted in that work. It was clearly stated in *Donoghue v Allied Newspapers Ltd*[10] that the legislature is concerned with the copying of physical material rather than the reproduction of ideas.

However, there is a great deal more to the right, as the legislature now recognises. Ownership of copyright is essentially an incorporeal entity. Separate copyright may exist in identical works independently reproduced.[11] Therefore, although copyright subsists in the material form of a work, it is not created by the existence of the material object but by some original intellectual quality of the author transposed into the material object. This creates practical problems e.g. where someone dictates a book to a secretary. The secretary is the first to produce the work in a material form but is the copyright vested in the person who dictates or the secretary? It has been held that the former applies, but, one exception, more apparent than real, was in the bizarre case of *Cummins v Bond*[12] where copyright was held to vest in a medium and not the spirit who supposedly dictated the works. Eve J. said, 'I think I ought to confine myself . . . to individuals, who were alive when the the work first came into existence and to conditions which the legisla-

6 With the exception of the Musical Copyright Acts 1902 and 1906 and one section of the Fine Arts Copyright Act 1862.
7 S.2(3) of the 1956 Act for literary, dramatic and musical works and S.3(4) ibid. for artistic works.
8 S.2(5) and S.3(5).
9 Part II of the 1956 Act.
10 [1938] Ch.106.
11 Hollinrake v Truswell [1894] 3 Ch.420 where it was stated that if two authors independently produced similar works there would be no infringement.
12 [1927] 1 Ch.167.

ture . . . may reasonably be presumed to have contemplated.'

This concept of copyright as being more than just a material property right is supported by such terms in the 1956 Act as 'intangible property', 'intellectual property' and 'incorporeal property'. But, largely due to its historical development, copyright is primarily concerned with its physical form. Rights in the Stationer Company were dependent on registration of the work rather than ownership and the statute of Anne 1709, in practice, extended only the printing right and little else. Consequently, whilst broader in outlook, the legislation today follows a similar pattern by protecting the right to do certain acts in relation to the work. But once such rights have been transferred, the Act cares little for the fate of the author, or the work itself as a creation as opposed to a material object. The most important rights, such as the restriction of others reproducing work in any material form, publishing the work or performing the work in public, are contained in s.2(5) and s.3(5) of the 1956 Act. Support of the idea that copyright is a property right is further provided by the 1956 Act since the above rights can be 'sold', 'assigned' and 'licensed'. It is also described as 'personal and movable' property.

The treatment of copyright as a physical property right is justified to a considerable extent by the fiscal value of a work and the right to sole publication of it for either the author or publisher or both. Yet copyright involves more than this and the legislature, somewhat obliquely and negatively, recognises the existence of additional rights existing to some extent independently of the material form of the work. The 1956 Act does not restrict the right to do all acts in relation to the work but only those acts set out in ss. 2(5) and 3(5). From this it may be presumed that any additional rights may subsist and be indivisible from the author, and that the transfer of rights by operation of law does not not include such additional rights. 12a

The first occasion on which these additional rights (which shall hereinafter be referred to as the 'moral rights' as distinct from the 'property rights') were discussed was in 1951 when the committee ultimately responsible for the 1956 Act, considered the implications of ratification of the Brussels Convention (1948). Article 6 of the Convention contained provisions to the effect that, even after the assignment of his copyright, an author should retain a right during his lifetime to claim authorship of his work (a paternity right) and a right to object to any distortion or mutilation of his work which would prejudice his reputation or honour (an integrity right). These rights will be examined later; it is sufficient now to note that the current legislation in no way protects the paternity right and only to a limited extent the integrity right.[13] Ratification of the Brussels Convention, therefore, required substantial changes in the

12a This is in part as a result of the absence of any comprehensive definition of 'Copyright' by the legislature. Certain quasi - copyright rights are protected by the Common law (see below) though not recognised by the 1956 Act despite the abolition of all rights of copyright at Common law by the Copyright Act 1911.

13 See s.43 of the 1956 Act.

law. However, ltttle time was devoted to discussion of the issues involved by the Copyright Committee since it was apparently believed the common law remedies were adequate and consequently the Copyright Act 1956 contained no new provisions to meet the requirements of Article 6 although the Convention itself was ratified. Despite this defect, no other member state has, on record, complained that whilst ratifying the convention, the United Kingdom has not enacted legislation to give effect to Article 6 as required by Article 6(2).

The Stockholm Convention (1967) revised Article 6 to extend the integrity right in the following manner, 'Independently of the author's ECONOMIC RIGHTS and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or OTHER MODIFICATION OF, OR OTHER DEROGATORY ACT in relation to the said work which would be prejudicial to his reputation or honour.'[14] As a result of the capitalised words (the additional words in the revised Article 6), the integrity right has been considerably extended. It is submitted that since even prior to this extension the right was not adequately protected, amendment, particularly of s.43 of the 1956 Act, is now essential. In fact, neither the United Kingdom nor any other major state ratified or acceded to the Stockholm Convention because of opposition to the controversial Protocol regarding developing countries. Therefore it did not become necessary for changes in the present law to be considered. Article 6 as amended has, however, been retained in the Paris Act 1971 whilst the controversial Protocol has been, for the time being, abandoned and since it is anticipated that the United Kingdom will ratify or accede to the new Act, it seems probable that some measure of legislative reform is now necessary.

Such moral rights as the integrity and paternity rights have long been recognised on the continent and it is by contrast with European copyright systems that the extent to which United Kingdom law neglects the moral right, certainly as regards statutory rights, is more easily seen. Whilst all European countries have adopted a moral right doctrine, the manner in which this has been achieved differs. It has already been seen that rights other than economic rights are internationally recognised as independent rights.[15] This is well illustrated by the French law[16] which provides 'The author of an intellectual work shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right, effective against all rights. This right includes attributes of an intellectual or moral nature, as well as attributes of an economic nature, as determined by this law.' The French law regards the two rights as subsisting independently from one another and even after the exhaustion of the author's economic rights e.g. by sale or assignment, the moral rights remain vested inalienably and perpetually in the author.

14 Article 6(1).
15 Article 6 Stockholm Convention Supra.
16 French Copyright Act 1957.

The prime motivation of the United Kingdom has been the encouragement to produce and publish works for the benefit of the general public balanced against the need to secure the authors' and publishers' economic rights with an almost total disregard for the intellectual qualities possessed by an author. Thus whilst the legislature admits the existence of rights other than those relating to physical property applicable equally to an author and a publisher, it fails to expand these rights. It is becoming increasingly necessary to do so in view of the recent revisions of the international agreements.

The Moral Rights

1. General Nature of the Rights

It has already been seen that the International Conventions contain provisions relating to paternity and integrity rights. To examine these, and ancillary moral rights, is best achieved by comparing them with the French rights. French law admits the existence of two separate and independent rights, one being patrimonial (capable of pecuniary evaluation) and the other extrapatrimonial (not capable of pecuniary evaluation i.e. the moral rights) and this distinction simplifies the study of individual rights.

The first point to note is that not only does the extrapatrimonial right exist independently of the patrimonial right but also that the former precedes the latter. Article 1 of the French Literary and Artistic Property Act 1957 contains the following provision - 'The author of the work of the mind shall, by the mere fact of its creation, enjoy an exclusive incorporeal right in the work effective against all persons . . . this right includes attributes of an intellectual and moral nature as well as attributes of an economic nature.' The French law, therefore, expressly provides for a moral right and later details the individual components making up this right whilst the United Kingdom law fails to admit the existence of rights other than those relating to the economic value of the work (except perhaps, as stated earlier, in a negative manner) with the possible exception of s.43 of the 1956 Act.

By virtue of the above Article, the French rights arise as a result of the creation of the work in the mind of the author. Works in the United Kingdom, whilst they are protected even if unpublished [17], must exist in a material form and be complete, but in France protection commences from the moment of realisation of the work in the mind of the author irrespective of whether or not the work has achieved its final physical form. [18] Thus, in the United Kingdom, 'A person may have a brilliant idea for a story, or a picture, or for a play, and one which appears to him to be an original, but if he communicates that idea to an author or an artist or a playwright, the product which is the result of the communication of the idea is the copyright of the person who has clothed the idea in form, whether by means of a picture, a play or a book and the originator of the

17 S.2(1)
18 Article 7

idea has no rights in that product.'[19] Clearly, under United Kingdom law, the owner of the idea fails to extablish any rights over his work prior to the conversion of the idea into some material form. Whereas, in France, the owner may claim all the rights applicable to a work the subject of copyright, if he is able to establish to the court's satisfaction that the producer of the material form of the work did in fact use his idea and that his idea was sufficiently developed to acquire protection of the law. The difference is important. An original work consists of an original idea in the mind of the author, subsequently transformed into a material form in such a manner as to appeal to the public if it is to bring financial rewards to the author. Whilst the person responsible for the creation of the material form should not be left without any rights at all, it is submitted that the French law adopts the better principle: that the original idea is fundamental and rights therein, both moral and prcuniary, should be protected. This admittedly raises practical difficulties in determining whether or not an idea has been sufficiently developed, but the French courts have had little difficulty in the application of the Article and its intentions.

A further difference is seen in that in French law the moral right applies once an original idea has been sufficiently formed in the mind of an author. Therefore, the moral right has its roots in the personality of the author and consequently the author must be a physical person. As a result, the French moral right does not extend to cinematograph films, sound recordings and television broadcasts etc.[20] as the right is concerned with the reputation and feelings of the author and such mechanical products cannot in themselves, enjoy a reputation or have feelings, although authors whose works become incorporated into such products still retain their moral rights. The 1956 Act does in fact treat cinematographic films etc. separately from copyright in other fields, but it does not distinguish between them for the sake of the moral rights but because of practical differences as to when copyright subsists.

A final distinctive feature of the moral rights is that under French law they exist in perpetuity and are effective against all rights conferred by the legislature, whilst the pecuniary rights attached to a work cease at the end of a prescribed statutory period. This is one point on which French law and International law differ. The latter proposes that the period of protection for the moral rights be the same as the period of protection for pecuniary rights under the legislation of each member state. As the moral right is concerned with an author's reputation and honour, protection in perpetuity is unnecessary as the author as a person in most cases will be long forgotten by the time the usual statutory periods of copyright have expired. The main argument in favour of any greater period of protection for the moral rights would be to prevent fundamental alterations or mutilations of the work so as to be unrecognisable from the original. The individual moral rights will now be

19 Farwell J. in Donoghue v Allied Newspapers Ltd [1937] 3 All E.R. 503 at 508
20 The only exception being Article 13 applying to collected journalistic works.

examined.

2. Rights of Disclosure

One of the most important moral rights under French law, although not contained in International Conventions, is the author's right of disclosure and first publication.

Article 19 of the French law provides that 'The author alone has the right to divulge his work . . . determines the means of disclosure and fixes their conditions.' This right exists independently of any contractual rights or obligations placed on the author and, where there may be conflict, the Article is to prevail. Thus in *Bouillot-Rebet v Davoine*[21] a French court held that an artist need not deliver a bust which he considered unfinished and unsatisfactory. In contrast the United Kingdom copyright law has developed along contractual lines, as did other property rights particularly during the late nineteenth and early twentieth centuries. A United Kingdom author's rights exist not by reason of his being the creator of his work and his inherent right to determine whether, at the risk to his own reputation, in his view, the work is ready to be divulged to the public but rather on the terms of the contract between himself and his publisher or patron as the case may be. Section 36(1) of the 1956 Act provides that copyright '. . . shall be transmissible by assignment, by testamentary disposition, or by operation of law as personal or moveable property which, once in material form, exists independently of the author, its creator, and can therefore be transferred as easily as any from of property in accordance with the ordinary rules of contract. French law provides that an author, the creator of the work, shall determine when a work 'exists' in its final material form for the purpose of publication etc. Under the present United Kingdom law, an author may even be bound by contract for works not yet in existence. S.37(1) provides that where there is a purported assignment of future copyright in writing, then effect will be given to the assignment. So in *Macdonald v Eyres*[22], an authoress entered into an agreement to publish her already completed novel and her next three. She wrote further novels and entered into another contract with a different publishing house. Nevertheless, it was held that she was bound by the first contract and that the copyright now vested in the first publisher. It is not intended to criticise the decision in this case insofar as an author should not be able to disregard, without penalty, a contract. However, it is questionable whether the authoress should still have been bound by the contract had she decided that the novels were not worthy of publication by anyone. If that had been the position in *Macdonald v Eyres*, it appears from the judgment that the authoress would still have been bound by the contract. Not only does the United Kingdom law depend on the terms of contract as to the owner of the copyright but further where there is doubt, the courts will favour the assignee as in *Joseph v National*

21 Trib. Civ. Charolles PA (1950) 83.
22 [1921] 1 Ch 631.

Magazine Co Ltd.[23]

Therefore, in the United Kingdom where a work appears to be in a complete material form, it becomes the property of the assignee from that moment in time onwards. It is submitted that a United Kingdom author should be entitled to the same rights of divulgence and disclosure as a French author. This would be subject to a provision to the effect that, as is the practice in France, the author must return any advances received under the terms of the contract and, in exceptional cases, where great pecuniary hardship to the publisher results from the author's repudiation of the contract, be liable for damages for breach of contract.

The relationship between an author and a publisher in the United Kingdom is determined by the terms of the contract between them and the law admits no moral rights of disclosure except to a very limited extent. This exception is the equitable remedy for breach of trust or confidence but it applies only to unpublished works where there is no contract for publication.

3 Right of Withdrawal

Closely associated with the right of disclosure is the right of withdrawal which again is not provided for in the International Conventions. Just as the right of disclosure confers on the author alone the right to decide when he believes a work is ready for publication, this right allows an author to withdraw his work from whoever may be the owner of the pecuniary right in it even if the work has been published. Article 39 of the French law provides that '. . . notwithstanding the transfer of his rights of exploitation, the author, even after his work has been published, enjoys the right of modification or withdrawal as against the the assignee. He may not, however, exercise this right without accepting the obligation to compensate the assignee for the losses which the author's act of renunciation or withdrawal might cause him.' The manner in which an author's reputation may be protected by this provision and the way in which it operates is illustrated by *Anatole France v Lemerre*[24] where an unknown author wrote 'A History of France' which was bought by a publisher but not published. Over a number of years, the author gained a considerable reputation as an historian and critic which prompted the publisher to publish his old work. The French appeal court held that the author had a right to prevent publication as the delay was unreasonable and the author's views had changed considerably since he wrote the book.

Until recently, the United Kingdom law had no equivalent at all to this right. In *Harris & Co v Phillips*,[25] the defendants decided to publish an old song of the plaintiff, never before published, and represented it as being a new song. In refusing to grant an injunction restraining publi-

23 [1959] Ch 14.
24 Trib. Civ. Seine, Pat. 1912 98.
25 (1918) TLR 440.

cation, the Court said that not only did the author have no rights of withdrawal, but also that the defendants had committed no legal wrong in representing the song as being new though their conduct may have been morally reprehensible. However, as will be seen later the extension of the tort of passing off may now possibly prevent such misrepresentation.

Subject to the following limitations, it is recommended that a right of withdrawal should be introduced into the United Kingdom law. The first restriction would be, as with the French law, that the author should return any advances received should the right be exercised and be liable for damages for breach of contract in exceptional cases. Secondly, the right should not apply where the work of the author has already been published since the practical difficulties in withdrawing all copies in circulation would be too great and the financial loss to the publisher disproportionate to justify the exercise of this right.

4 Right of Paternity

This right is recognised by both the French law and Article 6 of the Paris Act 1971 and endows the author with an inalienable right to claim authorship of his work.

It may seem somewhat superfluous and unnecessary that such a right should be expressly provided for and no similar right exists under United Kingdom law. However, justification for the right is two-fold. Firstly, it is morally desirable that an author should be entitled to receive the credit for his work, particularly as his reputation is dependent on his becoming associated by the public with his works. Secondly, on a more practical basis, without such a right an author, the more so in the case of an author yet to establish a reputation, may find himself in an unequal bargaining position. Such was the position in *Guille v Colmant*,[26] where an unknown painter entered into a ten-year contract with a dealer for his works, to be signed with a pseudonym and no other signature, in return for an unvariable monthly allowance. The contract was determinable only at the option of the dealer with ninety days notice. The French appeal court held the contract to be void as contrary to the right of paternity. Such a contract may be void in the United Kingdom as being too oppressive[26a] but not as being contrary to any right of paternity, and it is doubtful whether any remedy would have existed under United Kingdom law if the term had been shorter.

If an author in the United Kingdom is to be entitled to claim the authorship of his work, then this right must be included as an express term of the agreement with the publishing house, his patron etc. However, his paternity right is, indirectly and rather negatively, protected to some extent by s.43 of the 1956 Act and the civil action of passing-off which prevents publication of an author's work under another's name without

26 App. Paris Gaz. Pol. 1966 1 17.
26a cf. A Schroeder Music Publishing Co. Ltd v. Macaulay [1974] 3 All E.R. 616 H.L.

his permission. It would, therefore, appear at first sight that the paternity is of little importance since a publisher is unlikely to publish a work without any name at all appearing on the work but its importance lies in the field of dramatic plays, films and television and radio broadcasts where the source of the production is usually an original work incorporated into another work. An agreement between an author and his publisher for the publication of his work usually contains further provisions to the effect that the assignment of the author's copyright includes assignments of serial and film rights etc. If the author has failed to insist on his being credited for his work in plays and broadcasts then credit may be given indirectly to others who produce and direct the play etc.

At present, an author's paternity right depends upon the terms of his contractual agreements and it is submitted that such a right should be granted and exist independently of such agreements.

5 Right of Integrity

The final moral is of great importance and contains in itself really a number of rights. Article 6 of the French law of 1957 begins 'The author shall enjoy the right to respect for his name, his authorship and his work . . . The right is appurtenant to his person. It is perpetual and unassignable.' It provides further that his assigns may not alter his work without his permission and still attribute the work to him. The right is included in and extended by Article 6 of the Paris Act 1971 which entitles an author to object '. . . to any distortion, mutilation or other modification of, or other derogatory action in relation to the . . . work which would be prejudicial to [the author's] honour or reputation.'

One matter that may be dealt with here is that the integrity right includes the right of an author to be credited with the creation of his work and retain the product of his creation. This aspect of the right appears to be adequately provided for under the United Kingdom law, the only criticism being that the remedy for infringement is not statutory. The ratification of the Paris Act 1971 would remove this defect. An example of the right and its remedy is shown in *Hepworth Mfg. Co. Ltd. v Ryott*[27] where an actor was bound by contract to a film company a term of which was that he would not use his stage name when appearing in films produced by other companies. The court later refused to grant an injunction to restrain the actor from using his stage name as and when he liked. This was because the actor had extended his own reputation in his stage name through his acting ability and he should not be deprived of his means of earning a living.

The other aspects of the integrity right, basically the right to prevent unauthorised alterations of an author's work and general protection of his reputation are, subject to a few limitations, adequately provided for under the United Kingdom law.

27 [1920] 1 Ch. 1.

Existing Rights and Remedies

So far only passing comment has been made on the extent of recognition of the moral rights under United Kingdom law. These will now be examined by reference to remedies available to an author.

1 Breach of trust or confidence

It has already been noted that there is really no equivalent under United Kingdom law to the French right of disclosure as an inalienable right, but rather that an author's rights are dependent on contractual terms. Exceptionally in the case of unpublished works where there is no contract between the author and a publisher, then unauthorised publication of an author's work or of confidential information which may form the basis for copyright may be prevented in one of two ways. S.17 of the 1956 Act prevents publication of an author's work, in which he owns the copyright without his licence and needs little further explanation. It is to be noted that in relation to literary, dramatic and musical works, copyright protection lasts for 50 years from the death of the author or 50 years from the date of first publication whichever is the later.[27a] The meaning of 'publication' for this purpose is elucidated by s.49(3) which specifically provides that no account shall be taken of any unauthorised publication.

Alternatively, publication may be prevented by the equitable remedy of breach of trust or confidence where a confidential relationship exists between author and publisher as in *Percival v Phipps*.[28] In view of these statutory provisions the equitable remedy would rarely be used today, the more so since a 'confidential relationship' must first be established. However, it may still be of practical importance where the information may form the basis of material in which copyright may subsist but does not by itself become the subject of copyright as the statute requires copyright to subsist before there can be an infringement.[29]

2 Passing-off actions

This common law remedy is available not only for infringement of copyright but also to protect the general reputation of any person and is important in relation to the integrity right and, indirectly, to the paternity right. A passing-off action can be maintained where the defendant conducts his business in such a way or manner as to lead to the belief that his goods or business are those of another. Thus in *Samuelson v Producers Distributing Co. Ltd.*[30] it was held that advertising a new work in such a way as to be calculated to lead the public to believe the work is that of the plaintiff was actionable.

In a moral sense, the action prevents a person enhancing his own reputation at the author's expense and in the pecuniary sense the use

27a S.2(3).
28 (1813) 2 Ves & B 19.
29 See Seager v Copydex Ltd [1967] 1 W.L.R. 923.
30 [1932] 1 Ch 201. See also O'Gorman v Paramount Film Service Ltd [1934] 2 All E.R. 113.

of the author's reputation as a means of making profit.
Earlier cases suggested that deceit was essential to the wrong but it now seems well established that a simple intention to mislead the public will suffice.[31] However, recent decisions have effectively limited passing off actions in two ways. Firstly, damage to an author's reputation alone is not sufficient. The courts have held that a pre-requisite of the action is pecuniary damage to the plaintiff or the very real likelihood of such damage following.[32] It is also necessary to show that the plaintiff has acquired such a considerable reputation that he has a proprietory right which may have been infringed.[33] In *McCullock v Lewis A May (Produce Distributors) Ltd* [34] the only damage suffered by the plaintiff was injured pride and feelings. It follows that whilst the reputation of an author may be protected, it will only be so protected where the author suffers pecuniary damage and, therefore, the moral right as an independent right receives no protection. It would perhaps be unrealistic to allow an author to succeed in every case where no pecuniary damage occurs but only reputation is injured; however he should if he can establish substantial damage to his reputation. Similarly an author's reputation can only be infringed where the infringement is in relation to the same or a very similar trade, profession or office in which the author gained his reputation. in *McCullock v Lewis A May (Produce Distributors) Ltd* [35] a radio broadcaster, 'Uncle Mac' became very much a household name doing radio programmes for children and writing books. The defendants distributed a breakfast cereal called 'Uncle Mac's Puffed Wheat'. One of the reasons why the plaintiff's action failed was that there was no common field of activity between himself, a radio broadcaster, and the defendants, manufacturers and distributors of breakfast cereals. Later cases, most notably *Bollinger v Costa Brava Wine Co Ltd,*[36] appear to suggest that the action for passing-off was being expanded to the extent that it was no longer necessary to show a common field of activity. Copinger & Skone-James[37] concluded that a new tort of unfair trading with no requirement for a common field of activity had been created at common law. However, the recent decision in *Wombles v Wombles Skips* [38] reaffirmed the decision in 'Uncle Mac's' case that there must be such a common field of activity between the plaintiff and defendant. The decision seems to ignore the argument that the common field of activity necessary could be the public or a sector of it to which both of the parties to the action have directed their works or goods i.e. the people with whom the plaintiff has established his reputation and who are being exploited by the defendant through the popularity and reputation of the plaintiff. It is

31 See Repdaway v. Bentham Hemp Spinning Co.[1892] 2 Q.B. at 644. See also Bollinger v. Costa Brava Wine Co.(No.2) [1961] 1 W.L.R. 277.
32 McCulloch v. Lewis A May (Produce Distributors) Ltd.[1947] 2 All E.R. 845.
33 Oertli (T.) A.G. v. E.J. Bowman (London) Ltd.[1957] R.P.C. 388.
34 Loc. cit.
35 Loc. cit.
36 [1961] 1 W.L.R. 277.
37 'Copyright' 11th ed. 1971 Para. 239.
38 (1975) F.S.R. 488.

suggested that actions for passing-off be extended so as to exclude the requirement for a common field of activity.

3 Statutory Remedies

The 1956 Act contains a number of statutory remedies in respect of infringement of acts restricted by the Act but few specifically for the moral rights. The main statutory provision protecting the moral rights is s.43 [38a] and is divisible in two parts.

The first is concerned with an author's integrity right and is similar to the common law action for passing-off. S.43(2)(a) provides that a person contravenes the section who, without the licence of the author, affixes or inserts his name on a work of which he is not the author, or on a reproduction of such a work, in such a way as to imply he is the author of the work.

This statutory right is more advantageous in one respect than a passing-off action in that there need be no common field of activity between plaintiff and defendant. Much of the advantage is lost, however, as there can be no action unless the defendant actually inserts his name in in place of that of the author. A mere intention to mislead the public would not be sufficient and thus, for example, there could be no action under s.43(2)(a) in the advertising case of *Samuelson v Producers Distributing Co. Ltd.* [39] It is submitted that this right be extended so as to incorporate common law passing-off actions with no requirement for a common field of activity, that it should not be necessary that the defendant had inserted his name on the author's work and that whilst the author should be able to contract out of this right, there should be an overriding provision to the effect that his right will prevail as with some of the French provisions, where the contract is oppressive.

The second right contained in s.43 is that an artistic work, where the artist has parted with possession of it, may not be altered without the consent of the author.[40] This is analogous to the French right that an author's work may not be altered and still be attributed to the author. Although s.43(4) is limited to works of an artistic nature, alterations to other forms of work will not be allowed if they harm the reputation of the author, certainly where the author has parted with the copyright by way only of a licence as opposed to a full assignment.

Thus it appears the reputation of an author, here at least, is adequately provided for, the only recommendation for change being that s.43(4) be extended to include all types of work and not just artistic works.

4 Malicious Faslehood

This tort to some extent protects the integrity right of an author i.e. his

38a See also s.49(3) Supra p.
39 Supra note 30.
40 S.43(4).
41 Tolley v Fry & Sons Ltd.[1931] A.C. 333; Moore v News of the World [1972] 2 W.L.R. 245.

reputation and, indirectly, his paternity right. The tort is often pleaded as an alternative in an action for passing-off but in some cases it can operate in completely the reverse way to passing-off actions.

The action lies whenever a person maliciously publishes a false statement in disparagement of another person's title to his property and thereby causes special damage. The integrity of an author's work is further protected in that the false statement may relate to the author's goods or works themselves and not just his title to them.[41] The plaintiff must prove that the statement is false and that it is maliciously published. What amounts to malice has often been the topic of judicial consideration.[42] Maugham J. held that *Balden v Shorter* [43] that 'carelessness' is not sufficient for malice, although the plaintiff may still nevertheless be entitled to judgment in the form of a declaration of right,[44] which would be satisfactory although how frequently such a declaration might be given is very uncertain.

The question of malice was fully reviewed in *Wilts. United Dairies Ltd v Thomas Robinson Sons & Co Ltd* [45] where after considerable deliberation, Stable J. put forward three propositions which, if accepted, would add great weight to the integrity right in that the plaintiff would not have to show that there was deliberate intention to injure the plaintiff's reputation or works. Obviously in commercial affairs the defendant's aim is often only to profit from and not intentionally harm the plaintiff's reputation. The third proposal is as follows:

> 'If a person publishes a false statement which that person knows or believes to be false then, even though the aim of that person was his own advantage but with no intention to harm the plaintiff, provided the falsehood is intrinsically injurious (intrinsically meaning inherent in the statement itself rather than an intention to injure) that person will be liable, the malice consisting of the fact that what he published he knew to be false.'

The third element necessary to show malicious falsehood is that the plaintiff must have actually suffered special damage and that the damage must be pecuniary or capable of being estimated with a pecuniary value.[47] It was therefore held in *Fielding v Variety Incorporated* [48] that a person's injured feelings were not sufficient to found an action. Although the requirement that special damage must actually be suffered has been released in two instances by s.3(1) of the Defamation Act 1952, the continuing necessity for proof of special damage of a pecuniary nature defeats much of the moral right of integrity. Even the above exceptions to the general rule show once again the preoccupation of the

42 See Royal Baking Powder Co v Wright, Crossley & Co. [1901] R.P.C. 95.
43 [1933] 1 Ch. 429.
44 Louden v Ryder (No 2) [1953] Ch. 423.
45 [1958] R.P.C. 94.
47 Chamberlain v. Boyd (1883) 11 Q.B.D. 407.
48 [1962] 2 Q.B. 841. See also Morgan v. Odhams Press Ltd [1971] 1 All W.L.R. 1239.

legislature with the importance of the pecuniary rights to the exclusion of other rights which can exist independently. The pecuniary rights should continue always to be protected but, if the moral right is to be properly provided for, then the requirement for pecuniary damage must not be essential to the action but only an indication of the amount of damages which should be awarded.

Actions for malicious falsehood are yet a further example of a partial and indirect recognition of moral rights and their effect is greatly limited by the preoccupation of the legislature and the courts with pecuniary damage.

Conclusion

United Kingdom law is clearly lacking in recognition of moral rights. Some rights, such as those of disclosure and withdrawal are not recognised at all. Others, such as the paternity right, exist only partially or indirectly and the only statutory rights are limited in scope. The lack of recognition should not, however, be too greatly exaggerated as in the vast majority of cases publishing houses etc. do not intentionally seek to deprive an author of any rights or benefits due to him and most enter into very comprehensive and exhaustive contracts designed to give an author full protection.

However in an increasingly competitive society, a code of honour is an inadequate substitute for substantive law, and there are instances where an author requires protection of such a kind as only the courts and the legislature can provide. Further, the Paris Act 1971 if ratified or acceded to, requires not only recognition of moral rights as distinct from pecuniary rights but also that such rights become incorporated in a statutory form.

Several recommendations have already been made and only a few general comments remain to be made. Codification would prevent any doubts arising as to what rights an author has and would certainly be easier to refer to. It would also end the confusion caused by the partial recognition of some rights protected by several diverse common law remedies which frequently overlap with one another. The existing common law remedies also tend to protect, and give greater emphasis to, pecuniary rights and often only incidentally protect the moral rights which should exist by themselves. A further criticism of the common law remedies is that they are concerned with general civil wrongs not specifically aimed at dealing with problems involving copyright. Copyright has always required special legislation and so too should moral rights and the remedies to protect them.

Another general criticism is that such rights as presently exist, whether directly or indirectly, can be too easily signed away, the contractual terms overriding the rights themselves. An author's rights should to some extent be inalienable, He should retain a right to contract out of his rights in certain cases, such as paternity, provided there is a general overriding provision that his moral rights will be respected and prevail in the event of conflict where the author is in an unequal bargaining position in the same manner as the French law provides.

The rights should be inalienable, inherent and unassignable except as above, although it is difficult to envisage any genuine need for the rights to be perpetual as in France.

Finally, it is recommended that a suggestion of Professor R.F. Whale [49] be adopted - the establishment of a Department of Intellectual Property together with a permanent consultative committee of experts to constantly assess the workings of a moral right doctrine and make any recommendations necessary to protect an author's interests. A similar recommendation is made in the Paris Act 1971 and most European countries which practise a moral right doctrine have similar organisations.

49 British Copyright Council Pamphlet.

Extracts from an interview given by Sir Barnett Cocks KCB OBE, formerly Clerk to the House of Commons

What are the duties attaching to this office of Clerk to the House of Commons?

I have to go back to Edward III, 1363. Edward III was having a special dinner at the Vintner's Hall in the City of London (which, of course, is still there) with wine and porter. He had on his right the King of Scotland and on his left the King of France, both prisoners of war, and he was in an extremely good mood having had the Vinter's dinner. He came back to the Palace of Westminster and the first man who fell under his eye when he reached the Palace was Robert de Melton. He was the first Clerk, having received Letters Patent in 1363 from Edward III to look after the Commons. They were just a rabble at that time; they hadn't even a Speaker; so he said to Robert de Melton, do your best and bring some sense into these people and the Letters Patent which I received are in exactly the same frame of strong words as given by Edward III to Robert de Melton. I was the 38th in a direct line of descent and none of us were imprisoned, none of us were in any difficulties. There was one man in Henry V's day who had a bit of financial trouble, but nothing to do with the Parliamentary procedure which it was his duty to record. We began, of course, recording, first in notes, and finally, from November 1547, in the Daily Journal, which is being kept up by my colleagues this afternoon in Parliament. Working throughout the year we have a continuous working on the Journal of the last session before, and finally it is published annually as a rather expensive paperback, the last paperback issue of the Commons Journal published in my time costs £23 and was described as the world's most expensive paperback, but we are proud of the supreme accuracy of the Commons Journal which is one of the first duties of the Clerk of the House.

Other duties of the Clerk are to advise the Members of Parliament in general on the procedure of the House and remind them of all the rules laid down by their predecessors going back for generations. There are, of course, about 10,000 principal rules which we embody in the frequent publication of Erskine May's Parliamentary Practice, a new edition of which was published the other day. It is now the 19th edition of that work. It contains about a thousand pages and it is one of the duties of the Clerk to edit and keep up the work which has been published every few years since 1844. So the present practice and procedure of the House of Commons has been made known as far as possible to new members and we usually give lectures to new members when they come in. We have to deal with Mr Speaker himself, and, to him, we give special attention because clearly it is important he should know the the rules more than the ordinary member. We don't discriminate; we

don't have any secret practices which we make known to the Speaker and not to other members; the procedure of the House is open to all and it is our duty to make it available to any member who wants our advice. The other thing that we do is the preparation and writing up of all reports from the committees. We staff the committees; we assist in the investigations of Committees of enquiry and again we deal with the Law of Parliament. The Law of Parliament is one of the branches of the Laws of England and one of its more important aspects, although not the only aspect, is the law relating to privilege which gives a good deal of difficulty to those who come to the subject anew, but the Clerks have been dealing with matters of privilege for generations because it is one of their duties not only to inform existing members but to record and keep a list of all the precedents affecting the law of privilege which have been built up over the centuries. Another function of the Clerk is that of Accounting Officer, he is responsible for every sum of money spent in the Houses of Parliament and he signs the estimates for the House of Commons. The Speaker adds his signature to the estimates for the House of Commons when they are prepared. At present they run at about £8 million a year. In my time it was £3 million. And the Speaker has refused to accept any responsibility for the figures, so, on the House of Commons Estimates when they are drawn up there are two signatures - that of the Clerk, who has full responsibility for the accuracy of the estimates and proper accounting and spending of the money voted for the service of the House, and that of the Speaker who signs to indicate that it is a matter affecting the Commons, but he has no responsibility for accuracy or for any mistakes. This is such an important function of the Clerk that he spends about one-third of his time working with his accounting advisers on the accounts for the House of Commons, and they are accurate down to the last penny. I am told that in most Civil Service Departments they don't worry about the pence, which makes our operations rather more economical than some of theirs, but we do account for the last penny.

The other duties of the Clerk are now in the overseas field. He has devoted an immense amount of time to exchanging Clerks with overseas Parliaments, and harmonising their procedure with ours. Sometimes we learn from them, more often perhaps they learn from us. For instance, last spring, we had a Clerk serving the Parliament of Nova Scotia for three months at the request of that Parliament and he has now made a report on the work of the Parliament of Nova Scotia. At the same time, we have had a succession of Canadian Clerks coming over this summer to work with our clerks and look at our work in the House of Commons. In particular we have had the Speaker from the Ottawa Parliament, the National Parliament of Canada conferring with our Speaker at a Speaker's conference which was held in September embracing 32 Speakers of the Commonwealth. All that work, all the preliminary work and the preparation of the Conference itself is always handled, and always has been by the Clerks of the two Houses concerned, that is the Clerk of the House of Commons in Canada whose duties are very similar to the Clerk at the House of Commons at Westminster.
I think that's an outline of the work we do. If I could sum it up the recording of all the work of the Parliament, the advising on all con-

stitutional matters and handling the finance of the House of Commons.

Will you tell us something of the relationship with Speaker and the Leader of the House of Commons?

Relationship with the Speaker and with the Deputy Speakers who assist the Speaker in the Chair are very close. Every day the Clerk goes along to the Speaker at 12 o'clock with an enormous brief covering the whole of the Speaker's business and latterly beginning with the words 'Order, Order'. The Speaker relies very heavily on this brief because the more complicated the procedure of the House the more desirable it is that he should never slip up but get it absolutely right. So the Clerk's duty in the morning is really to prepare the brief, which looks like an actor's script, and for half an hour the Clerk with his assistant clerks sits with the Speaker in private conference and run over the verbiage which the Speaker has to speak in the House. I remember Mr Speaker Morrison, who was one of our great Speakers, said to the then Clerk, my predecessor, Sir Edward Fellows, 'I don't want, of course, any briefing because I have been a member of the House for 20 years. You don't therefore have to worry about telling me what I should do'. Sir Edward Fellowes, who had been there nearer 40 years than 20, and was an expert on procedures said, 'Very well, Sir, you go ahead'. The first item of business that day was Finance Bill Consideration and, of course, the order for consideration being read, that is the Clerk getting up at the table and reading out 'Finance Bill - for consideration'. There was silence and Mr Speaker Morrison said in a stage whisper, 'I have forgotten the words. What do I say?' That, of course was probably what Sir Edward Fellowes feared would happen. It did happen. After that the Speaker was a good deal more humble because the words spoken from the Chair and the words spoken from the Government Front Bench and the words spoken by the Clerk are all a little different. So, if we have the Speaker, as, say Hamlet, it is no good the first grave digger's speech being used by the Speaker, He has to use his own speech and nobody else's and the only way he is going to learn that is by having it in a brief in front of him. Some Speakers, of course, are very much better than others, but I am quite certain that no Speaker can do without the morning briefing which he has from the Clerks at the table.

Have you come across a Speaker who was difficult to deal with?

Oh No! All Speakers have, of course, been there a very long time. Secondly the Speakers are, by and large, acceptable to the House of Commons which means that they are equally acceptable to the staff of the House of Commons. A man who is a difficult character would probably never get as far as being appointed Speaker, and in most cases they would have been either Deputy Speakers like Speaker King who was a very outstanding Chairman of Ways and Means or Deputy Speaker, and greatly trusted by the House for his brilliance as Deputy Speaker; or indeed, like Mr Selwyn Lloyd who proved himself as Leader of the House to be totally acceptable in spite of his ministerial record which, perhaps, was not quite so pleasing to all members. I believe tonight he is appearing on a TV programme describing one of his ministerial adventures at the time of Suez but that was a political occasion, of

course. As a Leader of the House the Speaker is more or less obliged to take the sense of the House as a whole. In that he was so successful it seemed almost to follow that when the vacancy occurred in the Chair of the Speaker, Mr Selwyn Lloyd would get it; which he did. Therefore he would have had a lot of experience as Leader of the House.

Now you ask me about the relationship between the Clerk and the Leader of the House. This is a much more tenuous and shadowy relationship. Normally, the Leader of the House would not consult the Clerk over daily business. He would go into conference with his own Chief Whip and, in any case, the Clerk would feel obliged if the Leader of the House had consulted him on some point usually to let the leader of the Opposition and the leaders of the other opposition parties have a rough idea of what advice he was giving to the Leader of the House. The relationship would not be as confidential or as close between the Clerk and the Leader of the House as it always has been between the Clerk and the Speaker.

Will you tell us something of the development of the relationship between Westminster Parliament and the Common Market Parliament?

The Parliament of the Communities was one of the institutions which consulted the Clerks at Westminster in the early days. It is obviously going to be an important Institution, and some of our more experienced Clerks transferred to work for the Parliament of the Communities. Also, when our members go to serve this European Parliament, which is today meeting in Luxembourg, we send two or three of our Clerks to accompany our delegation. When they get there, they will meet and confer with their old colleagues, who are now occupying responsible positions in the European Parliament. Again, there are other European institutions for which we have worked for many years. The Council of Europe, in my view the most successful and far sighted of all the European institutions (partly, perhaps, because I wrote 7 editions of their official book procedure personally) but they are extremely advanced in the European field and we regularly have clerks working for them as we have done every year since 1949 when with our French colleagues the Commons Clerks formed the nucleus of the staff of the Council of Europe.

Lord Hailsham in his recent Dimbleby Lecture described our present system of Government as an elected Dictatorship. The Commons is virtually in thrall to the Government. Do you agree?

I wouldn't agree with that at all. Lord Hailsham has had a great experience in both Houses because he undertook a remarkable transfer of giving up his hereditory title, which was then Baron Hailsham, and returning to the Commons as Quintin Hogg. Then he returned to the Lords as Baron Hailsham of St Marylebone thereby honouring the agreement in the letter if not the spirit of the Peerage Act, 1958, by which once you give up your hereditory Peerage, for the rest of your life you remain a commoner unless a subsequent Peerage is created. Lord Hailsham has had this subsequent peerage created a life peerage which will cease on his death. His knowledge, therefore, of both Houses is

considerable, but I can only give my view in contradiction to his, that I don't see any great elective dictatorship of the government over the House of Commons. We had, for example, yesterday, when the Chancellor of the Exchequer, Head of the Treasury, the most powerful unit in the Executive, had to hurry to the House of Commons to explain what had gone wrong. This doesn't look to me like an elective dictatorship because the man who is in control of our finance should, in theory, be the strongest man in the government and therefore, likely to disregard the wishes or views of the House of Commons if Lord Hailsham's theory is correct. But, far from it, the Chancellor, as I said, hurried to the House. He was, I read in the papers, in a rather depressed and subdued mood, but he felt it obligatory to offer some immediate explanation to the House of Commons itself. This doesn't look like dictatorship. It looks like a man afraid of the opinion of the House. Not of course afraid of the opinion of the press because he pronounced very strongly against the views of the press which had appeared on the front page of 'The Sunday Times' the day before.

How do you see the relationship between Government and the Members of the Commons in the House itself?

We know that the former Prime Minister, Mr Wilson, read the papers every day. He telephoned Dick Crossman, who was then Leader of the House, saying - have you seen the papers, Dick? He paid very great attention to public opinion, both as expressed in the press and as expressed in the House of Commons. No Prime Minister can sustain his position without the constant support of the House. I can give you an instance when I was in the Table Office, (that is the office staffed by Clerks behind the Chair) at the time of Suez. The then Prime Minister, Anthony Eden used to telephone us saying 'What's the atmosphere like in the House?' And we would say 'Stormy', as it was in those days, and the Prime Minister himself was keenly aware that he had to carry a consensus of opinion in the House of Commons. Again, to go back to another Prime Minister, Mr Neville Chamberlain, he as you remember, in 1939 had a substantial majority in the House. But after a debate on the conduct of the campaign in Norway, in 1940, although he secured a majority in the Division he felt that the fall in support was so large that he had to resign. As I say, in spite of having won a majority in the House he felt he could not sustain the war without much more fully marked support from his fellow members. There already you have two Prime Ministers who were so keenly aware of feeling of the House. Mr Wilson, I can tell you, was always keenly aware of the need to carry the House with him on all major proposals.

We are looking now at the government's attempts with a paper thin majority, as the phrase goes, to force a bill through Parliament, and I am sure some members of the government at least are having sleepless nights over the difficulty of getting some of its legislation through Parliament. At this very day we have the end of the session coming up and I don't think any member of the government would put a bet on the certainty of getting all its present legislation through Parliament. Of course that will bring us on to the House of Lords which I gather you

may ask me of a little later.

Lord Hailsham has said that we would all be very much better off if the power and authority of the House of Lords were to be strengthened. What are your opinions of the role of the House of Lords and its composition?

It is, of course, a senate containing many experienced former House of Commons members, and I think there would be considerable resistance to abolishing a body which, over the centuries, has been shown to be rather useful. The Lords, themselves, have always offered reform, and I think it was recently pointed out by a former Leader of the House of Lords that they were willing to have reform. Proposals for reform were put forward in 1968 but these were defeated in the Commons by a curious alliance between Michael Foot, then a leader of the Tribune group and the extreme Right wing element of the House of Commons. The Lords themselves were ready and willing to be reformed. If you have a motor car, it has an accelerator, but it also has a brake. In our bicameral system a brake is equally useful. If the accelerator works too sharply you can put your foot on the brake, and it has some effect. I think that is the feeling generally in the Commons and Lords. They would not wish to abolish the brake altogether because if a substantial majority of the Commons felt the brake should be removed altogether, surely it could be done here in a matter of twelve months. Any desire by the Lords to reject a Bill for their own reform is I suggest on the evidence of the recent past very unlikely. I don't think even the Commons wished there would be any stern resistance to the abolition of the House of Lords.

Do you think there is a possibility of a crisis arising out of recent events?

It does appear that there is some disquiet in the Commons about the Lords' activity but they have said 'What do you want?' We are a revising body, that's our purpose in life. We are seeking to revise the legislation that you are sending up to us; that's all we are asked to do. If it is a matter of merely rejecting your legislation we could throw it out on the second reading, but we are trying to look into it and propose amendments which would make the legislation more workable.' I would have thought that is a reasonable answer from those who have been summoned by the Queen to represent or to give their duty and service to the work of legislation in this ancient Second Chamber of Parliament.

Having sat for so many years in the Commons Chamber you have had a unique opportunity to judge the standard of debate in the House. How would you assess that standard?

The standard of debate in the Lords is, of course, more leisurely, and speeches can be prepared at leisure unharassed by demands from 50,000 constituents. Probably the speeches in the Lords are made from the point of view of the public interest as a whole whereas the Commons members are only too often trying to put forward the interests of their own constituents. *Great* speeches in the Lords? I think I would say

good speeches in the Lords, are commonplace. Great speeches are usually heard in the House of Commons, not, I think, in the House of Lords. By the nature of things in times of crisis one listens to the voice of the House of Commons not to the voice of the House of Lords. The average level of the Commons is perhaps lower than the Lords, so what the Lords say is of much less importance, albeit perhaps better expressed than what is said in the House of Commons.

It is often said that the procedures of the Commons are so archaic and time-wasting as to be an impediment to the efficient working of the House. Do you agree?

I would like to answer that by recalling what I said earlier about the keeping of minutes. Business firms in England have not normally kept minutes of their proceeding earlier than 1890 or thereabouts. Certainly as late as the 1930's many businesses would hold meetings of directors and make important decisions without any formal recording, whereas the Commons have been recording their meetings which are, of course, influential on the state of the country since 1547, and recording them very accurately. So, one can look back on what was decided on any question of moment throughout several centuries. Historians, as you know, pay great attention to the work and the writing expressed in the Commons Journals but the mysteries decided in the Board Rooms until very recently have not been so well tabled and recorded. As to efficiency, there are not many brilliant proposals put before the Commons and efficiently carried through on a grand scale. I can only give one instance in recent years. There were many businesses in London, the great industrial complex, all of them in their several ways putting forth great clouds of smoke, and one member of the House of Commons, Sir Gerald Nabarro, in 1953 brought in a Bill to remove smoke from the atmosphere. It was an absurd and terribly complicated thing to do, but in 1953 we were all burning coal in open fires and every winter great clouds of smoke went up and many people died of bronchitis, which is an ailment almost unknown now. In 1955 the Government took over Sir Gerald Nabarro's proposal and produced the Clean Air Act, imposing on industry the duty of cleansing their flues and ceasing to produce clouds of smoke. The actual drafting of the Act was incredibly complicated. How do you legislate against dark smoke? A remedy was found by attaching to the Act a shade card showing the darkness of the smoke which should be outlawed by Clean Air Act 1955. Now that was a work of quite considerable skill involving quite a lot of business management which no single firm in London would have been capable of devising or of implementing.

The question is often asked why does the Commons not start its work in the morning instead of the afternoon.

This is a fair criticism. Many members have to make their living outside the House. There is a debate about whether you should have 630 professional politicians or whether you should have a good number engaged in outside industry or the professions. On balance, at present it is

clearly preferable to say that the majority of members find it preferable to start the business of the House of Commons in the afternoon unless they are serving on committees of the House which normally meet in the mornings. So members have to exist in a kind of split personality. Over 400 of the 635 members have to serve on committees which, as I say, normally meet in the morning and the pressure on members would be very great if the House met every morning. Of course, it does meet on Friday mornings when members are travelling to their constituencies to the weekend work which they carry out there. On the other days morning sittings were attempted as an experiment by Richard Crossman when he was Leader of the House and his diaries which appeared in the Sunday Times showed that Edward Heath, who was then Leader of the Opposition was very much against morning sittings and would not offer any encouragement. In the event Edward Heath was shown to be right. Morning sittings were abandoned after a couple of years' experimentation. It was too much for members to have to attend during the afternoon sittings and again deal with their committee work which is increasingly important. As for the criticism about sitting late at night; with that I would fully agree but the remedy lies in shorter speeches; time limits on speeches. In 1946 and again in 1965 Select Committees on Procedure recommended to the House that there should be time limits on speeches and, after considering each report, the House of Commons itself refused to contemplate time limits on speeches. This largely explains why they sit so late at night. If, as the procedure committee of 1966 recommended, ministers were limited to 30 minutes and other members to 15 minutes then more business would be got through and it would be possible for the House to rise much earlier. But there is a sort of tradition that there is particular merit in a late sitting. I think it is quite mistaken and I would like to see strict time limits imposed on individual speeches.

Should there be a timetable for Legislation?

We must recognise that the duty of the opposition is to scrutinise legislation with the utmost care and, in many cases, seek to defeat legislation. One of the wisest observers of the work of the Commons is the present 'Times' lobby correspondent, Mr David Wood, and he has said there is a great danger in undigested legislation being put on the statute book. I see this also as a great danger. In Edward Heath's last full year as PM, 1973, 2228 new pages were added to the statute book. So, we have 2228 pages of legislation much of which has not been properly digested. And if we didn't have an opposition, if we didn't have some attempt to hold up or to amend legislation we would have not 2,000 but, in this past year, perhaps as much as 5,000 pages of legislation. It must also be remembered that if the opposition does not try to put the brake on the immense mass of legislation we have to contemplate further and further increases in the number of civil servants. Some figures were given the other day showing that by January 1975 we had 690,000 civil servants. One year later we had 755,000. It really shows that if you pass legislation you can assume that for every major legislature project agreed to by Parliament we must contemplate an

additional number of civil servants to administer the new legislation. It would be salutory if Members bore in mind that it may involve 20,000 men to administer each separate Act of Parliament.

What value do you place on Question Time?

Question time is a useful brake on the Executive, but one not to be used too often. The more effective question may be one question in a year asked by a member. Perhaps the more humorous the questions which a Member manages to get on paper the less well thought out they have been. I have found, speaking now from the point of view of the ordinary citizen, that the question machine is a very valuable last resort. In the first instance, if a citizen hasn't had any satisfaction say from his Local Authority he can write to the Ministry concerned. Let us say a housing problem; first he would begin with the Local Authority, then he would move on to the Minister responsible for the particular aspect of housing, whatever it might be, and the minister would write back to him and, finally, if the citizen got no satisfaction he could turn to an opposition Member interested in the topic and write saying I haven't had any satisfactory response from the minister, will you table a question to him? Usually the Member will say, I won't table a question to the minister but I will first see him for you and see what we can do about it. The Opposition Member may press the minister privately and only in the last resort table a question. I always think that there is this one last resort for an injustice of some kind, or a hardship to be brought up in Parliament. I am sure that if the question process were to be ended it would be a very great relief to the Executive and a very great deprivation for the ordinary constituent. Speaking from the point of view of a constituent I know the immense value of being able to write to a Member saying will you deal with this matter. And even, if necessary, will you table a parliamentary question. Members know they have this weapon as a LAST resort.

And on Specialised Committees?

We have now two ways in which an MP can inform himself. The Committees have been much strengthened in recent years by the appointment of first class Clerks to serve them and to act as their liaison with the various government departments also affected or concerned with the enquiry. However, the Committees are also empowered to engage specialist advisers and they make quite considerable use of them. Of course, there is great difficulty in enlisting an expert because, although at first he may be expert in a particular technical field, for each day he he serves a committee he will be becoming less expert in the field of the enquiry and it is very difficult to get an expert specialist in a particular field who will be more expert than those enquired into. I only know about one instance in which an expert hired for a particular purpose was more expert than the experts and that was in the early days of the QE2 liner. None of the experts knew how to rectify a fault in the machinery and the enquiry, which was not, I think, a parliamentary enquiry, was able to call upon a retired man who, from his vast engin-

eering experience, told the enquiry what was wrong with the machinery. That is an outstanding example of somebody from outside being more expert than those within. As I say, the committees of enquiry, with their specialist advisers and with the Clerks, have no excuse if they are not fully aware of the problems and I have found that these committees are usually ahead both of the government and of in many cases, the government departments.

I will give you just one example. A report by the Select Committee on Race Relations and Immigration, session 1972-3. The subject - Education. The Report was unanimous, representing members from all sides of the House. The Chairman was, I think, the present Editor of 'The Daily Telegraph'. Mr William Deedes. This brilliant report deals with every difficulty of the education of immigrants, of the teaching of English to a multi-racial society; of teacher training; of Nursery and Further Education; and of localised difficulties and so on and of the future difficulties covering immigrants. About three years later we are perhaps in some respects just beginning to catch up with the wisdom and knowledge expressed by that all party Committee. The Prime Minister, for instance, on Monday of last week just began to pay attention to the education of children and suggested that it would be a good thing if they learned to read and write and not always to enter the civil service which, of course, he did when he left school. But that is the sort of point that the report covered in brilliant detail three years ago. So, as I say Members of the Select Committees of Enquiry have every source of information at their disposal if they ask, and of course much of it is given in evidence from the government departments. Again the library service in the House of Commons has increased beyond all recognition. When I first went to the House of Commons there were two elderly gentlemen who were the librarians and they sat in comfortable armchairs while the books gathered dust on shelves and now there are something like fifty very well qualified research librarians to assist Members in their work, Members with their library service at their disposal really have no excuse for not informing themselves fully on any topic which comes up.

Parliamentary Privilege?

If you want a Parliament you have to protect the members whom you elect, that is the basis of privilege. If you elect a Member to go to Westminster, you don't want any pressure put on him and therefore he is given a certain amount of freedom under the law, but freedom under the law is to speak freely, and that is really the only privilege which a member now requires under the present law of Parliament. He has no other privilege except that of speaking freely. The old privilege of freedom from arrest has no meaning in modern law. The privilege of freedom of speech is still vitally important. All this was gone into in immense detail in the Report known as the Silkin Report. This Report from the Select Committee on Parliamentary Privilege was ordered by the House of Commons to be printed on 1 December 1967. The Chairman of that Committee was Mr Sam Silkin who is now the Attorney General. An immense amount of evidence was taken and the conclusion of the Committee under the wise chairmanship of Mr Sam Silkin was that the

misunderstandings arising from the use of the word privilege were so frequent and so great that the House of Commons ought to consider abandoning the phrase altogether. His Report recommended legislation. If the report had been acted upon the very phrase privilege would have disappeared but not of course the vital protection given to members of freedom of speech. Parliamentary privilege has always led to people getting hot under the collar, saying why should members have some special privilege which we don't have, and freedom of speech, of course, means that any member can say what he likes. Now if he says something dishonourable based on, say, a bribe the privilege rule is that the House of Commons itself must investigate and has a duty to investigate and if they do not investigate the House itself is being false to its purpose and function and certainly in the recent past the House of Commons has taken most seriously the suggestion that a member has spoken with a bribe in his pocket. Over and over again the House has passed resolutions against bribery, resolutions against any dishonourable conduct, and has acted upon the resolution by expelling the member or by recommending that he be admonished by the Speaker. I well remember Mr Gary Allighan was found to be in receipt of a sum of £30 a week from the Evening Standard newspaper and he was expelled on a motion by Lord Hailsham, then Quentin Hogg. Herbert Morrison, Leader of the House, proposed that Mr Allighan be suspended and Quentin Hogg said 'No! not good enough, he must be expelled'. On an amendment to the motion to suspend him, Mr Allighan was duly voted out and expelled, because he had concealed from the House that he was in receipt of this particular payment. And another member who admitted, I think that he was in receipt of a payment of £5 a week from an evening newspaper was admonished by the Speaker and at the general election he was never again elected. So the House has in the recent past taken very seriously any allegation against a member. It doesn't always act speedily but, by and large, a Member who is suspected of any improper behaviour and of using privilege as a protection has usually lost prestige in the long term if not worse. It is the House's duty to see that privilege is not abused by members; that is, that their right to freedom of speech is not abused.

The Relationship between the Commons and the Courts in respect of breach of privilege and contempt?

I wonder if when judges are punishing somebody for contempt they are always in the best position to do so. Surely contempt against a court also places the judge who has to decide the punishment to some extent in the position of an accuser, as well as acting in a purely judicial capacity. Some judges exercise the law of contempt harshly. Others will tolerate a refugee throwing a shoe at a judge, I remember! There was no punishment. But in other courts, such an act would be taken rather seriously. I have seen the House of Commons acting in its judicial capacity in dealing with a contempt. It's a most kindly body. A person accused of contempt is usually expected to offer an apology. It is pointed out to the accused person that technically he is only appearing before a Committee of Privileges as a witness and only the House itself is in a position to condemn him. So that in the normal course, somebody

who is accused of a breach of privilege or of a contempt is asked to attend a Committee of Privileges as a witness and not as a person already charged and they are given the opportunity of apologising for an inadvertent activity which might amount to a breach of privilege. The House of Commons does not impose any fines.Indeed, such a man has successfully claimed his witnesses expenses when he has been summoned to appear before the Committee of Privileges.

The broadcasting of Parliament on Radio or Television or both?

I think that broadcasting on television would give a false impression of the work of the House of Commons and for that reason I would be opposed to it. The House of Commons does its best work when it is at its most boring. Television is a performance for the entertainment rather than the education of the viewer and whereas some aspects in the House of Commons are highly entertaining the best aspects would probably bore the viewer to tears. It might even disillusion him with the work of Parliament. To deal with a Mines and Quarries Bill with 600 amendments, on the floor of the House would be a terrible thing to view on TV; but it was one of the better Bills of our generation. It increased the degree of safety in quarries and mines by an immense amount, but it was not the sort of thing to be seen on the screen. I would be very much in favour of televising the work of one of the Select Committees of enquiry where you would see the witness actually sitting in front of the Committee and being examined by them. Such a television programme would, I think, result in the great appreciation of the modern work of the Commons. Typically, a Committee proposed that television should be admitted to the Committee's deliberations but it's proposal was turned down by the House because the House always has a good number of reactionary or conservative members (with a small 'c') who prefer the old ways, and the House would not contemplate the proposal by the Committee that its proceedings should be televised. I think this was regrettable.

Given a completely free hand what reform would you introduce to improve the effectiveness of the Commons?

Halve the number of members from 635 to 300 odd, and double their salaries! We would then have a better quality and more attendances because you can't get first class men if you are paying third class wages.